EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.8181 MERCK / SIGMA-ALDRICH (Art. 14(1) proc.)

(Only the English text is authentic)

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 14(1) Regulation (EC) 139/2004
Date: 03/05/2021

EUROPEAN
COMMISSION

Brussels, 3.5.2021
C(2021) 2400 final

COMMISSION DECISION

of 3.5.2021

imposing fines under Article 14(1) of Council Regulation (EC) No 139/2004

(Case M.8181 – MERCK / SIGMA-ALDRICH (Art. 14(1) proc.))

(Only the English version is authentic)

TABLE OF CONTENTS

1. Introduction 5
2. Background 6
2.1. Merger review of Case M.7435 – Merck/Sigma-Aldrich 6
2.1.1. The undertakings concerned 6
2.1.2. Overview of the merger review process in Case M.7435 6
2.1.2.1. Pre-notification contacts 7
2.1.2.2. Phase I investigation 9
2.1.2.3. Events post-Clearance Decision 16
2.2. The iCap project 17
2.2.1. General description 17
2.2.2. iCap development by Sigma-Aldrich 19
2.2.3. iCap within the framework of the Transaction 28
2.2.3.1. The period from the announcement of the Transaction until the adoption of the Clearance Decision 28
2.2.3.2. After the adoption of the Clearance Decision 32
2.3. The present proceedings 36
2.3.1. Overview 36
2.3.2. Legal privileged claims 42
2.3.3. Sigma-Aldrich's claims concerning procedural rights 44
3. Legal framework for disclosure obligations under the Merger Regulation 48
3.1. Obligation to supply correct and complete information to the Commission 48
3.1.1. Background 48
3.1.2. RFIs pursuant to Article 11(2) 49
3.1.3. Form RM 49
3.2. Infringement of the obligation to supply correct and complete information to the Commission 51
3.2.1. Incorrect and/or Misleading Information 51
3.2.2. Negligent or Intentional supply of Incorrect and/or Misleading Information 53
4. The infringements 56
4.1. Supply of incorrect and/or misleading information in RFI I-3 and RFI I-4, adopted pursuant to Article 11(2) of the Merger Regulation, and in the Final Form RM 56
4.1.1. Introduction 56
4.1.2. Innovation in the business to be divested 60
4.1.2.1. The information requirements of Section 5.3 of the Form RM 60
4.1.2.1.1. iCap was developed for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents which were part of the business to be divested 60

4.1.2.1.2.iCap together with the solvents and inorganics it was offered with constituted new products planned and iCap was an innovation project 64
4.1.2.1.3.Conclusion 66
4.1.2.2. The content of Section 5.3 of the Final Form RM 67
4.1.2.3. Incorrect and/or misleading information in Section 5.3 of the Final Form RM 67
4.1.2.4. Conclusion 73
4.1.3. R&D functions in the business to be divested 74
4.1.3.1. The disclosure requirement of questions 12, 13, and 16 of RFI I-4 as incorporated into Section 5.4 of the Form RM 74
4.1.3.1.1.Sigma-Aldrich R&D agreement with Metrohm was related to solvents and inorganics in the EEA 74
4.1.3.1.2.iCap was a project related to the business to be divested and it was developed by R&D personnel located in Buchs 75
4.1.3.1.3.Conclusion 75
4.1.3.2. The content of the replies to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) 76
4.1.3.3. Incorrect and/or misleading information in reply to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) 76
4.1.3.3.1.R&D Agreements 76
4.1.3.3.2.R&D Personnel 80
4.1.3.4. Conclusion 86
4.1.4. Assets excluded from the business to be divested 87
4.1.4.1. The disclosure requirements of question 6 of RFI I-3 as incorporated into Section 5.12 of the Form RM 87
4.1.4.2. The content of the reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM 88
4.1.4.3. Incorrect and/or misleading information in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) 88
4.1.4.4. Conclusion 93
4.1.5. Conclusion 93
4.2. Sigma-Aldrich's Liability 94
4.2.1. Responsibility for the content of the replies to Article 11(2) RFIs and the Final Form RM 94
4.2.2. Sigma-Aldrich acted intentionally or at least negligently 96
4.2.2.1. Sigma-Aldrich was aware (or could not have been unaware) of the fact that the information required was necessary and material for the Commission's assessment of the compatibility of the Transaction 97
4.2.2.2. Sigma-Aldrich was aware (or could not have been unaware) that the information supplied to the Commission was incorrect and/or misleading 99
4.2.2.2.1.iCap and the cooperation agreement with Metrohm 99

4.2.2.2.2.iCap's responsiveness 103
4.2.2.3. The incorrect and/or misleading information was provided by Sigma-Aldrich as part of a strategy to avoid disclosing iCap to the Commission 108
4.2.2.3.1.Sigma-Aldrich deliberately provided incorrect and/or misleading information to avoid the disclosure of iCap to the Commission and its transfer to the Purchaser of the Divestment Business. 109
4.2.2.3.2.Sigma-Aldrich provided incorrect and/or misleading information to make the exclusion of iCap from the scope of the Divestment Business go unnoticed, by suggesting that the Commission's guidance on IP and R&D had been addressed .. 112
4.2.2.4. Conclusion 118
4.3. Other arguments presented by the Parties do not affect the Commission's conclusion 119
4.3.1. Preliminary remark on the probative value of witness statements 119
4.3.2. Overview of the other arguments presented by the Parties 120
4.3.3. Commission's assessment 121
4.3.3.1. The Parties' argument that Sigma-Aldrich fully disclosed iCap 121
4.3.3.1.1.Presentations provided during the Phase I investigation 121
4.3.3.1.2.Excluded Assets Schedule 124
4.3.3.2. The Parties' argument that Sigma-Aldrich was first asked to discuss R&D and packaging late in the merger process and under time pressure 125
4.3.3.3. The Parties' argument that iCap and R&D are unimportant for laboratory chemicals and for the Divestment Business 129
4.3.3.3.1.Importance of R&D in laboratory chemicals 129
4.3.3.3.2.Importance of R&D – and more specifically, iCap – for the Divestment Business 132
4.3.3.4. Conclusion of the Commission's assessment 141
4.4. Conclusion 141
5. Decision to impose a fine 142
5.1. The nature and gravity of the infringements 144
5.1.1. The obligation to provide correct and non-misleading information in merger investigations is crucial for the Commission's assessment of the compatibility of a concentration with the internal market 144
5.1.2. Sigma-Aldrich acted intentionally or at least negligently 144
5.1.3. The incorrect and/or misleading information related to an R&D project of Sigma-Aldrich 147
5.1.4. iCap was relevant to the scope of the Divestment Business 147
5.1.5. The gravity of Sigma-Aldrich's infringement compared with the infringements in Facebook/WhatsApp and GE/LM Wind 151
5.2. The duration of the infringements 152
5.3. Mitigating and aggravating circumstances 152
5.4. Conclusion 158

6. Amount of the fines 159

COMMISSION DECISION

of 3.5.2021

imposing fines under Article 14(1) of Council Regulation (EC) No 139/2004

(Case M.8181 – MERCK / SIGMA-ALDRICH (Art. 14(1) proc.))

(Only the English version is authentic)

THE EUROPEAN COMMISSION,

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

Having regard to the Agreement on the European Economic Area (the "EEA"),[1] and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings,[2] and in particular Article 14(1) thereof,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,[3]

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

Whereas:

1. INTRODUCTION

(1) On 21 April 2015, the Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Merck KGaA ("Merck", Germany) would acquire, within the meaning of Article 3(1)(b) of that Regulation, control of the whole of Sigma-Aldrich Corporation ("Sigma-Aldrich", USA) by way of purchase of securities (the "Transaction") (Case M.7435 – Merck/Sigma-Aldrich).

(2) On 15 June 2015, the Commission adopted a decision pursuant to Articles 6(1)(b) and 6(2) of the Merger Regulation declaring the Transaction compatible with the internal market, subject to conditions and obligations set out in commitments offered by Merck (the "Clearance Decision").[4]

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1 For the purposes of this Decision, references to the EEA should be understood as covering the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision also include the United Kingdom. See further, footnote 4 below.

2 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.

3 Opinion of the Advisory Committee on Concentrations of 30 April 2021.

4 Commission decision of 15 June 2015, Case M.7435 – *Merck/Sigma-Aldrich*.

(3) This Decision,[5] adopted pursuant to Article 14(1) of the Merger Regulation, concerns the supply of incorrect and/or misleading information by Sigma-Aldrich during the course of the European Commission's investigation into the Transaction in reply to two requests for information made under Article 11(2) of the Merger Regulation and in the Final Form RM submitted pursuant to Article 20(1a) of Commission Regulation (EC) No 802/2004.[6]

2. BACKGROUND

2.1. Merger review of Case M.7435 – Merck/Sigma-Aldrich

2.1.1. The undertakings concerned

(4) Sigma-Aldrich is a U.S. company and a global undertaking engaged in the development, production, and supply of life science tools and services as well as chemicals, analytical reagents, and lab-ware. At the time of the Transaction, Sigma-Aldrich operated through three business units: Research, Applied and SAFC Commercial (custom manufacturing and services). Sigma-Aldrich supplied laboratory chemicals, such as solvents and inorganics, through its Research division (for sales to research customers) and its Applied division (for sales to industrial customers). Following the completion of the Transaction on 18 November 2015, Sigma-Aldrich became a subsidiary of Merck.

(5) Merck KGaA ("Merck" or the "Notifying Party") is a German pharmaceutical and chemicals company. At the time of the Transaction, Merck's activities were organised into 4 divisions, namely Merck Serono, Consumer Health Care, Performance Materials, and Merck Millipore. Merck Millipore was (and still is) active in the development, manufacturing and supply of tools and products for the life science industry. At the time of the Transaction, Merck Millipore was organised in three business units: Bioscience, Lab Solutions, and Process Solutions. The Lab Solutions business unit focused on the supply of laboratory chemicals, including solvents and inorganics.

2.1.2. Overview of the merger review process in Case M.7435

(6) On 22 September 2014, Merck and Sigma-Aldrich (together, the "Parties") signed a share purchase agreement[7] whereby Merck would acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, control of the whole of Sigma-Aldrich by way of purchase of securities.

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5 For the purposes of this Decision, although the United Kingdom withdrew from the European Union as of 1 February 2020, according to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continues to have competence to apply Union law as regards the United Kingdom for administrative procedures which were initiated before the end of the transition period.

6 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.04.2004, p. 1-39), as amended by Commission Regulation (EC) No 1033/2008 (OJ L 279, 22.10.2008, p.3-12) and by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 (OJ L 336, 14.12.2013, p. 1-36) (the "Implementing Regulation").

7 See Form CO, Annex 6, Agreement and Plan of Merger dated as of September 22, 2014 [Doc Id: 462].

2.1.2.1. Pre-notification contacts

(7) On 26 November 2014, Merck submitted a draft Form CO[8] to the Commission regarding the Transaction in accordance with Article 3 of the Implementing Regulation. On 16 February 2015 and 17 April 2015, Merck submitted amended drafts of the Form CO to the Commission.[9]

(8) Those drafts of the Form CO generally described Merck's and Sigma-Aldrich's activities as complementary. The main area of horizontal overlap between the activities of the Parties was in life science chemicals.

(9) Within life science chemicals activities, according to the drafts of the Form CO, the Transaction gave rise to 39 horizontally affected markets[10] at EEA level,[11] including 26 in the area of laboratory chemicals.

(10) Laboratory chemicals are chemicals used for research, analytical testing, and quality control purposes by a wide range of customers, including academia, laboratories, and pharmaceutical companies. The main purpose of laboratory chemicals is to allow for repeated standardised testing with high precision and accuracy according to a predetermined testing protocol. As a result, laboratory chemicals have to meet high quality standards to avoid the presence of any contaminant. Given the nature of their use, laboratory chemicals are generally sold in catalogue quantities, i.e., less than 10 kilograms or litres per unit.

(11) Out of the 26 horizontally affected product markets in laboratory chemicals identified in the Form CO drafts, 17 concerned the supply of solvents and inorganics in the EEA:

(a) Solvents are a broad category of laboratory chemicals used to dissolve a target substance (a chemically different liquid, solid or gas) for the analysis or synthesis of any given material. Within solvents, some are used for instrumental analysis through techniques such as High Performance Liquid Chromatography ("HPLC"). HPLC is a technique in analytic chemistry used to separate the components in a mixture, to identify each component, and to quantify each component. It relies on pumps to pass a highly pressurized liquid solvent (containing the sample mixture) through a column filled with a solid adsorbent material.

(b) Inorganics are a broad category of laboratory chemicals composed of reagents, meaning substances or compounds added to a system in order to bring about a chemical reaction or to see if a reaction occurs. Within inorganics, some are used for instrumental analysis and sold as ready-to-use (pre-mixed) materials for specific applications where customers require a high degree of precision in the results. Inorganics for instrumental analysis can be further distinguished on the basis of the applications for which they are designed, such as volumetric and titration solutions (used to determine the unknown concentration of any substance), and Karl Fisher titration solutions (designed to determine and measure the presence of water and moisture).

(12) Between 10 December 2014 and 1 April 2015, the Commission sent 7 sets of questions on the Form CO drafts. The Commission sought to understand more

8 Pursuant to Annex 1 of the Implementing Regulation.

9 The final version was notified to the Commission on 21 April 2018 (the "final Form CO").

10 In line with Section 6 of the Form CO, affected markets mean product and geographic markets where the parties were active and had a combined market share in excess of 20%.

11 These product markets were affected in almost all states within the EEA.

clearly the affected markets, including solvents and inorganics. As Merck stated already in the Form CO drafts,[12] solvents and inorganics are manufactured or purchased in large quantities. The Parties' role was essentially to perform quality control and down-fill those into small quantities for standardized testing. The Commission asked several questions to the Parties to clarify which of their activities (for example, quality control, purification and/or packaging) brought the highest added value to customers; the exact added value of those activities; and what was the importance of know-how and IP rights in the affected markets.[13] The Parties provided responses to all these questions during the pre-notification phase.

(13) During the pre-notification phase, the Commission also contacted a select number of market participants to prepare its market investigation and understand the quality characteristics of solvents and inorganics which were critical for customers. These pre-notification contacts showed that customers required laboratory chemicals with limited risk of contamination from impurities, especially in solvents and inorganics used in instrumental analysis.[14]

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12 See notably draft Form CO dated 11 February 2015, para. 436 on solvents and paras. 502 and 560 on inorganics [Doc Id: 329-9831].

13 The questions that the Commission sent to both Parties during pre-notification included the following: *"Please elaborate in detail on the services such as quality assurance and control, purification and packaging of those products* [laboratory chemicals] *provided by the Parties and competitors. Please indicate the time, the equipment and the cost needed to develop those services*" (RFI 2, Question 13 [Doc Id: 595]); *"The Parties indicate that catalogue and bulk solvents address different customers (paragraph 248) and differ in terms of volume, packaging and delivery (paragraph 249). Please elaborate on the capacities for suppliers of bulk solvents to enter into the market for catalogue solvents quickly, as mentioned in paragraph 284".* (RFI 2, Question 25 [Doc Id: 595]); "*Please elaborate on the facilities, distribution, logistic, investments and know-how needed to refill, mix, blend and package inorganics*" (RFI 2, Question 38 [Doc Id: 595]); "*Could you please indicate which activities (i.e. production, distillation/purification, filling/packaging, quality control) drive the* product [laboratory chemical]*'s quality? At which level of the process is the know-how and/or possible IP rights?*" (RFI 4, Question 30 [Doc Id: 665]) *"Please explain in detail […] the value added by the Parties in the final product* [laboratory chemical]*" (*RFI 4, Question 39 [Doc Id: 665]) *"Regarding Inorganics for Instrumental Analysis:* […] *c. Please indicate at which steps of the process is the know-how to supply Karl Fischer titration products.* […] *f. Please explain what was protected by the IP rights owned by Sigma-Aldrich regarding the Karl Fischer titration products. Please also indicate when the corresponding IP rights expired"* (RFI 6, Questions 9(c) and 9(f) [Doc Id: 695]); "*Please confirm that the Parties do not hold any IP right in the solvents sector*" (RFI 2, Question 28 [Doc Id: 595]); and "*Could you please confirm that the Parties do not own IP rights in the fields of inorganics? If not, please list... them and provide a brief explanation on what is protected and indicate to which category of products they belong*." (RFI 6, Question 10 [Doc Id: 695]).

14 By way of example, set forth below are some extracts from the minutes of the conference calls that the Commission held with various market participants during pre-notification: *"The superior quality can stem from various elements such as the level of documentation, the source of raw materials, whether the products are filtered or unfiltered, whether they are redistilled, whether there is water or hydrosolvents, and the condition of packaging. All these factors can reduce the presence of impurities. This is crucial for the pharmaceutical industry in order to improve the reliability of clinical trial results"* (Minutes of a conference call dated 10 February 2015 [Doc Id: 2078])*; "Quality/grade* [of solvents] *depends on the specifications guaranteed such as purity, specific functionality tests, conductivity, organic content and others".* (Minutes of a conference call dated 19 February 2015 [Doc Id: 2087]); *"The various quality indicators are the following: purity grade (99.9%, 99.99%...), UV transmission (transparency), HPLC performance (drift measure which is an indirect proxy for purity – the aim is to obtain a flat line, not foreign peaks), and dryness (especially for organic and synthesis such as DNA)".* (Minutes of a conference call dated 23 February 2015 [Doc Id: 2088]); "*For these* [chromatographic] *measurements, a stable baseline - which has to be reached in the fastest possible time - is critical and ghost peaks resulting from potential impurities have to be avoided."* (Minutes of a conference call dated 18 February 2015 [Doc Id: 2084]); and *"As to chemicals for research, to […] knowledge, Sigma mostly does packing*

(14) On 18 March 2015, the Commission visited Sigma-Aldrich's manufacturing plant in Seelze.[15]

2.1.2.2. Phase I investigation

(15) On 21 April 2015, the Transaction was formally notified to the Commission with the submission of the Form CO pursuant to Article 4 of the Merger Regulation.

(16) On the same day, the Commission launched a Phase I market investigation in Case M.7435 – *Merck/Sigma-Aldrich* pursuant to Article 6(1) of the Merger Regulation.

(17) As part of its Phase I market investigation, the Commission contacted competitors[16] in, and customers[17] of, laboratory chemicals, as well as bulk manufacturers[18] of those chemicals. In particular, the Commission sought assistance with its investigation: (i) with competitors regarding parameters of competition[19] in the affected markets; and (ii) with customers regarding the selection criteria when purchasing laboratory chemicals, and more specifically the purchase of solvents and inorganics.[20] Market participants were invited to rank several selection criteria (including "reliability" and "packaging"), and to indicate whether the Parties were particularly strong in relation to one or several of those criteria[21]. The Commission also investigated whether the investments needed to fill and re-pack chemicals were a barrier preventing bulk manufacturers from supplying laboratory chemicals to customers.[22]

(18) Market participants informed the Commission that the Parties are strong competitors in terms of product reliability and packaging.[23] Investments to fill and re-pack chemicals have been consistently identified as a barrier to entry in the affected markets.[24]

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while Merck is much more active in the downstream steps such as distillation and purification" (Minutes of a conference call dated 25 March 2015 [Doc Id: 2091]).

15 Seelze manufacturing plant is a jointly operated site with a third party, Honeywell.

16 M.7435 Q1 Competitors [Doc Id: 1230].

17 M.7435 Q3 Customers [Doc Id: 1226].

18 M.7435 Q2 Bulk manufacturers [Doc Id: 1225].

19 M.7435 Q1 Competitors, question 51 [Doc Id: 1230].

20 M.7435 Q3 Customers, question 39 [Doc Id: 1226].

21 M.7435 Q1 Competitors, question 52 [Doc Id: 1230]; M.7435 Q3 Customers, questions 37 and 39 [Doc Id: 1226].

22 M.7435 Q1 Competitors, questions 62-63 [Doc Id: 1252 and Doc Id: 1253]; M.7435 Q2 Bulk manufacturers, questions 8-9 [Doc Id: 1254 and Doc Id: 1255].

23 By way of example: "*Both Merck and Sigma are offering high quality product, with availability of documentation, quick delivery time. Both two companies are offering reliability, flexible range of packagings and both are having serious representatives in our local Market*" (Q1 Competitors, question 52 [Doc Id: 1250]); Strengths of Sigma: "*Diversity in product (chemicals & biologicals) and packaging Quick delivery*" ; "*Portfolio offering, Webshop, rare chemical offering, niche application offering, Pack size flexibility, research product offering*" (Q3 Customers, question 37 [Doc Id: 1256]); "*Laboratory chemicals: due to breadth of portfolio, Sigma Aldrich is able to meet most of 's demand and therefore, benefits from economy of scale effects. Sigma has a short delivery time and small, suitable packing sizes*"; "*sono molto competitivi sulla purezza, sulla completezza della documentazione e sul packaging dei prodotti da laboratorio*"; "*believes Sigma is a strong supplier when it comes to pricing, packaging, reliability, delivery time and brand recognition for lab chemicals*"; "*Laboratory chemicals: both Merck and Sigma are strong suppliers in relation to all the areas indicated above. Merck is stronger on the manufacturing side (supplying Sigma for some products), while Sigma is particularly strong in portfolio and packaging.*" (Q3 Customers, question 40 [Doc Id: Id 1258]).

24 By way of examples: "*Not to my knowledge, as stated previously mainly due to the lack of re-packing and testing resources and distribution network.*" "*This business needs to supply at least thousands of items of small scale chemicals. Nobody knows which item sells well in advance, so many items must be stored in each area to be able to be delivered quickly. So sales will be relatively small compared to cost*

(19) The Commission also organised conference calls with market participants, as a follow-up to their questionnaire reply. These calls confirmed the strength of each of the Parties in terms of product quality and packaging infrastructure in the affected markets for the supply of solvents and inorganics.[25]

(20) Having regard to the information received from the market actors, the Commission concluded in the Clearance Decision that "*even if the product is sourced from a third party bulk manufacturer, added value resides in the additional processing which is carried out by Merck and Sigma. This additional processing, depending on the chemical, may consist of quality control, packaging, down-filling, and/or labelling of the product under the Parties' own brands*".[26] The Commission also noted in the Clearance Decision that "*large chemical manufacturers such as Ineos, Akzo Nobel, BASF and Dow, confirmed during the market investigation that they are unlikely to enter the markets for catalogue solvents and inorganics since it is a "different business model" from their current activities and because of the "lack of customer relationship" and the "investments needed to fill/repack*".[27]

(21) On 23 April 2015, in parallel to its Phase I market investigation, the Commission sent to both Parties a request for information ("RFI") pursuant to Article 11(2) of the Merger Regulation. The Commission requested that the Parties provide internal documents prepared as of 1 January 2014 concerning the competitive landscape in laboratory chemicals in Europe.[28] The internal documents were provided by the Parties on 29 and 30 April 2018.

(22) On 5 May 2015, the Commission participated in a call with Merck's and Sigma-Aldrich's respective external counsel to inform them about the necessity of scheduling a State of Play ("SOP") meeting.[29] During the call, the possibility of a remedy, at least in relation to HPLC and other solvents, was also discussed. The Parties explained that "*Sigma* […] *doesn't actually produce HPLC or any solvents* [...] [a] *lot of what Sigma does is only downfilling/packaging*". The Commission indicated that "*the repackaging steps may seem banal, but* [based on the results of

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of inventory, test, repack and delivery" "Yes, they could, but main hurdles identified are: investment into refilling. Often third party manufacturers do not have possibilities to pack into smaller packaging (lab size)". (Q1 Competitors, question 63 [Doc Id 1253]); *"[…] is not interested in the delivery of small volumes, this is not in line with´s business model for the sale of respective products. […] does not have the facilities to pack in smallest volumes and to deliver such volumes to customers"*. (Q2 Bulk manufacturers, question 9 [Doc Id: Id 1255]).

25 By way of example: "*Merck and Sigma show to be particularly strong since they both have a sufficient reach-out to customers through a sales force (direct or indirect), a developed packaging and other logistical infrastructure, a wide product portfolio range which can reach almost 100% of products coverage when combined between the two companies, IP in forms of well recognized brands, proper delivery timing, and overall high quality standards*" (Minutes of the conference call with a competitor dated 6 May 2015 [Doc Id: 1302]). In a meeting of 5 May 2015 with the Parties, the Commission communicated the results of the market investigation regarding packaging (see recital (22)).

26 Clearance Decision, recital (87) (emphasis added) [Doc Id: 937].

27 Clearance Decision, recital (186) (emphasis added) [Doc Id: 937].

28 RFI I-1, questions 1(a) and 2(a) ([Doc Id: 774]).

29 As per DG Competition Best Practices on the conduct of merger control proceedings 20.01.2004 (paragraph 33(a)), the Notifying Parties are offered the opportunity of attending an SOP meeting where it appears that the concentration is likely to give rise to "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation.

the Phase I market investigation] *they don't seem to be – they seem to be important*".[30]

(23) On 13 May 2015, the Commission held an SOP meeting with the Parties and informed them that following the Phase I market investigation and based on the information submitted by the Parties, the Transaction was likely to give rise to serious doubts regarding its compatibility with the internal market in relation to laboratory chemicals, and in particular in solvents and inorganics in the EEA.[31] The Commission preliminarily took the view that the Parties would be the two leading and closest competitors in solvents and inorganics markets in the EEA, each of them providing high quality products and marketing strong brands. In addition, the Commission explained to the Parties that the Phase I market investigation revealed that barriers to entry in those markets were high, in particular because of brand loyalty, economies of scale and scope and the need for know-how and IP rights. For all these reasons, the Commission preliminarily concluded that the Transaction, if implemented as notified, would have eliminated competition between the closest competitors, leading to risks of increased prices and reduced choice for customers post-merger. The Commission also informed the Parties that they were not, at that stage, in a position to dispel the Commission's serious doubts as to the Transaction's compatibility with the internal market in relation to raw materials for (bio)pharmaceutical production.[32]

(24) On 18 May 2015, to alleviate the serious doubts discussed in the SOP meeting in relation to solvents and inorganics in the EEA, the Parties submitted draft commitments (the "Draft Commitments"), together with a draft Form RM submission (the "Draft Form RM").[33] The Draft Commitments consisted of the divestiture of a substantial portion of Sigma-Aldrich's solvents and inorganics business in the EEA (the "Divestment Business").

(25) On 19 May 2015, the Commission held a meeting with the Parties to discuss the Draft Commitments.[34] Following that meeting, on the same day, the Commission sent comments to the Parties regarding the scope of the Divestment Business as set out in the Draft Commitments. The Commission indicated to the Parties that these comments reflected the input that the Commission had received during the Phase I market investigation.[35] The objective was to ensure that the commitments ultimately submitted covered the entire value chain of Sigma-Aldrich's solvents and inorganics business, so as to replicate its position on the relevant markets.[36] More specifically, the

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30 See email from [NAME OF INDIVIDUAL AND LAW FIRM] to [NAME OF INDIVIDUAL], 5 May 2015, "Fwd: Important Update – telephone conference with EC", [Doc Id: 2002] and email from [NAME OF INDIVIDUAL AND LAW FIRM] to [NAME OF INDIVIDUAL], 5 May 2015, "Call with EC today – key points", [Doc Id: 2003].

31 See list of attendees from the Parties [Doc Id: 777].

32 On 19 May 2015, the Parties submitted replies to RFI I-2. Following the analysis of these replies, the Commission was in a position to dispel serious doubts as to the Transaction's compatibility with the internal market in relation to raw materials for (bio)pharmaceutical production.

33 Draft Form RM of 18 May 2015 [Doc Id: 779], Draft Commitments [Doc Id: 781].

34 See list of attendees from the Parties [Doc Id: 785].

35 Comments on the Draft Commitments and Draft Form RM [Doc Id: 787]. See also cover email from Arthur Stril (case team) to [NAMES OF INDIVIDUALS AND LAW FIRMS] ("*Following the helpful meeting this afternoon, please find attached our comments on the draft Commitments and Form RM*") [Doc Id: 786]. The purpose of the comments was to recapitulate the feedback of the Commission on the Draft Commitments initially provided in the meeting of 19 May 2015.

36 "*[I]n relation to the scope of the Commitments, the assets contained in the Divestment Business cover the entire value chain of solvents and inorganics; from the production assets through the channel to the*

Commission's comments included a separate section on "*IP, know-how, design and other*" which stated that for "*packaging*" "*any IP or know how should be included*".[37]

(26) On 22 May 2015, the Parties formally submitted commitments (the "Initial Commitments"), together with a Form RM submission (the "Initial Form RM").[38] The Initial Commitments consisted of the divestiture of Sigma-Aldrich's solvents and inorganics business as described in the Schedule to the Initial Commitments, including Fluka branded products sold at global level; Sigma-Aldrich branded products sold at EEA level; and Sigma-Aldrich's manufacturing facility in Seelze (Germany).[39] The Initial Commitments did not cover products sold under certain brands,[40] nor nuclear magnetic resonance ("NMR") solvents, nor Dried Anhydrous solvents.[41] The Parties did not inform the Commission of any other asset(s) excluded from the Initial Commitments.

(27) Overall, the Initial Commitments[42] appeared to reflect the feedback provided by the Commission on the Draft Commitments during the meeting of 19 May 2015 and subsequent written comments.[43] In particular, as to the comment that "*any IP or know how* [on packaging] *should be included*",[44] the Initial Commitments stated: "*the Parties shall grant Purchaser a license to Sigma's rights in the patents, other IP, and know-how owned by or licensed to Sigma that are used in the Divestment Business, including those related to the relevant labels and packaging*".[45]

(28) The Commission launched a market test[46] of the Initial Commitments on 22 May 2015.

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market to customer information. This further enhances the viability of the Divestment Business if operated by a suitable Purchaser" (Clearance Decision, para. (256)). See also "*The remedy was designed to cover the entire value chain of the products* […] *IP. The yardstick governing IP transfer was the relevance of Sigma's know-how and associated IP rights for the Divestment Business* […] *Through a combination of divested tangible and intangible assets covering the entire value chain* […] *the remedy package aimed at ensuring that the purchaser could swiftly replicate Sigma's position in the relevant markets.* […] *Merck/Sigma-Aldrich is a good example of the Commission's ability to clear complex cases involving novel product markets in phase I, subject to the parties' willingness to submit comprehensive remedy packages*" (Competition Merger Brief, 3/2015 – November, page 9).

37 Comments on the Draft Commitments and Draft Form RM, page 2 [Doc Id: 787]. This comment reflected the importance of packaging for competition among suppliers of solvents and inorganics (see recitals (17)-(20)).

38 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 22/05/2015 "Re:M.7435 Merck/Sigma-Aldrich" [Doc Id: 803], Initial Form RM of 22 May 2015 [Doc Id: 804], Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 22/05/2015 "M.7435 Merck/Sigma-Aldrich" [Doc Id: 788], Initial Commitments [Doc Id: 789].

39 Initial commitments of 22 May 2015 [Doc Id: 789].

40 "Sigma," "Aldrich," "Supelco," "SAFC," "SAFC Hitech," "Proligo," "Cerilliant," "Vetee," "BioReliance," and "Cell Marque", Initial Commitments, Schedule, paragraph 13 [Doc Id: 789].

41 The Parties explained to the Commission that NMR solvents and Dried Anhydrous solvents should be excluded from the Divestment Business because of their specificities in terms of production processes, features and customer base (see email from the Parties to the Commission "M.7435 Merck/Sigma Aldrich", dated 5 June 2015 [Doc Id: 368-5122]).

42 Initial Commitments [Doc Id: 789].

43 For example, on 21 May 2015, a new version of the Draft Commitments was sent to the Commission assuring that the revised draft was "*incorporating your comments*" [Doc Id: 996]. This suggested that the comments of the Commission of 19 May 2015 were addressed.

44 Comments on the Draft Commitments and Draft Form RM, page 2 [Doc Id: 787].

45 Initial Commitments, Schedule, paragraph 18 [Doc Id: 789].

46 Commitments submitted to the Commission are market tested (see Preamble, recital 35 of the Merger Regulation). During the market test, the Commission collects third parties' views on the commitments so as to conclude on whether the concentration as modified by the commitments is compatible with the

(29) On 29 May 2015, the Commission sent an RFI to the Parties pursuant to Article 11(2) of the Merger Regulation ("RFI I-3") including questions on the content of the Initial Form RM. In particular, the Commission asked the Parties to inform the Commission of any assets that they intended to retain from Sigma-Aldrich's solvents and inorganics business in the EEA (i.e. that would not be included in the business to be divested).[47]

(30) As a part of the market test of the Initial Commitments, the Commission contacted competitors,[48] customers,[49] and distributors[50] of laboratory solvents and inorganics. More specifically, the Commission sought assistance with its investigation with competitors regarding whether any other IP and know-how[51], personnel[52] or indeed any other assets[53] were necessary for a purchaser to effectively and efficiently compete with the merged entity for the supply of solvents and inorganics in the EEA.

(31) Within the framework of the market test of the Initial Commitments, market participants mentioned the need to make sure that pipeline projects and R&D agreements were included in the Divestment Business.[54]

(32) The results of the market test of the Initial Commitments were communicated to the Parties in a meeting on 2 June 2015, in particular the fact that market participants had stressed the importance of pipeline projects and R&D agreements and the need to

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internal market. See also Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01) (the "Remedies Notice"), para. 80.

47 RFI I-3, question 6 [Doc Id: 812]. The reply to this question of the RFI I-3 is further discussed in Section 4.1.4 below.

48 R1 Competitors [Doc Id: 1227]

49 R2 Customers [Doc Id: 1228]

50 R3 Distributors [Doc Id: 1229].

51 R1 Competitors, question 12 [Doc Id: 1262]

52 R1 Competitors, question 13 [Doc Id: 1263].

53 R1 Competitors, question 24 [Doc Id: 1364].

54 *"A Divestment Business would have to include also such pipeline products (or related IP/know-how) of the merging parties which are likely to replace in the foreseeable future the products/technologies included in the Commitments and without which a purchaser will not be able to effectively compete with the merged entity going forward"* (Reply of Company F to question 9.1, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 964, see also Doc Id: 1358]); *"key to success is […] an active sales pipeline of new products"* (Reply of Company F to question 33, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 964, see also Doc Id: 1358]);*; "it seems that R&D personnel is entirely missing even though such functions need to be considered as critical to the competitiveness of the Divestment Business"* Reply of Company F to question 18, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 964, , see also Doc Id: 1358]; *"The Divestment Business should also include the benefit of any R&D agreements with third parties which relate to the relevant products"* (Reply of Company A to question 9.1, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 1024, see also Doc Id: 1318]); *"the Buchs site in particular has heavy involvement with R&D, QC* [Quality Control] *and New Product Introduction for the Fluka brand"* (Reply of Company B to question 1, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 967, see also Doc Id: 2067]); As to personnel, *"we would expect that R&D should also be cited explicitly and included"* (Reply of Company C to question 13, Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 965, see also Doc Id: 2068]); *"key functions include "all critical manufacturing, R&D and sales & marketing personnel with domain knowledge relating to the solvents and inorganics."* (Reply of Company D to question 13, Questionnaire Market Test of the Commitments, 23 May 2015 [Doc Id: 966, see also Doc Id: 2069]); "*while we are not certain that the product range in question has material IP rights beyond the Hydranal line, there is massive know-how embedded in the current organization. Such areas include: […] 4. Down packing products into sellable units keeping the guaranteed specifications"* (Reply of Company E to question 9.1 Questionnaire R1 Competitors, 23 May 2015 [Doc Id: 968, see also Doc Id: 2070]).

include them in the scope of the Divestment Business.[55] As a result, the Commission informed the Parties that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments.

(33) On 2 June 2015, the Parties provided their replies to RFI I-3, with the exception of their replies to question 10. On that day, the Commission received replies both as a separate document and incorporated in an updated version of the Initial Form RM (the "First updated version of the Initial Form RM").[56]

(34) On 2 June 2015, the Commission also sent another RFI to the Parties pursuant to Article 11(2) of the Merger Regulation ("RFI I-4") asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA.[57]

(35) On 5 June 2015 (01:51 AM),[58] the Parties provided a new version of the Initial Commitments to address the feedback from the Commission's market test.[59] This version (like the previous versions) did not include any explicit mention of pipeline projects and R&D agreements.

(36) In light of the above, and in particular the feedback received from the respondents to the market test, on 5 June 2015 (04:51 PM), the Commission suggested that the Parties include a new section (titled "R&D") in the Commitments reading as follows: "*To the extent it concerns products included in the Divestment Business, the Parties shall transfer all R&D and pipeline projects and related information to the Purchaser. To the extent any such agreement exist and concern the products included in the Divestment Business, the Parties will transfer to the Purchaser all R&D agreements with third parties*".[60]

(37) On 8 June 2015 (02:48AM), a new updated version of the Initial Form RM was submitted to the Commission (the "Second updated version of the Initial Form RM") including the Parties' replies to RFI I-4.[61] Regarding R&D agreements, the Parties submitted that "*Sigma does not have any formal R&D agreement with respect to its current solvents and inorganics products in the EEA*".[62]

(38) On 8 June 2015 (02:50AM), the Parties sent a revised version of the Initial Commitments. In relation to the "R&D" section, the Parties did not follow the wording that the Commission suggested and proposed the following wording instead: "*To the extent it concerns solely or predominantly new products or products under development within the scope of the Divestment Business, the Parties shall transfer all assignable R&D and pipeline projects and related information existing at the*

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55 See list of attendees from the Parties [Doc Id: 949].

56 Email from Merck's external lawyers "Re: M.7435 Merck / Sigma Aldrich - Article 11(2) request for information RFI I-3 - deadline 1/6/2015" [Doc Id: 826]: "*enclosed is an updated version of the Form RM incorporating the Parties' replies to RFI I 3*".

57 RFI I-4, questions 12, 13 and 16 [Doc Id: 829]. The replies to these questions of RFI I-4 are further discussed in Section 4.1.3 below.

58 All times refer to Central European Time ("CET") zone.

59 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 5/06/2015 "RE: M.7435 Merck/Sigma-Aldrich" [Doc Id: 911].

60 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Commitments was proposed [Doc Id: 954 and Doc Id: 956].

61 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 8/06/2015 "RE: STRICTLY CONFIDENTIAL M7435 COMMITMENTS 4 JUNE (2).DOCXS" [Doc Id: 368-6938].

62 RFI I-4, Reply to question 12 [Doc Id: 833].

Effective Date to the Purchaser or will use their best efforts to facilitate such transfer. To the extent any such agreement exist and concern solely or predominantly new products or products under development within the scope of the Divestment Business, the Parties will transfer to the Purchaser all assignable R&D agreements with third parties, and will use their best efforts to facilitate the transfer of any such agreements which are non-assignable".[63]

(39) On 8 June 2015 (10:45AM), the Parties attended a conference call with the Commission to discuss the last version of the Initial Commitments.[64] In relation to the "R&D" section, the Commission indicated that, in light of the feedback received from the market test, the Commitments should not be limited to only R&D and pipeline projects which are "*solely or predominantly related*" to the Divestment Business but all R&D and pipeline projects related to the Divestment Business (as per the Commission's suggested wording on 5 June 2015). The Parties indicated that they would reflect on the Commission's comments and submit a revised version of the Initial Commitments.

(40) On 8 June 2015 (01:47 PM), following up on the conference call, the Parties submitted a revised version of the Initial Commitments. In the "R&D" section, the Parties repeated the wording that only R&D and pipeline projects that solely or predominantly relate to the Divestment Business would be included in the commitments. Regarding R&D and pipeline projects which do not relate solely or predominantly to the Divestment Business, they added the following: "*To the extent it concerns new products or products under development which do not relate solely or predominantly to the Divestment Business, the Parties will provide a royalty-free, irrevocable, non-exclusive, global license to these R&D and pipeline projects.*"[65]

(41) On 11 June 2015, the final commitments (the "Final Commitments") were submitted to the Commission,[66] including a Schedule describing the Divestment Business in detail.

(42) On 12 June 2015, the Parties submitted the final version of their submission on the Form RM (the "Final Form RM").[67]

(43) On 15 June 2015, the Commission adopted the Clearance Decision pursuant to Articles 6(1)(b) and 6(2) of the Merger Regulation declaring the Transaction compatible with the internal market, subject to conditions and obligations set out in the Final Commitments.

(44) Based on the information available at that point in time, the Clearance Decision concluded that the Divestment Business comprised all necessary assets from its pre-

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63 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 8/06/2015 "RE: STRICTLY CONFIDENTIAL M7435 COMMITMENTS 4 JUNE (2).DOCX" and attachment [Doc Id: 954 and Doc Id: 956].

64 Email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 8/06/2015 "RE: STRICTLY CONFIDENTIAL M7435 COMMITMENTS 4 JUNE (2).DOCX" [Doc ID 368-6928].

65 Updated version of the Initial Commitments sent on 8 June 2015 (01:47 PM) [Doc Id: 1923].

66 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer [Doc Id: 840] and Final Commitments signed by the Parties [Doc Id: 938]. The section on "R&D" was similar to the one submitted on 8 June 2015 at 5:27 pm.

67 [Doc Id: 849] The Final Form RM was filed directly to the Merger Registry of the Commission. The Draft Form RM dated 18 May 2015, the Initial Form RM dated 22 May 2015, the First updated version of the Initial Form RM dated 2 June 2015, the Second updated version of the Initial Form RM dated 8 June 2015 and the Final Form RM dated 12 June 2015 are together referred hereinafter as the "Form RM Submissions".

Transaction operations that allowed it to be viable (if operated by a suitable purchaser) and to compete effectively on the relevant markets.[68] The Clearance Decision specified that the Divestment Business consisted essentially in Sigma-Aldrich's business in solvents and inorganics in the EEA (including the businesses under the Fluka brand and the Sigma-Aldrich brand), with the explicit exception of NMR and Anhydrous solvents' activities, which, however, did not affect the viability of the Divestment Business.[69] More specifically, the Clearance Decision states that "*the only carve-out aspect of the divestiture was NMR and Anhydrous solvents, which are manufactured at different facilities than Seelze and using different production equipment which may be problematic to transfer, and which given the small size of their sales, were unlikely to affect the viability of the Divestment Business*".[70] Therefore, the Commission concluded in the Clearance Decision that the Final Commitments were sufficient in scope and suitable to eliminate the serious doubts on the compatibility of the Transaction with the internal market in relation to solvents and inorganics markets in the EEA. The Commission declared the Transaction compatible with the internal market, subject to full compliance with the Final Commitments.

(45) Under the Final Commitments, the closing of the Transaction was conditional on the signing of a sale and purchase agreement regarding Sigma-Aldrich's solvents and inorganics business as specified in the Final Commitments (the Divestment Business) to a suitable purchaser approved by the Commission (upfront buyer clause).[71]

2.1.2.3. Events post-Clearance Decision

(46) On 25 June 2015, the Commission approved Competition Rx Limited as the monitoring trustee in Case M.7435 - *Merck/Sigma Aldrich* (the "Monitoring Trustee").

(47) In the context of the sale of the Divestment Business to a suitable purchaser, the Monitoring Trustee contacted the Commission on several occasions to clarify the scope of the Divestment Business in the Final Commitments.[72] In a conference call on 26 August 2015, the Monitoring Trustee flagged that some Sigma-Aldrich products were sold under different Standard Keeping Units ("SKUs") depending on their packaging and wanted to know which "SKUs" should be included in the Divestment Business. The Commission indicated that the scope of the Divestment Business in the Final Commitments did not depend on the packaging of the products. When a product is part of the Divestment Business, all "SKUs" for all types of packaging concerning the product should be included in the Divestment Business and transferred to a suitable purchaser. On 9 September 2015, the Monitoring Trustee relayed this information to the Parties.[73]

(48) On 29 September 2015, the Monitoring Trustee sent the Commission the main draft transaction agreements, including the draft Share and Purchase Agreement, between Merck, Sigma-Aldrich, and Honeywell International Inc. ("Honeywell", USA) for

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68 Clearance Decision, paras. (249), (256)-(257) and (262) [Doc Id: 937].

69 Clearance Decision, para. (262) [Doc Id: 937].

70 Clearance Decision, para. (255) (emphasis added) [Doc Id: 937].

71 Final Commitments, para. 3 [Doc Id: 938]. See also Remedies Notice, paras. 53 to 55.

72 See for example, email from the Monitoring Trustee to the Commission dated 23 July 2015 "M.7435 Merck/Sigma – products in/out of scope of the Divestment Business" [Doc Id: 1413]; Email from the Monitoring Trustee to the Commission dated 13 August 2015 "Case M.7435 Merck/Sigma – Scope of Divestment Business (products in or out)" [Doc Id: 1459].

73 Email from Monitoring Trustee to [NAMES OF INDIVIDUALS] dated 9 September 2015 [Doc Id 304-1124] The Monitoring Trustee also refers to this discussion in an email to the case team dated 4 September 2015 [Doc Id: 1499].

the sale of the Divestment Business[74]. On 6 October 2015, the Monitoring Trustee sent the Commission the full set of the draft transaction documents, including the draft schedules of the Share and Purchase Agreement.[75] On 8 October 2015, the Monitoring Trustee sent comments to the Parties on the main draft transaction agreements, including comments from the Commission.[76]

(49) On 19 and 20 October 2015, the Parties signed a Share and Business Asset Purchase Agreement (the "SPA") with Honeywell for the sale of the Divestment Business.[77]

(50) On 20 October 2015, the Parties submitted a reasoned proposal[78] identifying Honeywell as a suitable purchaser.[79]

(51) On 4 November 2015, the Monitoring Trustee submitted a reasoned opinion[80] (the "Reasoned Opinion")[81] concluding that (i) Honeywell was a suitable purchaser for the Divestment Business and (ii) the Divestment Business was to be sold in line with the Final Commitments.[82]

(52) On 10 November 2015, the Commission approved Honeywell as a suitable purchaser for the Divestment Business.

(53) On 18 November 2015, Merck completed the acquisition of Sigma-Aldrich.[83]

(54) On 15 December 2015, Honeywell completed the acquisition of the Divestment Business.[84]

2.2. The iCap project

2.2.1. General description

(55) iCap is an intelligent bottle cap technology developed by Sigma-Aldrich in cooperation with Metrohm AG ("Metrohm", Switzerland), a laboratory instrument manufacturer.[85] An iCap bottle cap seals a liquid product (reagent or solvent) bottle and connects the chemical (in the bottle) to the (titration) instrument in a "*safe, secure, and smart*" way.[86] Sigma-Aldrich often referred to iCap as the "*3S*" project referring to these three adjectives.[87]

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74 Cover email from Monitoring Trustee to the case team dated 29 September 2015 [Doc Id: 863]

75 Cover email from Monitoring Trustee to the case team dated 6 October 2015 and draft transaction documents [Doc Ids: 395 and 396]

76 Email from Monitoring Trustee to the case team dated 8 October 2015 and comments on the transaction documents [Doc Ids: 887 and 888]

77 [Doc Id. 890]

78 See para. 18 of the Final Commitments [Doc Id: 938]. See also Remedies Notice, para. 101.

79 Cover email from Merck's external lawyer to the case team dated 20 October 2015 [Doc.Id: 889] sending the Reasoned Proposal [Doc Id: 894].

80 See para. 28 (ix) of the Final Commitments [Doc Id: 938]. See Remedies Notice, para. 119.

81 Reasoned Opinion dated 4 November 2015 [Doc Id: 1891].

82 The only observation in the Reasoned Opinion was that the trademarks [SIGMA'S TRADEMARKS] which were included by mistake were not part of the SPA, that Honeywell was not acquiring all of the […] sales and marketing employees and that one key employee had been replaced.

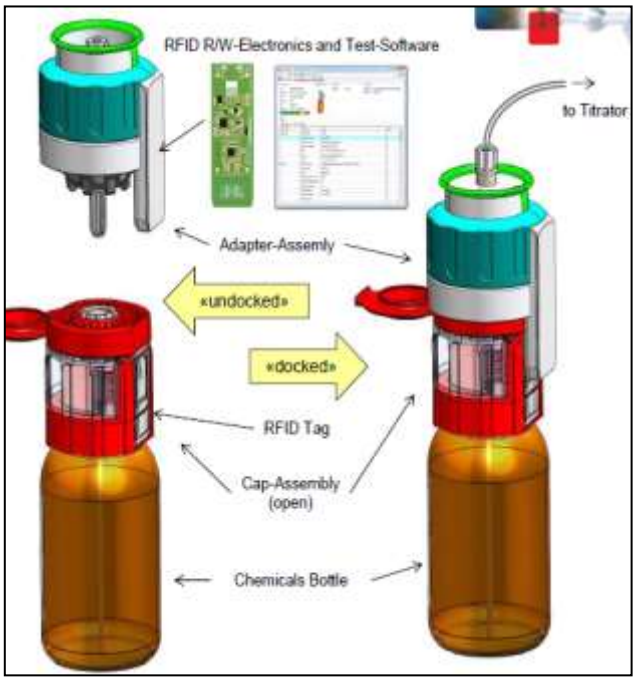
83 See the press release available at: http://www.merckgroup.com/en/media/extNewsDetail.html?newsId=56A41154F904B568C1257F01003EA896&newsType=1.

84 See the press release available at: https://www.honeywell.com/newsroom/pressreleases/2015/12/honeywell-completes-acquisition-of-research-chemicals-business-from-sigma-aldrich.

85 Presentation "Metrohm-Sigma-Aldrich, new titration platform", 31 March 2011, pp. 7-12 [Doc Id: 28-722].

86 See documents submitted in replies to questions 1 and 2 RFI iCap2 [Doc Id: 28-1370]. During the First Oral Hearing (02:36:10-02:41:21), [NAME OF INDIVIDUAL] explained that [SIGMA'S BUSINNES STRATEGIES]. According to [NAME OF INDIVIDUAL], [SIGMA'S BUSINNES STRATEGIES]. As regards [SIGMA'S BUSINNES STRATEGIES], [NAME OF INDIVIDUAL] and Merck's legal

Figure 1



Source: Sigma-Aldrich presentation, [SIGMA'S R&D], p. 6, [Doc ID 29-834]

(56) The advantages of iCap for customers of laboratory chemicals include the reduced risk of contamination of chemicals and the creation of an interface between the chemicals and the instrument, including an electronic memory that allows for the exchange of data between the bottle and the instrument.[88]

(57) iCap was planned in a single-use and in a multi-use version:[89]

(a) The single-use iCap was meant to be permanently affixed onto a Sigma-Aldrich liquid bottle with a pre-programmed electronic memory that could not be changed. According to the iCap patent application (2014), the technology allows for a safe and easy connection between the bottle cap and the instrument and enables fluids to be taken out of a container in an easy and safe manner,

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counsel explained that [SIGMA'S BUSINNES STRATEGIES]. Merck's legal counsel, however, also referred to Metrohm's website which advertises the Omnis instrument as "safer" (without explaining the comparator) exactly because it comes with the "patented 3S technology for noncontact handling of chemicals". See https://www.metrohm.com/en-us/products-overview/titration/.

87 See, by way of examples, email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Fwd: Lieferzeit PM3401 + PM3451" dated 14 December 2015, [*original in German*]; email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL], Metrohm, re "AW: Akronym 3S" dated 11 May 2015 [Doc Id: 29-2413]; email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Fwd: [SIGMA'S R&D] & iCap" dated 13 May 2015 [Doc Id: 28-1808]; and FMEA Analyse iCap, [*original in German*] [Doc Id: 30-799].

88 According to iCap patent application dated 1 April 2014, "*the invention relates to a closure for a container, comprising a connecting element for connection of the closure to the container, a sealing device for sealing the access to a container content and an interface to an adapter having a coupling receptacle*" (see https://patentscope.wipo.int/search/en/detail.jsf?docId=WO2014161831).

89 Presentation "Task 85 – Produktvarianten" by Helbling dated 2 October 2015, slide 3 [Doc Id: 30-533].

without contamination. The amount of work for the user is reduced and the process becomes safer.[90]

(b) The multi-use iCap would be supplied together with the laboratory instrument and could be connected with several bottles, including those of some of Sigma-Aldrich's competitors. The electronic memory on the cap would have to be programmed and re-programmed by the user in the laboratory.[91]

(58) iCap was developed and a pilot plant production was set up in Sigma-Aldrich's site at Buchs, Switzerland[92] under the responsibility of the Director for Marketing and R&D, [NAME OF INDIVIDUAL].[93]

2.2.2. iCap development by Sigma-Aldrich

(59) Based on the information in the file, the first reference of iCap within Sigma-Aldrich date back to March 2011 when Sigma-Aldrich employees prepared a discounted cash flow ("DCF") report and a presentation for iCap, discussing the purpose, the characteristics, and the value of the project.[94] This DCF analysis was eventually presented to Sigma-Aldrich's management for approval of iCap's funding.[95]

(60) On 29 March 2011, after reviewing an early version of the iCap DCF report, [NAME AND JOB TITLE OF INDIVIDUAL], Sigma-Aldrich Analytical stated: "*we feel strongly it is an important and good strategic investment as it gives us a competitive advantage providing reagents to Metrohm's next generation of titration instruments. Our development of intelligent cap* […] *will drive future titration reagent sales*".[96] In the same email, [NAME AND JOB TITLE OF INDIVIDUAL], Sigma-Aldrich Analytical suggested that iCap did "*not look real attractive from a financial perspective*"[97] but one day later, he asked [NAME AND JOB TITLE OF INDIVIDUAL], Sigma-Aldrich to compare Sigma-Aldrich's expected sales (i) in a scenario where it launches iCap and (ii) in a scenario where Sigma-Aldrich would not launch iCap while another competitor would cooperate with Metrohm.[98]

(61) On 29 March 2011, [NAME OF INDIVIDUAL] (Sigma-Aldrich) also reviewed an early version of the iCap DCF report and stated: "*a long gestation period in a project is not necessarily a bad thing but* […] *question is why we should do this investment with a long-term horizon versus another project* […]".[99]

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90 Summary of information provided in Patent WO 2014/161831, p. 11 [Doc Id: 30-848].

91 Merck's response to RFI iCap-1, Annex 4iv, p. 3 [Doc Id: 67].

92 Reply to question 3, RFI iCap-2 [Doc Id: 84].

93 See organigrams included in presentations "Analytical Standards & Reagents", 9 March 2012, slide 9 [Doc Id: 29-334] and "Analytical Standards & Reagents", 24 February 2014, slide 3 [Doc Id: 29-1488].

94 The first exchange on iCap in the Commission's file is dated March 2011. Following the Reply to the SO [Doc Id: 1187, see paras. 70ff], it appears that the document "i-Cap titration" [Doc Id: 28-1078] dated 2008 mentioned in the Statement of Objections was not related to iCap but that the reference to "iCap" in the title was included by mistake. The Commission however notes that based on the witness statements provided by the Parties, discussion on the iCap project between Sigma-Aldrich and Metrohm would have started in 2008-2009 [Doc Id: 1179-5, para. 3; Doc Id: 1179-9, para. 7].

95 Reply to SO, para. 49 [Doc Id: 1187]

96 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "DCF Metrohm iCAP" dated 29 March 2011 [Doc Id: 28-53].

97 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "DCF Metrohm iCAP" dated 29 March 2011 [Doc Id: 28-53].

98 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re Metrohm, 30 March 2011 [Doc Id: 28-52].

99 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "DCF Metrohm iCAP" dated 29 March 2011[Doc Id: 28-53].

(62) On 30 March 2011, [NAME OF INDIVIDUAL] reported by email that he "*discussed the structure of the DCF with [NAME OF INDIVIDUAL]… and [NAME OF INDIVIDUAL] is fine with th*[e current] *version* [of the DCF]".[100]

(63) On 31 March 2011, following these internal exchanges, the first DCF report on iCap was finalized (the "2011 DCF") and included the following:

(a) [SIGMA'S R&D AND BUSINESS STRATEGIES];[101] [102]

(b) [SIGMA'S R&D AND BUSINESS STRATEGIES];[103]

(c) [SIGMA'S R&D AND BUSINESS STRATEGIES].[104]

Figure 2

[SIGMA'S R&D AND BUSINESS STRATEGIES]

Source: Excel file with [Doc Id: 28-123], sheet "DCF"

(64) A presentation titled "*Metrohm-Sigma Aldrich: new titration platform*" on 31 March 2011 incorporated the outcome of the DCF.[105] This presentation included a "titration summary", presenting Metrohm's position in instruments, as well as Sigma-Aldrich's position in reagents for Karl Fisher (global market share of [60-70]%, with Merck and Mitsubishi as main competitors) and "*other*" titration (global market share of [10-20]% with Merck and Fisher as main competitors).[106] This presentation described the value proposition of iCap, its sales potential, the portfolio of volumetric titration applications and the additional potential iCap may have over the years, among which "*defending our position for Hydranal titration products*".[107] Other "*options*" to "*evaluate*" as iCap applications include HPLC and Ultra-High Performance Liquid Chromatography ("*UHPLC*").[108]

(65) To develop the iCap project, Sigma-Aldrich hired a third party, Helbling Technik AG ("Helbling", Switzerland). On 19 July 2011, Helbling sent a report to Sigma-Aldrich, which describes the background of the project as follows:

> *"In the last year SIAL* [Sigma-Aldrich] *pursued further the idea of an intelligent cap for bottles. In titration applications, bottles with chemicals are connected and removed from the analyse instruments several times until the content of a bottle is depleted completely.*
>
> *Two aspects are of particular importance for this handling:* […]
>
> *SIAL is seeing a very promising implementation approach in an intelligent cap for the bottles with chemicals, in the following called iCap.*

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100 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, 30 March 2011 [Doc Id: 28-71].

101 For reagents used in Karl Fischer titration, Sigma-Aldrich's market share was foreseen to be up to [60-70]% in 2020 with iCap, as opposed to [40-50]% without iCap in 2020. For reagents used in other titration solutions, Sigma-Aldrich's market share was foreseen to be up to [20-30]% in 2020 with iCap, as opposed to [10-20]% in 2020 without iCap.

102 Excel file with [Doc Id: 28-123], sheet "scenario with and without iCAP".

103 Excel file with [Doc Id: 28-123], sheet "market size & adoption".

104 Excel file with [Doc Id: 28-123], sheet "DCF", rows "Yr1 – Yr10" and "Residual" under "Valuation", column "NPV".

105 Presentation "Metrohm-Sigma-Aldrich, new titration platform", 31 March 2011, pp. 7-12 [Doc Id: 28-722].

106 Presentation "Metrohm-Sigma-Aldrich, new titration platform", 31 March 2011, p. 3[Doc Id: 28-722].

107 Presentation "Metrohm-Sigma-Aldrich, new titration platform", 31 March 2011, pp. 7-12 [Doc Id: 28-722].

108 Presentation "Metrohm-Sigma-Aldrich, new titration platform", 31 March 2011, p. 12 [Doc Id: 28-722].

SIAL had several talks and analysis with the company Metrohm (development of titration instruments) to discuss how a complete system, consisting of an analytical instrument (by Metrohm) and iCap (by SIAL) would need to be shaped in order to transfer this idea into reality. […]

The iCap development shall take place in connection with the development of a new titration instrument, which can actually make use of the benefits of iCaps with a corresponding interface. It is envisaged that the three parties will work closely together during the system development; Metrohm being responsible for the titration instrument on the one hand and SIAL assisted by the innovation partner [i.e., Helbling] *with the responsibility for the iCap on the other hand".*[109]

(66) On 1 September 2011, Sigma-Aldrich entered into an agreement with Metrohm to "*collaborate on the mutual commercialization of a new analytical system, which combines an analytical instrument with chemical consumables and reagents in a new innovative concept and provides the users of the* system *a higher convenience, higher safety and quality in running their analysis*".[110] Under the agreement, Sigma-Aldrich had to offer "*the chemical consumable allowing integration of the reagent delivery into the analytical instrument*" (in the case of single-use iCap) and "*non-dedicated chemical consumables*" (in the case of multi-use iCap).[111] The agreement provided for the launch of the new system for autumn 2014 unless agreed otherwise during the project.[112] [SIGMA'S R&D AND BUSINESS STRATEGIES].[113]

(67) On 9 March 2012, iCap was mentioned in an internal strategy presentation titled "*Analytical Standards & Reagents: Business Review and Planning*". This presentation depicted, among other things, how Sigma-Aldrich could differentiate its reagents offering by emphasising convenience of use. iCap was described as a key element of this strategy. Sigma-Aldrich added that "*this* [project] *will give us exclusive w*[orld]*w*[ide] *rights to sell Hydranal and all volumetric solutions for titration with this convenience → multi 10M $ opportunity*".[114] [NAME OF INDIVIDUAL], Director

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109 Project report "Projekt iCap" by Helbling dated 19 July 2011, page 4 [*original in German*] [Doc Id: 30-31]: *"Im letzten Jahr hat SIAL die Idee eines intelligenten Deckels für Flaschen vertieft. Bei Titrationsanwendungen werden nämlich die Chemikalienflaschen mehrmals an die Analysegeräte angeschlossen und wieder entfernt, bis der Inhalt einer Flasche vollständig verbraucht ist. Zwei Aspekte sind bei diesem Handling sehr wichtig* […] *Ein vielversprechender Ansatz zur Umsetzung sieht SIAL in einem intelligenten Deckel für die Chemikalienflasche, nachfolgend iCap genannt. SIAL hat mit der Firma Metrohm (Entwicklung von Titrationsgeräten) mehrere Gespräche und Analysen durchgeführt, wie ein Gesamtsystem, bestehend aus Analysegerät (von Metrohm) und iCap (von SIAL) ausgestaltet sein müsste, um die Idee in die Realität transformieren zu können. Die iCap-Entwicklung soll in Verbindung mit der Entwicklung eines neuen Titrationsgerätes erfolgen, welches die Vorzüge eines iCaps mit entsprechenden Interfaces auch tatsächlich nutzen kann. Es ist geplant, dass in der Systementwicklung drei Parteien eng zusammenarbeiten: Metrohm mit der Verantwortung für das Titrationsgerät einerseits und SIAL unterstützt durch einen Innovationspartner mit der Verantwortung für den iCap andererseits*". Preliminary discussions between Sigma-Aldrich and Helbling had already started in February 2011. See Helbling Proposal No. 113361400, "iCap Pre-Project", dated 17 February 2011 [*original in German*] [Doc Id: 28-4].

110 Mutual Agreement between Sigma-Aldrich and Metrohm, 1 September 2011 [Doc. Id: 60]. On 15 September 2012, Sigma-Aldrich and Metrohm amended the agreement to allow Sigma-Aldrich to explore the use of iCap for HPLC applications together with HPLC instrument manufacturers, such as Agilent or Waters.

111 Mutual Agreement between Sigma-Aldrich and Metrohm, 1 September 2011, Sections 4 and 6 [Doc. Id: 60].

112 Mutual Agreement between Sigma-Aldrich and Metrohm, 1 September 2011, Section 3 [Doc. Id: 60].

113 Mutual Agreement between Sigma-Aldrich and Metrohm, 1 September 2011, Section 7 [Doc. Id: 60].

114 "Analytical Standards & Reagents" Business Review and Planning presentation [Doc Id: 29-334].

for Marketing and R&D (Sigma-Aldrich) was involved in the preparation of that presentation.[115]

(68) Sigma-Aldrich continued to work on the development of iCap with Helbling. On 23 March 2012, Helbling prepared a report on the project for Metrohm and Sigma-Aldrich. This report presents in particular an "*IP-way forward*" for the iCap project, specifying that the novelty of the project lies with the *"increase of process security and process quality with titration"*, *"increase of usage comfort for the user (convenience)"* and *"direct recognition of bottles/consumables by titrator (without the detour via burette)*". [116]

(69) On 4 June 2012, a capital expenditure request ("CER") form was prepared by Sigma-Aldrich employees. It was titled "*iCap Development*" and described the milestones of the cooperation between Sigma-Aldrich and Helbling: *"Pre-development Phase 1 approved APR*[il]*2011 completed AUG*[ust]*2011* […] *Development Phase 2 approved SEP[tember]2011 completed APR*[il]*2012* […] *Development Phase 3 approved SEP[tember]2011 scheduled to completion APR*[ril]*2013* […] *Implementation* […]*".*[117]

(70) On 18 July 2012, Sigma-Aldrich concluded an agreement with Novoplast AG ("Novoplast", Switzerland) regarding sourcing of tooling and moulds for the different parts of iCap.[118] Novoplast delivered the first 25 assembled single use iCap bottle-heads to Metrohm and Sigma-Aldrich for testing in February 2015.[119]

(71) On 4 February 2013, iCap was mentioned in an internal presentation titled "*Applied Markets BU & Analytical Update*".[120] That presentation explained, among other things, how Sigma-Aldrich could create value with partners by leveraging its consumables portfolio. The cooperation with Metrohm regarding iCap was included as an example of a value-generating partnership on one slide. [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) was involved in that preparation of the presentation.[121] The same slide was included in a 23 July 2013 presentation, titled "*Applied Market Strategy*".[122]

(72) On 10 April 2013, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) sent an email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) and other Sigma-Aldrich employees sharing with them a spreadsheet summarising the company's collaborations and "*other external contracts*". [NAME OF INDIVIDUAL] requested that [NAME OF INDIVIDUAL] and the other addressees update the

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115 The properties of the presentation indicate that the Powerpoint document was last modified by him.

116 Helbling report [Doc Id: 30-162], page 3 [*original in German*]: "*Als eigentliche Neuigkeit und damit als IP- Stossrichtung wurden folgende Punkte identifiziert (siehe Bild oben): - Themen «Erhöhen der Prozess- Sicherheit und Prozess- Qualität beim Titrieren» - Themenkreis «Erhöhen des Bedienkomfortes für Anwender» (Convenience) - Themenkreis «Direktes Erkennen von Flaschen/ Consumables durch Titrator» (ohne Umweg über Bürette)".*

117 CER Form, Project Title "iCap Development" [Doc Id: 28-575] and Attachment to CER Form, Project Title "iCap Development" [Doc Id: 28-576].

118 Email by [NAME OF INDIVIDUAL], to [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "AW Offerte […] AG 12-252-A", dated 18 July 2012 [*original in German*] [Doc Id: 29-469].

119 Reply to question 3, RFI iCap-2 [Doc Id: 84].

120 Applied Markets BU & Analytical Update, JRG Buchs, 4 February 2013, [Doc ID 29-747], sl. 48-49.

121 The properties of the presentation indicate that the Powerpoint document was last modified by him.

122 Sigma-Aldrich 2013 Applied Market Strategy, July 2013, [Doc ID 28-1143], sl. 15.

collaboration lists on a monthly basis.[123] The most recent version of those lists (likely prepared in or after December 2013)[124] included […] collaborations, one of which is "*iCap titration w/Metrohm*". The iCap titration collaboration [SIGMA'S R&D].[125]

(73) On 30 April 2013, iCap was mentioned in a document prepared for an upcoming meeting of the Sigma-Aldrich Science & Technology Committee, a standing committee of Sigma-Aldrich's Board of Directors.[126] The reference to iCap appeared in point 3 in the agenda for the meeting, "*Executive Development Program (EDP) Follow-Up*". One of the 4 major recommendations from the EDP was to "*establish more effective customer centric relationships*". In this respect, the presentation included a list of collaborations and external interactions. The list mentioned "*iCap/Metrohm*", specifying that it concerns the area of "*Reagent Delivery*" and is an "*Equip*[ment]-*compat*[ible] *Cap that measures solvents*".

(74) In May 2013, iCap was mentioned in a presentation titled "*Analytical: Fuel for Growth*" concerning innovation in the Analytical division of Sigma-Aldrich.[127] iCap was listed first among the "*new platform/venture projects*" developed for solvents and reagents. [NAME AND JOB TITLE OF INDIVIDUAL], was involved in the preparation of the presentation.[128]

(75) On 31 May 2013, a draft DCF was circulated within Sigma-Aldrich concerning a potential expansion of the company's plant in Buchs, Switzerland.[129] As explained above, iCap was developed and a pilot plant production was set up in Sigma-Aldrich's site at Buchs, Switzerland (the "Buchs expansion").[130] The incremental sales that iCap could generate were taken into account in the 31 May 2013 DCF and in DCFs that followed (on 22 July 2013[131]; on 28 August 2013;[132] on 5 September 2013;[133] on 23 January 2014;[134] and on 27 April 2015[135]). Importantly, the DCFs on Buchs expansion not only took into account iCap incremental sales for titration applications (as did the 2011 DCF) but also incremental sales from the use of iCap in [SIGMA'S R&D AND BUSINESS STRATEGIES] applications. DCFs on Buchs expansion dated 31 May 2013[136] and 22 July 2013[137] estimated that the iCap incremental sales in [SIGMA'S R&D AND BUSINESS STRATEGIES] applications

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123 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "Collaborations update", dated 12 April 2013 [Doc Id: 28-932].

124 The spreadsheet mentions that on 15 December 2013 "*prototypes* [of iCap] [were] *delivered* [and] *testing started together with Metrohm*" and that in "*Q1 2014*" "[SIGMA'S R&D AND BUSINESS STRATEGIES] *will get* […] *samples* [of iCAP]" [Doc Id: 29-1360].

125 SIAL Collaborations Spreadsheet [Doc Id: 29-1360].

126 Science & Technology Committee Meeting, 30 April 2013, page 26 [Doc Id: 26-20].

127 Draft presentation "Analytical: Fuel for Growth – Part II: Innovation Foundation for Growth" dated May 2013, slide 19 [Doc Id: 29-1235].

128 The properties of the presentation indicate that the Powerpoint document was last modified by him.

129 See email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "DCF", dated 31 May 2013 [*original in German*] [Doc Id: 28-1019] and excel file with [Doc Id: 29-956], sheet "business". See also email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "[SIGMA'S R&D AND BUSINESS STRATEGIES]", dated 31 May 2013 [Doc Id: 28-1029].

130 See recital (58).

131 Excel file with [Doc Id: 29-1131], sheet "business".

132 Excel file with [Doc Id: 29-1212], sheet "business".

133 Excel file with [Doc Id: 29-1228], sheet "business".

134 Excel file with [Doc Id: 28-1384], sheet "business".

135 Excel file with [Doc Id: 29-2361], sheets "base DCF" and "DCF realistic".

136 Excel file with [Doc Id: 28-1018], sheet "business".

137 Excel file with [Doc Id: 29-1131], sheet "business".

would be as high as the iCap incremental sales in titration applications. Subsequent DCFs on Buchs expansion dated 28 August 2013,[138] 5 September 2013,[139] 23 January 2014,[140] and 27 April 2015[141] estimated that iCap incremental sales for [SIGMA'S R&D AND BUSINESS STRATEGIES] would be […] than iCap incremental sales in titration applications.

(76) On 23 July 2013, iCap was mentioned in a presentation titled "*Expansion Recommendations Buchs and Bellefonte*".[142] iCap was listed among the growth opportunities that could justify an expansion of the Buchs site. iCap was expected to allow for $13M sales within 5 years in case of iCap Titration and of $18M sales for iCap HPLC. [NAME OF INDIVIDUAL], Vice President in Sigma-Aldrich Analytical, was involved in the preparation of the presentation.[143]

(77) On 24 February 2014, iCap was mentioned in a presentation titled "*Analytical Standards & Reagents – Overview Innovation Pipe"*.[144] [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) delivered this presentation in the course of his visit at a company plant in Seelze, Germany. In a slide titled "*Cooperation SiAI (CH) with Metrohm*", the presentation referred to "*R&D coop*[eration]" as "*focussed to convenient chemicals/containers for new instrument generation*". The three slides following that provided details on iCap (including the description in the presentation of 9 March 2012) and illustrations explaining what iCap consists of and how it interoperates with laboratory instruments.[145]

(78) On 5 March 2014, Sigma-Aldrich finalised a new DCF report on iCap (the "2014 DCF"). Regarding the installed base of Metrohm instruments, the 2014 DCF used the same assumptions as the 2011 DCF report. In both those DCF reports, 5 different scenarios were considered and scenario "*V4*" was used for the purposes of the DCF calculation. The 2014 DCF takes into account incremental sales over ten years (up to 2024) starting from the expected commercialisation of iCap in 2015,[146] unlike the 2011 DCF which only took into account sales over 7 years (up to 2019) starting from the then expected commercialisation of iCap in 2013.[147] Based on these sales (which are limited to volumetric titration applications only), the NPV of iCap would amount to [SIGMA'S R&D AND BUSINESS STRATEGIES]. The project was estimated to have an additional [SIGMA'S R&D AND BUSINESS STRATEGIES]. The total NPV of iCap was estimated at approximately EUR […].

Figure 3

[SIGMA'S R&D AND BUSINESS STRATEGIES]

Source : Sigma-Aldrich internal document [Doc ID : 29-1483], tab « Base »

138 Excel file with [Doc Id: 29-1212], sheet "business".
139 Excel file with [Doc Id: 29-1228], sheet "business".
140 Excel file with [Doc Id: 28-1384], sheet "business".
141 Excel file with [Doc Id: 29-2361], sheets "base DCF" and "DCF realistic".
142 Draft presentation" Analytical Fuel for Growth – Expansion Recommendations Buchs and Bellefonte" dated 23 July 2013, slides 16-17 [Doc Id: 28-1118].
143 The properties of the presentation indicate that the Powerpoint document was last modified by him.
144 Presentation "Analytical Standards & Reagents: overview, innovation pipe, mid term strategy" dated 24 February 2014, slides 14-17 [Doc Id: 29-1488].
145 Presentation "Analytical Standards & Reagents: overview, innovation pipe, mid term strategy" dated 24 February 2014, slides 14-17 [Doc Id: 29-1488].
146 Excel file with [Doc Id: 29-1483], tab "Base".
147 Excel file with [Doc Id: 28-123], sheet "DCF"

(79) The Commission notes that the 2014 DCF does not include market share estimates with and without iCap, as did the 2011 DCF.

(80) On 6 March 2014, following-up on his visit in Seelze, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) wrote to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), stating: *"iCap – certified volumetric solutions (and later Hydranal): project has been presented, [SIGMA'S R&D AND BUSINESS STRATEGIES]"*.[148]

(81) On 1 April 2014, Sigma-Aldrich and Metrohm jointly filed a patent for the single-use version of iCap called "*closure for a container*" under the application number PCT/EP2014/056491.[149] [NAMES OF INDIVIDUALS] from Sigma-Aldrich are listed among the "*inventors*".[150]

(82) On 29 April 2014, iCap was again presented at Board of Directors level, in a document prepared for an upcoming meeting of Sigma-Aldrich's Science & Technology Committee. Point 2 in the Agenda of the meeting was "*Innovation at SIAL and Role of Committee*". Regarding this point, a presentation entitled "*Pathways to Innovation*" was prepared which included a list of collaborations with academic institutions and companies that allow Sigma-Aldrich to "*fill*[] *market segment needs*". Metrohm was mentioned among these collaborations and iCap was mentioned as a "*product example*[]" including illustrations.[151]

(83) On 4 June 2014, iCap was mentioned in a presentation titled "*Solvents – Global Overview*" prepared by [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich). This presentation included iCap in the context of a Global Solvents Strategy under the list headed "*Product and Packaging –Innovation*".[152]

(84) In April 2015, iCap was mentioned in a report titled "*the Sigma-Aldrich analytical business*", prepared by [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich). The section of *'Sigma analytical reagents & solvents'* contains a reference to iCap for Metrohm in the *'reagents for titration: […]* section and a reference to iCap for

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148 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: Follow-up von unserem Besuch" dated 6 March 2014 [*original in German*] [Doc Id: 29-1456]: *"iCap - certified volumetric solutions (und später Hydranal): Projekt wurde vorgestellt, [SIGMA'S R&D AND BUSINESS STRATEGIES]"*.

149 On 23 March 2012, Helbling had submitted a report to Sigma-Aldrich and Metrohm titled "System development iCap – Report on 'protection of intellectual property'". The report states that "[…] *the focus should be more on protection of the actual innovation of the idea iCap and less on the theme RFID. As actual novelty and therefor as IP-way forward the following points are identified: - theme 'increase of process security and process quality with titration; - themes 'increase of usage comfort for the user" (convenience) - themes 'direct recognition of bottles/consumables by titrator" (without the detour via burette)"*. See Helbling Report "Systementwicklung 'iCap'", 23 March 2012, pp. 3-4 [*original in German*] [Doc Id: 30-162]: "*Darum sollte der Fokus mehr auf den Schutz der eigentlichen Innovation der Idee iCap und weniger auf das Thema RFID gelegt wird. Als eigentliche Neuigkeit und damit als IP- Stossrichtung wurden folgende Punkte identifiziert (siehe Bild oben): - Themen «Erhöhen der Prozess- Sicherheit und Prozess- Qualität beim Titrieren» - Themenkreis «Erhöhen des Bedienkomfortes für Anwender» (Convenience) - Themenkreis «Direktes Erkennen von Flaschen/ Consumables durch Titrator» (ohne Umweg über Bürette)"*.

150 See https://patentscope.wipo.int/search/en/detail.jsf?docId=WO2014161831&tab=PCTBIBLIO&maxRec=1000.

151 Science & Technology Committee Meeting, 29 April 2014, p. 10 [Doc Id: 26-27]. This document was prepared by "[NAME OF INDIVIDUAL]" to [NAMES OF INDIVIDUALS] and [NAME AND JOB TITLE OF INDIVIDUAL] in copy.

152 Presentation "Sigma-Aldrich, Solvents-Global Overview" dated 4 June 2014, slide 14 [Doc Id: 130].

[SIGMA'S R&D AND BUSINESS STRATEGIES][153] under *'analytical solvents: […]*. The overall section concluded with a general reference to the focus area *'Next Generation Packaging'* to address the needs of analytical customers. According to the presentation, "*a commercial offering with those characteristics will give us unique selling points. First projects like iCap and iBarrel are already in development and will be launched within the next 12 month*".[154]

(85) On 19 April 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) wrote to [NAME OF INDIVIDUAL] (Sigma-Aldrich), serving as member of the Steering Committee for the integration of Sigma-Aldrich into Merck: "*Hi [NAME OF INDIVIDUAL], We should be ready to launch iCap and iBarrel at the next Analytical in Munich in April 2016. Can you use any of your connections at Merck to see if we can get space on their booth for this? Otherwise we should consider paying for a booth of our own, which I don't really want to do".*[155] On 20 April 2015, [NAME OF INDIVIDUAL] responded: "*We should know the future leaders in the next 4 weeks. We can then make this a top priority with them. Is there a deadline for reserving space that is approaching?*".[156]

(86) On 8 June 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) communicated to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) that they "*have made great progress with [SIGMA'S R&D AND BUSINESS STRATEGIES] as well as [SIGMA'S R&D AND BUSINESS STRATEGIES] and iCAP*".[157]

(87) On 2 July 2015, [NAME OF INDIVIDUAL] (Sigma-Aldrich) sent an email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) explaining discrepancies between the R&D budget and the actual or forecast spend on R&D. Among other things, [NAME OF INDIVIDUAL] stated that there was a shortfall of approximately CHF [SIGMA'S R&D AND BUSINESS STRATEGIES] regarding the development of iCap with Metrohm. He noted that "*We are now so close to launch with Metrohm that we cannot pull out. Metrohm's instruments depend on our supply of reagents with iCAP*".[158]

(88) On 11 August 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) wrote to [NAME OF INDIVIDUAL] (Helbling) to inform him that "[SIGMA'S R&D AND BUSINESS STRATEGIES]". [NAME OF INDIVIDUAL] added that the plan proposed is to "[SIGMA'S R&D AND BUSINESS STRATEGIES]".[159]

(89) On 9 September 2015, Sigma-Aldrich prepared a DCF report specifically for the multi-use version of iCap. Contrary to the single use iCap, the multi-use iCap would be sold by the laboratory instrument manufacturer together with the instrument. Under the base case scenario, Sigma-Aldrich estimated a total NPV for the multi-use

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153 In addition to Metrohn, [SIGMA'S R&D AND BUSINESS STRATEGIES].

154 Report "the Sigma-Aldrich analytical business", [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL], April 2015 [Doc Id: 28-1881]. According to the Word document properties, it was last modified on 25 June 2015.

155 Document "Re: Analytica Booth" by [NAME OF INDIVIDUAL] dated 19/04/2015 [Doc Id: 29-2319].

156 Document "Re: Analytica Booth" by [NAME OF INDIVIDUAL] dated 20/04/2015 [Doc Id: 29-2319].

157 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, "Re: [SIGMA'S R&D] solvent project" [Doc Id: 330-44686].

158 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "2015 6+6 Forecast C/C 56299", dated 7 July 2015 [Doc Id: 29-2661].

159 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Helbling, re "Fwd: 150727 Kurzprotokoll Sputnik TC" dated 11 August 2015 [*original in German*] [Doc Id: 29-2751]: *"[SIGMA'S R&D AND BUSINESS STRATEGIES]".*

iCap of USD [SIGMA'S R&D AND BUSINESS STRATEGIES].[160] On 13 November 2015, Sigma-Aldrich prepared an updated DCF report regarding the multi-use iCap. Taking into account follow up orders of additional multi-use iCaps for each instrument, Sigma-Aldrich increased the total NPV of the project under the base case scenario to USD [SIGMA'S R&D AND BUSINESS STRATEGIES].[161]

(90) On 25 September 2015, [NAMES OF INDIVIDUALS] participated in a call to discuss the way forward regarding Sigma-Aldrich's business development projects. Following up on the call, [NAME OF INDIVIDUAL] identified "*five major BD projects*" that he considered "*in implementation phase*". One of these projects was iCap. [NAME OF INDIVIDUAL] acknowledged that "*this project is in an advanced stage*" and Sigma-Aldrich had "*already made significant investments within the scope of the business partnership with Metrohm*". However, he added that *"[n]ow there are increased risks as a result of the upcoming merger"* (i.e., the Transaction). It follows from the content of this email that it related to ensuring that the supply chain of the combined entity "*is prepared for the production, warehousing, and distribution of the products required by Sigma-Aldrich/Merck Millipore and Metrohm to support a successful launch at Analytica 2016 (April/May 2016)"*.[162]

(91) On 2 October 2015, a presentation by Helbling to Sigma-Aldrich titled "*Product Variants*" (*Produktvarianten* in German) showed three different iCap products: titration single use, titration multi-use, and HPLC single use.[163]

(92) On 20 October 2015, a presentation by [NAME OF INDIVIDUAL], Sigma-Aldrich, titled "*Analytical BD – Update October 2015*" identified the top 5 "*B[usiness] D[evelopment] projects*" for the company's Analytical business division, including iCap for titration and HPLC applications. The highest priority for iCap was the definition of the "*product portfolio*". The presentation also calculated the engineering and design and tooling investment for iCap at USD [SIGMA'S R&D AND BUSINESS STRATEGIES] (for the version developed with Metrohm) and USD [SIGMA'S R&D AND BUSINESS STRATEGIES]. The launch of iCap was expected in the Analytica Fair 2016 (for iCap developed with Metrohm) and in autumn 2016 ([SIGMA'S R&D AND BUSINESS STRATEGIES]).[164]

(93) On 26 October 2015, Sigma-Aldrich employees finalized an attachment for a capital expenditure request ("CER") form regarding the "*tooling for multi-use iCap suitable for titration and HPLC*". The document explained that "[SIGMA'S R&D AND BUSINESS STRATEGIES]*"*. The production of the first lot of multi-use iCaps was expected to start on 7 November 2015.[165]

(94) On 26 October 2015, [NAME OF INDIVIDUAL] (Sigma-Aldrich) sent an email to [NAME OF INDIVIDUAL] and [NAME AND JOB TITLE OF INDIVIDUAL]

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160 Excel file with [Doc Id: 30-809], tab "Base". The file includes three scenarios, a "base" case; a "best" case; and a "worst" case.

161 Excel file with [Doc Id: 28-2072], tab "Base".

162 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: Notes from our call today", dated 25 September 2015, [Doc Id: 28-1991].

163 Presentation "Task 85 – Produktvarianten" by Helbling dated 2 October 2015, slide 3 [Doc Id: 30-533].

164 Presentation "Analytical BD – Update October 2015", slides 2-3 and 7-8 [Doc Id: 28-2019].

165 Attachment to CER, Project Title "Tooling for Multi-use iCap suitable for titration and HPLC", 26 October 2015 [Doc Id: 28-2030].

(Sigma-Aldrich) stating that "[SIGMA'S R&D AND BUSINESS STRATEGIES]*"*.[166]

(95) On 29 October 2015, Sigma-Aldrich prepared an "*Innovation Pipeline Planner*" document focusing on innovation in the Union. The document includes a tab titled "*Inno Pipeline List*" which lists […] pipeline projects, including "*iCap ([SIGMA'S R&D AND BUSINESS STRATEGIES])*" and "*iCap ([SIGMA'S R&D AND BUSINESS STRATEGIES])*". In those lists, iCap ([SIGMA'S R&D AND BUSINESS STRATEGIES]) and iCap ([SIGMA'S R&D AND BUSINESS STRATEGIES]) are the [SIGMA'S R&D AND BUSINESS STRATEGIES]. iCap ([SIGMA'S R&D AND BUSINESS STRATEGIES]) is the only pipeline project with expected incremental sales [SIGMA'S R&D AND BUSINESS STRATEGIES]. For each pipeline project, the "*Inno Pipeline List*" specifies whether it is run "*in-house*" or in collaboration with third parties.[167]

(96) On 5 November 2015, Helbling sent a monthly report to Sigma-Aldrich concerning iCap developed in cooperation with Metrohm. The current step of the project was "*iCap Metrohm Finalization*" and the next milestone was the "*production of 1,000 Caps (single-use) and 800 caps (multi-use)*". The overall progress of the project was estimated at 99% and the expected end date was 10 May 2016, the date iCap would be launched at Analytica 2016.[168]

2.2.3. iCap within the framework of the Transaction

2.2.3.1. The period from the announcement of the Transaction until the adoption of the Clearance Decision

(97) In an email exchange of 22-23 September 2014 between [NAME AND JOB TITLE OF INDIVIDUAL], and [NAME OF INDIVIDUAL] from Helbling, [NAME OF INDIVIDUAL] informed [NAME OF INDIVIDUAL] of the Transaction. Mr [NAME OF INDIVIDUAL] stated he hoped that the Transaction would not affect the development of projects, but he did not yet know. They agreed to discuss further and [NAME OF INDIVIDUAL] set up an agenda for a telephone conversation covering also "*Strategy Helbling-SIAL after sale: - SIAL is strategically moving from product producer to 'solution offerer' (interview CEO SIAL); - iCap and iBarrel are strategic projects; - who communicates this message Merck and SIAL internally*". [NAME OF INDIVIDUAL] replied to [NAME OF INDIVIDUAL] that "*for the moment"* it should be *"business as usual*".[169]

(98) On 29 April 2015, in the course of the Phase I investigation in Case M.7435 – *Merck/Sigma-Aldrich*, Sigma-Aldrich provided 66 documents to the Commission, with Merck's counsel in copy, in response to the Commission's RFI I-1 of 23 April 2015. Two of those documents, two mentioned iCap in the context of the planned "*next steps*" in Sigma-Aldrich's "*global solvent strategy*". The two documents were

166 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "iCap implementation", dated 26 October 2015 [Doc Id: 28-2031].

167 Spreadsheet "Innovation Pipeline Planner R&D – Innovation EU (WIP only)", dated 29 October 2015, tab "Overview" [Doc Id: 29-2985].

168 Excel sheet, "Project Cockpit / Monthly Report", 5 November 2015 [Doc Id: 29-3223].

169 Email from [NAME OF INDIVIDUAL] (Helbling) to [NAME AND JOB TITLE OF INDIVIDUAL], "Sigma-Aldrich @ Merck", 23 September 2014 [*original in German*] [Doc Id: 29-1813].

the final version and an early draft of the 4 June 2014 "*Solvents – Global Overview*" presentation.[170]

(99) On 6 May 2015, iCap project manager [NAME OF INDIVIDUAL] informed [NAMES OF INDIVIDUALS] (Sigma-Aldrich) and [NAME AND JOB TITLE OF INDIVIDUAL], that a German packaging magazine picked up that the iCap patent application had been published. The email of 6 May 2015 was forwarded to [NAME OF INDIVIDUAL] (among other people). On 22 May 2015, [NAME OF INDIVIDUAL] forwarded the 6 May 2015 email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) indicating "[a]*s we think about communication we are going to have to get to Metrohm when it comes out that we are divesting Hydranal.*[171] *We need to develop a strategy on how we are going to proceed."* On 26 May, [NAME OF INDIVIDUAL] replied *"*[a]*greed. There are several angles to this. Lets talk when we have our call tomorrow, Wednesday.*"[172]

(100) On 3 June 2015, [NAME OF INDIVIDUAL] sent an email titled "*short question*" to [NAME OF INDIVIDUAL]: "*[NAME OF INDIVIDUAL], just to make sure I understand: whatever we curve* [sic] *out from our SiAl portfolio – this will NOT affect any of the Merck products, right? In other words, we can go on with pipeline projects (iCap, iBarrel, GCAT…) with the existing Merck products. I just went* [sic] *to get this confirmed as we have the deal with Metrohm (iCap) where we launch at Analytica 2016.*"[173]

(101) On 5 June 2015 (5:30PM), [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) sent an email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) stating: "*the Commission is asking us to include all pipeline project*[s] *for R&D within the divested business.*[174] *Any concerns with this? I don't imagine there is anything but keep in mind the divested business now includes solvents and inorganics out of all worldwide sites (including Sheboygan) going into the EEA and all Fluka global. We need to understand if this gives us any concerns asap."*[175] In a follow-up email of 5 June 2015 (5:53PM), [NAME OF INDIVIDUAL] added: "*please give your attention first to any [R&D] in [the] EEA. Then focus outside [the] EEA. We need an answer as soon as possible*".[176]

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170 Presentation "Sigma-Aldrich, Solvents- Global Overview" dated 4 June 2014, slide 14 [Doc Id: 130], discussed above in recital (83).

171 Sigma-Aldrich's Karl Fischer titration solutions were part of the Divestment Business as defined in the Initial Commitments dated 22 May 2015.

172 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: iCap" dated 26 May 2015 [Doc Id: 330-47071].

173 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "short question" dated 3 June 2015 [Doc Id: 29-2475].

174 On 5 June 2015 (4:51PM), the Commission suggested to the Parties to include a new section in the Commitments requiring the transfer to the Purchaser of all R&D and pipeline projects and all R&D agreements with third parties to the extent they concern the Divestment Business (See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Initial Commitments was proposed [Doc Ids: 954 and 956], see recital (36)).

175 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

176 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

(102) On 5 June 2015 (6:30PM), [NAME OF INDIVIDUAL] replied to [NAME OF INDIVIDUAL] email with a list of R&D projects that were responsive to [NAME OF INDIVIDUAL] request. [NAME OF INDIVIDUAL] considered this list as "*a first iteration*". Among other things, [NAME OF INDIVIDUAL] included: "*iCap: [SIGMA'S R&D AND BUSINESS STRATEGIES]"*[177]

(103) On 5 June 2015 (6:36PM), [NAME OF INDIVIDUAL] proposed a call "*at… 7.30 CET… to discuss*".[178] On 5 June 2015 (6:51PM), [NAME OF INDIVIDUAL] sent an Outlook invite titled "*Invitation: R&D call*" to [NAMES OF INDIVIDUALS] (Sigma-Aldrich) and three specialised antitrust lawyers, who acted as outside counsel to Sigma-Aldrich.[179] The invite concerned a call at 7.30PM. [NAME OF INDIVIDUAL] accepted the invite.[180] [NAME OF INDIVIDUAL] replied to [NAME OF INDIVIDUAL] regarding the call "*works for me. Let me know which number to dial*".[181] [NAME OF INDIVIDUAL], one of the three specialised antitrust lawyers, also accepted the invite.[182] [NAME OF INDIVIDUAL] tentatively accepted the invite.[183] [NAME OF INDIVIDUAL] received an "*out-of-office*" email from [NAME OF INDIVIDUAL].[184] [NAME OF INDIVIDUAL] also sent an email (at 7:34PM) to [NAME OF INDIVIDUAL] stating: "*I don't think you need me for R&D with [NAME OF INDIVIDUAL] being there. Let me know if I can help after the call*".[185] In the course of the call, the invite was forwarded to [NAME OF INDIVIDUAL], Sigma-Aldrich (at 7:31PM)[186] and to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), Sigma-Aldrich (at 7:44PM).[187] [NAME OF INDIVIDUAL] joined the call with a delay.[188] During the call (at 7:38PM), [NAME

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177 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

178 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

179 Outlook invite by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, and [NAMES OF INDIVIDUALS AND LAW FIRMS], re "Invitation: R&D call", dated 5 June 2015 [Doc Id: 329-43588].

180 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich titled "Accepted: R&D call", dated 5 June 2015 [Doc Id: 356-10046].

181 Email chain between [NAMES OF INDIVIDUALS], Sigma-Aldrich, and [NAMES OF INDIVIDUALS AND LAW FIRMS], titled "Fwd: R and d", dated 5 June 2015 [Doc Id: 368-5066].

182 Email by [NAMES OF INDIVIDUALS] to [NAME OF INDIVIDUAL], Sigma-Aldrich, titled "Accepted: Invitation: R&D call @ Fri Jun 5, 2015 7:30pm – 8:30pm)", dated 5 June 2015 [Doc Id: 356-10043].

183 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich titled "Tentatively Accepted: R&D call", dated 5 June 2015 [Doc Id: 329-43564].

184 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAME OF INDIVIDUAL], Sigma-Aldrich titled "Out-of-office: June 5 Re: R and d", dated 5 June 2015 [Doc Id: 329-43727].

185 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAME OF INDIVIDUAL], Sigma-Aldrich, titled "Re: R and d", dated 5 June 2015 2015 [Doc Id: 329-43523].

186 Outlook invite by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Einladung: R&D call", dated 5 June 2015 [Doc Id: 356-10062]. On 5 June 2015 (7:34PM), [NAME OF INDIVIDUAL] also forwarded to [NAME OF INDIVIDUAL] the "*first iteration*" list that [NAME OF INDIVIDUAL] circulated on the same day at 6.30PM. See email from [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Fwd: R and d", dated 5 June 2015, [Doc Id: 329-43510].

187 Outlook invite by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Einladung: R&D call", dated 5 June 2015 [Doc Id: 356-10062].

188 After the call, [NAME OF INDIVIDUAL] sent an email to [NAMES OF INDIVIDUALS] (Sigma-Aldrich) and two outside legal counsel, apologizing for being late for the call. [NAME OF INDIVIDUAL] added: "*I will come back to you [NAME OF INDIVIDUAL] on this*". Email chain between [NAMES OF INDIVIDUALS] (Sigma-Aldrich) and [NAMES OF INDIVIDUALS AND LAW FIRMS] re "Re: call today", dated 5 June 2015 [Doc Id: 330-45194].

OF INDIVIDUAL] sent an email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) saying: "*We are on a call right now with [NAMES OF INDIVIDUALS] to work through the R&D question which is a bit sticky*".[189]

(104) On 5 June 2015 (8:18PM), [NAME OF INDIVIDUAL] circulated to [NAME OF INDIVIDUAL] and to the persons attending the call above a "*modified list*" which included "*no new substance, just some rewording and order change*". In this list, [NAME OF INDIVIDUAL] ordered the items from his earlier email in 4 categories, namely, "*New Product Pipeline", "Production Technology", "RediDry packaging technology"*, and "*New technology"*. iCap is included in the last category and is described as *"[a n]ew versatile technology for consumables talking to instrument. Intelligent cap. Cooperation with Metrohm (contract) to be launched 2016, with inter linked w Metrohm instruments (KF titration)[SIGMA'S R&D]."*[190]

(105) On 8 June 2015 (01:47 PM), following a conference call at 10:45 AM, an updated version of the Initial Commitments was submitted to the Commission, including paragraph 24: "*To the extent it concerns solely or predominantly new products or products under development within the scope of the Divestment Business, the Parties shall transfer all R&D and pipeline projects and related information existing at the Effective Date to the Purchaser or will facilitate such transfer, under the supervision of the Monitoring Trustee. To the extent it concerns new products or products under development which do not relate solely or predominantly to the Divestment Business, the Parties will provide a royalty-free, irrevocable, non-exclusive, global license to these R&D and pipeline projects".*[191] Regarding this version, [NAME OF INDIVIDUAL] sent an email (at 6:17 PM) to [NAMES AND JOB TITLES OF INDIVIDUALS], Sigma-Aldrich) commenting on the most recent version of the Initial Commitments that the Parties sent to the Commission: "*Unsurprisingly, we lost the argument on R&D. We will give a license. Still related to new products though so should be ok. New language below. Thanks.*"[192]

(106) On 14 June 2015 (one day before the adoption of the Commission's Clearance Decision on Case M.7435 – Merck/Sigma-Aldrich), [NAME OF INDIVIDUAL] asked [NAME OF INDIVIDUAL] what should be the message to Metrohm if they ask about their iCap cooperation. [NAME OF INDIVIDUAL] wrote: "*I expect Metrohm will see the potential threa[t] for our iCap cooperation, and therefore they will see their 2016 new instrument generation launch at risk." [NAME OF INDIVIDUAL]* stated: *"As far as I know these things are not included* [in the Divestment Business]*",* to which [NAME OF INDIVIDUAL] answered: *"but Hydranal is as well as all volumetrics. [SIGMA'S R&D]*" In his final reply, [NAME OF INDIVIDUAL] noted: "*... [SIGMA'S R&D] Or will find any other creative solution to leverage iCap.*"[193] [NAME OF INDIVIDUAL] interjected and confirmed *"iCap isn't affected… we can let [Metrohm] know this isn't involved".*[194]

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189 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Status", dated 5 June 2015 [Doc Id: 329-43509].

190 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

191 Updated version of the Initial Commitments submitted on 8 June 2015 [Doc Id: 1923].

192 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "Fwd: Commitments", dated 8 June 2015 [Doc Id: 960-1062].

193 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "short question" dated 3 June 2015 [Doc Id: 29-2552].

194 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "Re: Metrohm and iCap", dated 14 June 2015 [Doc Id: 329-42824].

(107) On the same day, in order to prepare for internal communication at the Buchs plant, [NAME OF INDIVIDUAL] (who did not attend the 5 June 2015 conference call and had not "*been fully in the loop*") asked [NAME OF INDIVIDUAL] regarding "*the R&D activities and the pipeline products and projects for solvents and whether they are part of the divestiture package.*" [NAME OF INDIVIDUAL] replied: "*We have indicated that no specific R&D is taking place in the divested product portfolio. […] For now we don't expect any [SIGMA'S R&D] R&D activity to be affected. Fi. iCap is not seen as specifically related to the divested portfolio, as it isn't specifically linked and will support a larger group of other products. We will need to come up with a communication to Metrohm in the coming days.* […]".[195]

2.2.3.2. After the adoption of the Clearance Decision

(108) On 30 July 2015, when negotiating the sale of the divested business to Honeywell, several Sigma-Aldrich employees discussed the assets that should or should not be included in the sales agreement with Honeywell. In this respect, [NAME OF INDIVIDUAL] commented: "*The Packaging Innovation line maybe has the biggest exposure. We really need to find another way to present/attack this. In the process of negotiation with the* [C]*ommission we always tried to keep R&D out and were successful doing so by always referring to product R&D. With this we tried to keep iCap, iBarrel, filtration etc. out of scope. With products (SKU's) explicitly mentioned in the transfer list this get hard to apply to Redi-Dry* [another Sigma-Aldrich packaging technology]. *In discussing what the options are we so far weren't able to come up with a good strategy."*[196]

(109) On 27 August 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) sent an email to request information on the contracts for Fluka and Hydranal products in the context of the sale of the Divestment Business: "… *we need to provide all contracts concerning Fluka products and Hydranal. I believe customer agreements are more likely to be relevant for you, but if you have any supply agreements please send those as well*".[197] On 28 August 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) replied that "*we do not have any supply or other agreements*".[198] However, on the same day, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) pointed out to [NAME OF INDIVIDUAL] that "*the agreements with Metrohm, Helbling, Biolab and other such technology, licencing- and marketing-agreements could be relevant*".[199] On 29 August 2015, [NAME OF INDIVIDUAL] replied to [NAMES OF INDIVIDUALS] that "*iCap is not part of the* [Divestment Business], *[NAME OF INDIVIDUAL] confirmed we keep out our pipe with packaging technology.*"[200]

(110) On 28 August 2015, in a separate email exchange, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) indicated that "*what we should discuss before*

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195 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: Communicstion [sic] at Buchs – question" dated 14 June 2015 [Doc Id: 330-44055].

196 Email by [NAME OF INDIVIDUAL] to [NAME AND JOB TITLE OF INDIVIDUAL], Sigma-Aldrich), copying [NAME OF INDIVIDUAL], "Divested products list, [NAME OF INDIVIDUAL] request plus add-remove", dated 30 July 2015 [Doc Id: 304-1179].

197 Email exchanges between [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "URGENT – Customer & Supply Contracts", dated 27 August 2015 [Doc Id: 329-32787].

198 Email exchanges between [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "URGENT – Customer & Supply Contracts", dated 27 August 2015 [Doc Id: 329-32787].

199 Email exchanges between [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "URGENT – Customer & Supply Contracts", dated 27 August 2015 [Doc Id: 329-32787].

200 Email by [NAME OF INDIVIDUAL], 29 August 2015, 09:27 [Doc Id: 28-1938].

Seelze are the technologies in the pipe that concern at least partially Solvents and Inorganics. We kept this deliberately out of the [Divestment Business] *as agreed with [NAMES OF INDIVIDUALS]. But I am not sure, whether this is a potential High-risk, if we withhold it from Seelze completely. This concerns our bigger projects like iCap, iBarrel, [SIGMA'S R&D AND BUSINESS STRATEGIES]…For this there are no products yet, but just, there are to be some – even if under the Merck brand. We should look at this very closely* [unter vier Augen]*"*.[201] [NAME AND JOB TITLE OF INDIVIDUAL] at Sigma-Aldrich, responded: "*For next week please keep out. Thanks"*.[202]

(111) On 28 August 2015, Sigma-Aldrich employees also discussed the content of the excluded assets schedule that would be appended to the SPA signed with Honeywell (the "Excluded Assets Schedule"). [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) explained that the purpose of the Excluded Assets schedule was to "*make clear there are some assets used in the divestment business which are not included to make sure we are protected as well as to give HON a more complete picture of all the things they may need for the business moving forward*".[203] On the same day, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) replied that she "*look[ed] through the patent docket"* and found that *"probably the closest patent, as it relates to solvent generally, that must be excluded relates to "iCap""*.[204]

(112) On that same date, [NAME AND JOB TITLE OF INDIVIDUAL] at Sigma-Aldrich) questioned whether iCap should be referred to as an IP (rather than "*a packaging format*") since "*in the discussions with the EC as it related to R&D we always referred to product R&D this to specifically exclude packaging or production technology to be transferred to the buyer.*"[205] Finally, [NAME OF INDIVIDUAL] replied on the same day that "*the MT* [Monitoring Trustee] *asked us (through the EC) today why we removed Redi-Dri,*[206] *so I think we are about to wind up in that conversation one way or another unfortunately*".[207]

(113) On 30 August 2015, [NAME AND JOB TITLE OF INDIVIDUAL], reported about a discussion he had with [NAME AND JOB TITLE OF INDIVIDUAL], to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich): *"[SIGMA'S R&D AND BUSINESS STRATEGIES]*".[208]

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201 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804].

202 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804].

203 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 303-1241].

204 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 303-1241] (emphasis added).

205 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 304-1165].

206 Following discussion with the Commission, a license to the [SIGMA'S R&D] technology was included in the sale to Honeywell.

207 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 304-1165].

208 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "Icap Besprechung", dated 30 August 2015 [Doc Id: 29-2806].

(114) On 31 August 2015, [NAME OF INDIVIDUAL] updated a Failure Modes and Effects Analysis ("FMEA") for iCap. This analysis lists the risks that the iCap project entails and proposes solutions. According to this analysis, which is expressly limited to single-use iCap for titration, the following risks are discussed regarding the sale of the Divestment Business and integration of iCap in Merck's portfolio:

> "*[SIGMA'S R&D AND BUSINESS STRATEGIES]"*
>
> *(1)* *[SIGMA'S R&D AND BUSINESS STRATEGIES]*
>
> *(2)* *Mitigating Measures: "Clear communication with Merck, as soon as possible. But for launch this is not an issue"*
>
> *Potential Risk: "Claim of the 'new competitor' in Seelze for iCap (participation or complete)"*
>
> *(3)* *Potential Impact: "loss of market opportunities of the new technology"*
>
> *(4)* *Mitigating Measures: "Emphasis iCaps as innovative packaging instead of a titration feature"*[209]

(115) On 9 September 2015, the Monitoring Trustee emailed [NAME OF INDIVIDUAL] and the Parties' outside counsel. The Monitoring Trustee sought to pass on the Commission's guidance on the scope of the products to be included in the Divestment Business. The Monitoring Trustee noted: "*We are writing with some further guidance from the case team concerning the scope of products to be included in the Divestment Business. There is no differentiation with regard to packaging under the Commitments, for example, standard and redi-dry versions of a product should be included in the Divestment Business. If particular packaging is required and is considered part of Sigma's patents, IP or know-how, Sigma should grant a license to the Purchaser under paragraph 18 of the* [Final] *Commitments' Schedule."* Forwarding this email to [NAME OF INDIVIDUAL], [NAME OF INDIVIDUAL] stated: "*obviously we will have to have another call on application as this is a serious concern*". [NAME OF INDIVIDUAL] replied to [NAME OF INDIVIDUAL] and also [NAME OF INDIVIDUAL] and Sigma-Aldrich's outside counsel saying: "*This is very concerning. In the way it is written it opens the door to areas we have been able to single out... Possibly the iCap could come in play."* [NAME OF INDIVIDUAL] responded: *"I think we have to be cautious arguing too much over concepts on some of these questions because we could argue ourselves into a broader interpretation which does bring into play other issues which are today out. It's likely best to agree to the license and finish this conversation sooner rather than later."* [210] [NAME OF INDIVIDUAL] replied: *"[NAME OF INDIVIDUAL], I admire your optimism in this".*[211]

(116) On 26 September 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) asked [NAME AND JOB TITLE OF INDIVIDUAL] and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) whether the "*solvent cap IP (i-Cap and iBarrel)*" should be included in the Excluded Assets Schedule, since "*while not*

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209 FMEA Analyse iCap, tab "iCap titrat single use Start" [*original in German*] [Doc Id: 30-800] (emphasis added).

210 Email from Thomas Höhn (Monitoring Trustee) to [NAME OF INDIVIDUAL] and Sigma-Aldrich and Merck's external counsels "M.7435 – Scope of DB and SKU list", dated 9 September 2015 [Doc Id: 304-1124].

211 Email from [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "Re: M.7435 – Scope of DB and SKU list", dated 9 September 2015 [Doc Id: 330-29323].

solely or predominantly related, these could be seen as related" and she was "still concerned that if this isn't addressed now, H[oneywell] *will come back later and say that it should have included. There is already one published patent application, [SIGMA'S R&D AND BUSINESS STRATEGIES]*".[212] [NAME AND JOB TITLE OF INDIVIDUAL] agreed that including the patent application would be the safest course of action and suggested "*doing so with note to H*[oneywell] *similar to the following, if true: [the foregoing is IP [SIGMA'S R&D AND BUSINESS STRATEGIES] not in use as packaging for any Products. To avoid all doubt, however, we are including it on the schedule of Excluded Assets]*."[213]

(117) Ultimately, Schedule 2.4.1(i) of the SPA signed with Honeywell (the "Excluded Assets Schedule") lists "*PCT Patent Appl. No. PCT/EP2014/056491 entitled "CLOSURE FOR A CONTAINER" filed April 1, 2014 and all related applications and any patents that pay issue therefrom*" and "*any research and development related to packaging and closures for packaging not used in connection with any of the Products*", in the section on "*other IP rights*". [214]

(118) On 9 October 2015, Sigma-Aldrich discussed internally Merck's request for a list of all R&D projects with spend above EUR 1M for "*purchase price allocations for accounting purposes*". [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) asked [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) for input. [NAME OF INDIVIDUAL] asked back: "*[SIGMA'S R&D], iBarrel and Ifkan are included?*", to which [NAME OF INDIVIDUAL] replies "*Let's include them for now if they are over 1M euros*".[215]

(119) On 23 October 2015, Sigma-Aldrich followed up on Merck's request with a document which, according to Merck[216], was provided to [NAME AND JOB TITLE OF INDIVIDUAL] (Merck) at a meeting. The document contained a hand-written addition "*received from [NAME OF INDIVIDUAL] 10/15/15*", which implies that it dates from 15 October 2015 at the latest. The document contained an overview and further details for 6 Sigma-Aldrich R&D projects with total cost over USD [SIGMA'S R&D] (according to a hand-written addition). iCap was listed fourth among the 6 projects. The document detailed the costs of the iCap project (EUR [SIGMA'S R&D]) and stated that iCap had the highest probability of completion among the 6 projects (>99%).[217]

(120) On 5 November 2015, Helbling sent a monthly report to Sigma-Aldrich concerning the iCap version developed in cooperation with Metrohm. This monthly report flags that *"the planned portfolio* [namely, the portfolio of reagents that were planned to work with the single-use iCap] *is part of the divested business"* and concludes that *"a new portfolio with "Merck" products has to be defined".* The report further adds that "*to avoid discussion with Honeywell we need to promote the concept of innovative packaging, not innovative titration solution*".[218]

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212 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS] "Fwd: Updated schedules", 26 September 2015 [Doc Id: 304-691].

213 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL], "Re:Updated schedules", 26 September 2015 [Doc Id: 304-691].

214 Schedule 2.4.1 (i) of the purchase agreement (Appendix A) [Doc Id: 46].

215 Email from [NAME OF INDIVIDUAL] (Sigma-Aldrich) to [NAMES OF INDIVIDUALS] "R&D Request", 9 October 2015 [Doc Id: 29-2897].

216 Reply to Question 3 of Article 11(3) decision of 14 October 2016 [Doc Id: 217].

217 Sigma-Aldrich "R&D Details – Purchase Accounting request from Merck – Summary" [Doc. Id: 303-4].

218 See excel sheet, "Project Cockpit/Monthly Report", 5 November 2015 [Doc Id: 29-3223].

(121) On 6 November 2015, Sigma-Aldrich communicated to Helbling that iCap would have to work with titration reagents of Merck instead of titration reagents of Sigma-Aldrich. Notes of a discussion between Sigma-Aldrich and Helbling are summarised in Helbling's follow-up report, which reads: "*In the future, titration products will likely be from the Merck portfolio (the SIAL titration business has been divested to Honeywell for competition law reasons)*".[219]

(122) On 12 November 2015, mandated by Merck, auditing firm Deloitte asked Sigma-Aldrich to provide NPV estimates and details for each of the Sigma-Aldrich R&D projects. Deloitte used this information to assist Merck with the allocation of the purchase price paid for Sigma-Aldrich. On 24 November 2015, based on the information supplied by Sigma-Aldrich, Deloitte compiled an overview of Sigma-Aldrich's R&D projects, which included iCap with an NPV of USD […], namely, the NPV stemming from the 2014 DCF (and relating only to "other" titration).[220] On 3 December 2015, Deloitte concluded: [a]*ccording to our understanding, the project "iCAP" is a R&D project in line with the meaning of [the international accounting standard] IAS 38…*".[221]

(123) On 11 December 2015, less than one month after closing of the Transaction, [NAME OF INDIVIDUAL] wrote to [NAME OF INDIVIDUAL] (Metrohm) to inquire about future job opportunities in Metrohm, [SIGMA'S R&D AND BUSINESS STRATEGIES] [NAME OF INDIVIDUAL] replied on 12 December 2015: "*For [NAME OF INDIVIDUAL] it does not look great either – you're in touch with him too. But he still has a trump card up his sleeve – which includes iCap / 3S among other things. Let's see how that works. [SIGMA'S R&D AND BUSINESS STRATEGIES]. But I hope for him that he can still play his trump card at Merck".*[222]

2.3. The present proceedings

2.3.1. Overview

(124) On 10 February 2016, the Monitoring Trustee sent an email to the Commission indicating that it had become aware, through Honeywell, of the existence of a joint development project which had been initiated between Sigma-Aldrich and Metrohm, a Swiss-based third party and a titration equipment manufacturer, well before the notification of the Transaction and the Clearance Decision. This agreement however had not been transferred to Honeywell as part of the Divestment Business. The Monitoring Trustee also indicated that neither of the Parties disclosed this project to the Monitoring Trustee team or to Honeywell during the due diligence process of the Transaction. The Monitoring Trustee also informed the Commission that, according to Honeywell, the iCap project was of the utmost importance for the viability of the

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219 Project report "Projekte Sigma-Aldrich Chemie GmbH, Masterplanung" dated 6 November 2015, page 8 [*original in German*], [Doc Id: 29-3161].

220 Email by [NAME OF INDIVIDUAL], Deloitte to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: R&D activities", dated 24 November 2015, [Doc Id: 28-2108].

221 Email by [NAME OF INDIVIDUAL], Deloitte to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: R&D activities", dated 3 December 2015, [Doc Id: 28-2108].

222 Email from [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAME OF INDIVIDUAL], Metrohm, re "Re: Auf zu neuen Ufern!", dated 12 December 2015 [*original in German*] [Doc Id: 29-3418]: *"Bei [NAME OF INDIVIDUAL] sieht's auch nicht toll aus, ihr seid ja auch in Kontakt. Er hat aber noch einen Trumpf im Ärmel - welcher unter anderem iCap / 3S beinhaltet. Mal schaun, wie das läuft. In Sachen Business Development kann ich ihn sehr empfehlen. Ich hoffe aber für ihn, dass er seinen Trumpf bei Merck noch ausspielen kann".*

Divestment Business. Between 10 and 17 February 2016, the Monitoring Trustee transmitted to the Commission correspondence between Merck and Honeywell in that respect.[223]

(125) On 24 February 2016, the Commission sent a request for information pursuant to Article 11(2) of the Merger Regulation in relation to iCap (the "RFI iCap-1").[224] The Commission requested that Merck describe and provide general information on this project including its applications, and explain why Merck considered that iCap did not form part of the Divestment Business. On 2 March 2016, Merck replied to RFI iCap-1.[225] In response to question 7 of that RFI, Merck provided its interpretation of the Final Commitments and explained that in its view, iCap was not a part of the Final Commitments for the following reasons: "*The exclusion of the iCap packaging project from the DB is entirely consistent with the* [Final] *Commitments submitted on 11 June 2015. As explained above, iCap is a packaging technology. The only reference to packaging in the* [Final] *Commitments is under paragraph 18 of the Schedule to the* [Final] *Commitments, according to which "[…] the Parties shall grant Purchaser a license to Sigma's rights in the patents, other IP, and know-how owned by or licensed to Sigma that are used in the DB, including those related to the relevant labels and packaging […]". This provision is plainly limited to IP and know-how regarding packaging that is "used in the DB" at the time of the adoption of the EC decision. The iCap packaging was not then (and still is not) used for any products, whether in the DB or not, and therefore cannot fall under that provision. In addition, the* [Final] *Commitments anticipated that some product R&D might be ongoing and therefore a separate provision was entered into covering product R&D (paragraphs. 24 and 25 of the Schedule to the* [Final] *Commitments). Those paragraphs clearly apply to R&D to the extent it concerns "new products or products under development within the scope of the Divestment Business." The iCap R&D related to a packaging technology usable for any liquid substance in a bottle. This R&D does not in any way concern the chemical products themselves, i.e. it does not concern "new products or products under development within the scope of the Divestment Business". Therefore, consistent with the* [Final] *Commitments, iCap packaging is properly excluded from the scope of the DB".*[226]

(126) Merck also recalled that as iCap was outside the scope of the Divestment Business it had been included in the list of Excluded Assets annexed to the SPA as part of "*any research and development related to packaging and closures for packaging not used in connection with any of the Products".*[227] Schedule 2.4.1(i) of the SPA (the "Excluded Assets Schedule") lists "*PCT Patent Appl. No. PCT/EP2014/056491*

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223 Email from Monitoring Trustee "Hydranal Letter Honeywell" of 10/02/2016 [Doc Id: 39], Email from Merck to Honeywell of 09/02/2016 [Doc Id: 40]. Letter from Honeywell to Merck dated 08/02/2016 [Doc Id: 41]. Email from Monitoring Trustee to the Commission "Honeywell Letter Feb 11 2016" [Doc Id: 42]. Letter from Sigma-Aldrich to Honeywell "Alleged Integrity of Sales breaches" [Doc Id: 43]. Cover email from the Monitoring Trustee to the Commission [Doc Id: 44]. Letter from Sigma-Aldrich to Monitoring Trustee of 15/02/2016 [Doc Id: 45]. Schedule 2.4.1 (i) of the purchase agreement (Appendix A) [Doc Id: 46]. Hydranal Appendix B [Doc Id: 47]. Cover email from the Monitoring Trustee to the Commission "Re: M.7435 Merck/Sigma-Aldrich: TSA Monitoring – Hydranal" of 17/02/2016 [Doc Id: 48]. Letter from Merck to Honeywell dated 16/02/2016 [Doc Id: 49].

224 RFI iCap 1 [Doc Id: 57]

225 Question 7 of RFI iCap 1 was: "*Please clarify the rationale for not divesting this R&D project with the Divestment Business as identified in the Schedule to the [Final] Commitments of 11 June 2015*" [Doc Id: 57].

226 Reply to Question 7, RFI iCap 1 [Doc Id: 59].

227 Schedule 2.4.1 (i) of the purchase agreement (Appendix A) [Doc Id: 46].

entitled "CLOSURE FOR A CONTAINER" filed April 1, 2014 and all related applications and any patents that may issue therefrom".[228]

(127) On 16 March 2016, a meeting was held between the Commission and Merck in relation to iCap. Following this meeting, on 17 March 2016, the Commission sent an additional request for information pursuant to Article 11(2) of the Merger Regulation, including a request for Merck's and Sigma-Aldrich's internal documents pertaining to iCap (the "RFI iCap-2").[229]

(128) On 21 March 2016, the Commission held a conference call with Honeywell.[230] On 5 April 2016, Honeywell submitted information in response to questions raised by the Commission during the conference call in particular on: (i) the importance of iCap to the Divestment Business; (ii) how and for what purposes iCap was developed; and (iii) whether iCap was covered during Honeywell's negotiations with Merck.[231]

(129) On 20 April 2016, during a conference call, the Commission asked Merck about its intention and Metrohm's intention regarding the launch of iCap.[232]

(130) On 21 April 2016, Honeywell sent a letter to the Commission seeking an update on the situation regarding iCap. In this letter, Honeywell stressed the urgency of the matter mentioning that Merck was planning to launch iCap during the Analytica Fair in May 2016.[233] On 25 April 2016, the Commission replied to Honeywell that the matter was being taken very seriously and that Honeywell will be kept informed of any developments relevant to them.[234]

(131) On 4 May 2016, Merck explained in an email sent to the Commission that, at the Analytica Fair on 10-13 May 2016, Metrohm will launch its new volumetric titration instrument and the multi-use version of iCap (without involving Merck's volumetric titration solutions). The single-use version of iCap with Merck's products was planned to be launched on 1 July 2016.[235]

(132) On 21 April 2016 (03:00 PM), a conference call was held between the Commission and Metrohm to discuss the iCap project and its status.[236]

(133) At the end of May 2016, Honeywell's outside counsel contacted the Commission to obtain an update on the situation regarding iCap. Following that request of Honeywell's outside counsel, on 2 June 2016, the Commission attended a conference

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228 Schedule 2.4.1 (i) of the purchase agreement (Appendix A) [Doc Id: 46]. See reply to Question 7, RFI iCap 1 [Doc Id: 59].

229 The Commission requested in particular internal documents of Sigma-Aldrich for the period between January 2011 and December 2015 on the project's feasibility study, business case, customer base, marketing material and applications. The Commission also requested Merck's and Sigma-Aldrich's internal documents mentioning iCap in the period January-June 2015 [Doc Ids: 70 and 71] Merck submitted the replies to the RFI iCap-2 on 4 April 2016 [Doc Id: 84], except for the replies to Questions 1, 2 and 10 which were submitted on 18 April 2016, 12 May 2016, 27 May 2016 and 30 May 2016 [Doc Ids: 91, 116 and 117]. Merck did not provide any Merck internal documents mentioning iCap dated between January 2015 and December 2015.

230 See notes of the conference call by the Monitoring Trustee [Doc Id: 1242] and minutes of the conference call based on the case team handwritten notes [Doc Id: 1801].

231 Cover email from O'Melveny & Myers LLP on behalf of Honeywell [Doc Id: 31], see Honeywell's submission [Doc Id: 32 to 38].

232 Email from the Commission to Monitoring Trustee dated 21 April 2016 [Doc Id: 1890].

233 Cover email from O'Melveny & Myers LLP dated 21 April 2016 [Doc Id: 140]; Letter from O'Melveny & Myers LLP to the Commission on "iCap Issue" dated 21 April 2016 [Doc. Id: 141].

234 Email from the Commission to Honeywell's external lawyers dated 25 April 2016 [Doc Id: 102].

235 Email from Merck's external lawyer to the Commission dated 4 May 2016 [Doc Id: 1925].

236 See Minutes "Conference call with Metrohm" [Doc Id: 107].

call with Honeywell during which the company expressed its concerns that even if only the multi-use version of iCap was launched at the Analytica Fair 2016, the single-use version of iCap was still planned to be launched soon by Merck and this would threaten to undermine the viability of the Divestment Business.[237]

(134) On 7 June 2016, the Commission issued an RFI pursuant to Article 11(2) of the Merger Regulation to Merck requesting copies of certain documents that were accessible to it throughout the due diligence process of Sigma-Aldrich in the context of the Transaction ("RFI iCap-3").[238] Merck submitted its response on 13 June 2016.[239]

(135) On 30 June 2016, in an SOP meeting, the Commission informed Merck that, based on the available evidence at that time, there were indications that, by not disclosing iCap, the Parties provided incorrect and/or misleading information to the Commission in the course of merger review proceedings of the Transaction.

(136) On 15 July 2016, Merck submitted a paper summarising its position regarding iCap.[240]

(137) On 29 July 2016, the Commission sent a letter to the Parties to inform them that an investigation was ongoing with a view to a possible revocation of the Clearance Decision pursuant to Article 6(3)(a) of the Merger Regulation and a possible imposition of fines pursuant to Article 14(1) of the Merger Regulation.[241]

(138) On 2 August 2016, Honeywell was informed that an investigation was ongoing and that, should any preliminary findings be made in the future, a press release would be issued by the Commission.[242]

(139) On 2 September 2016, the CEO of Metrohm sent an email to the Commission explaining that the current proceedings were preventing the launch of the single-use version of iCap which was an important innovation with a significant impact on Metrohm's sales.[243] Following up on this email, on 4 October 2016, a conference call was held between Metrohm and the Commission during which Metrohm provided its view on the impact of the ongoing investigation on the launch of iCap.[244]

(140) On 14 October 2016, the Commission adopted two decisions pursuant to Article 11(3) of the Merger Regulation addressed to Merck and Sigma-Aldrich (the "Article 11(3) Decisions of 14 October 2016"),[245] requesting information on the Parties' R&D projects in solvents and inorganics, as well as the process for the collection of information during the due diligence process of the Transaction and the merger review proceedings. In particular, the Commission requested that Merck and Sigma-Aldrich provide the complete set of email data (excluding manifestly personal content) of [NAME AND JOB TITLE OF INDIVIDUAL] (Merck), [NAME AND

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237 See email exchange between the Commission and Honeywell's lawyers [Doc Id: 1268].

238 RFI iCap-3 [Doc Id: 119].

239 Merck's response to RFI 3 and annexes dated 13 June 2016 [Doc Ids: 25 and 26].

240 See Position paper - Strictly Confidential M7435 iCap Position Paper [Doc Id: 132].

241 Letter from the Commission to the Parties dated 29 July 2016 [Doc Id: 2].

242 Email from [NAME OF INDIVIDUAL], Partner of O'Melveny & Myers LLP, to the Commission dated 6 June 2018 reconstructing the call of 2 August 2016 [Doc Id: 1268]. Honeywell had contacted the Commission to obtain an update of the situation on 14 July 2016 [Doc Id: 1028].

243 Email from [NAME OF INDIVIDUAL] to the Commission dated 2 September 2016 [Doc Id: 3].

244 See minutes of this conference call based on the case team handwritten notes [Doc Id: 2065].

245 Article 11(3) Decisions of 14 October 2016 to Merck [Doc Id: 2039] and to Sigma-Aldrich [Doc Id: 2041].

JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), and Mr [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) for the period 1 January to 31 December 2015.

(141) On 24 October 2016, Sigma-Aldrich and Metrohm agreed to unilaterally grant a licence for iCap to Honeywell (the "iCap Licence Agreement"). Merck informed the Commission of the licence by e-mail on 25 October 2016.[246]

(142) On 27 October 2016, Merck and Sigma-Aldrich provided a submission arguing that the request of the complete set of email data of the three individuals mentioned above[247] was disproportionate in terms of time and cost.[248]

(143) On 3 November 2016, Merck and Sigma-Aldrich provided partial responses to the Commission's Article 11(3) Decisions of 14 October 2016. Merck submitted additional information on 10 and 15 November 2016.[249]

(144) On 18 November 2016, an SOP meeting was held between the Commission and the Parties during which the attendees discussed the Bottle Cap Technology Licence Agreement and Merck's reply to the Article 11(3) Decisions of 14 October 2016.[250]

(145) On 1 December 2016, the Commission adopted two decisions pursuant to Article 11(3) of the Merger Regulation addressed to Merck and Sigma-Aldrich (the "Article 11(3) Decisions of 1 December 2016") requesting the information which was not provided by the Parties in their replies to the Article 11(3) Decisions of 14 October 2016 and specifying the applicable periodic penalty payments that could apply should the Parties fail to reply by 21 December 2016. In relation to the requested complete set of email data of [NAME OF INDIVIDUAL], the Article 11(3) Decision of 1 December 2016 to Merck specified that Merck need not provide content that is manifestly and exclusively related to transactions other than the Transaction.[251]

(146) On 5 December 2016, following discussions with Honeywell, Sigma-Aldrich and Metrohm amended the licence agreement dated 24 October 2016 (the "Amended iCap Licence Agreement"), which was agreed and acknowledged by Honeywell.[252]

(147) On 13 December 2016, Merck and Sigma-Aldrich requested an extension of the deadline to reply to the request for complete set of email data of [NAMES OF INDIVIDUALS] until 31 January 2017. On 15 December 2016, the Commission granted an extension to reply to that request until 9 January 2017. On 20 December 2016, Merck and Sigma-Aldrich requested an additional deadline extension, which was granted on 23 December 2016 until 16 January 2017.

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246 Email from Merck to the Commission "M.8181 - Merck/Sigma-Aldrich" dated 25 October 2016 [Doc Id: 210]. The Bottle Cap Technology Licence Agreement concluded between, Sigma-Aldrich, Metrohm and Honeywell was attached to this email [Doc Id:211]),

247 Question 9 of Article 11(3) Decision of 14 October 2016 to Merck [Doc Ids: 200 and 201] and Question 6 Article 11(3) Decision of 14 October 2016 to Sigma-Aldrich [Doc Ids: 203 and 204].

248 Email from Merck's external lawyers to the Commission of 27/10/2016 "Request for Information" [Doc Id: 221].

249 Merck's and Sigma-Aldrich's responses to Article 11(3) Decisions of 14 October 2016 on 3 November 2016 [Doc Id: 217], on 10 November 2016 [Doc Id: 227] and on 15 November 2016 [Doc Id: 232-49].

250 Minutes of the SOP meeting [Doc Id: 297].

251 Article 11(3) Decision of 1 December 2016 to Merck, Article 3 [Doc Id: 273].

252 Merck informed the Commission on 7 December 2016 [Doc Id: 287]. The Amended Bottle Cap Technology Licence Agreement concluded between, Sigma-Aldrich, Metrohm and Honeywell was attached to this email [Doc Id:288]),

(148) On 21 December 2016, Merck and Sigma-Aldrich provided their responses to the Article 11(3) Decisions of 1 December 2016, except for the questions regarding email data of [NAMES OF INDIVIDUALS].

(149) On 20 December 2016 and 10 January 2017, the Commission held two conference calls (one with Honeywell and one with the Hold Separate Manager of the Divestment Business, a Honeywell employee) to discuss the terms of the Amended Bottle Cap Technology Licence Agreement.[253]

(150) On 16 January 2017, Merck and Sigma-Aldrich submitted their replies to the outstanding requests of the Article 11(3) Decisions of 1 December 2016. On 31 January 2017, Merck supplemented its reply by submitting one additional document responsive to the Article 11(3) Decisions of 1 December 2016.

(151) On 8 February 2017, the Commission services requested that the Monitoring Trustee provide all of the exchanges and documents between it and Merck, Sigma-Aldrich and Honeywell in relation to the Excluded Assets Schedule. The Monitoring Trustee responded by submitting documents on 17 February 2017.[254]

(152) On 28 June 2017, an SOP meeting was held to inform Merck of the Commission's preliminary conclusions as to the possible supply of incorrect and/or misleading information by Merck and Sigma-Aldrich in the context of these proceedings.[255]

(153) On 6 July 2017, the Commission issued the Statement of Objections ("SO"). On 10 July 2017, the Commission provided the Parties access to all accessible documents in the Commission's file for Case M.8181 – *Merck/Sigma-Aldrich*.

(154) Following the issuance of the SO, the Commission informed Merck of the possibility to engage in a cooperation procedure which would merit a reduction in fines. On 27 March 2018 and 16 April 2018, Merck sent two additional submissions to the Commission including some factual clarifications and requesting the Commission to reconsider the allegations against Merck as set out in the SO.[256]

(155) On 30 April 2018, Merck informed the Commission that it decided not to engage in a cooperation procedure in this case. On the same day, Merck and Sigma-Aldrich submitted the Reply to the SO[257] and requested an Oral Hearing (the "First Oral

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253 Notes of the Monitoring Trustee on the two calls [Doc Ids: 1290 and 1291]. During the SOP meeting on 18 November 2016, Merck informed the Commission that they preferred the Commission not to contact Honeywell prior to the signature of the amended licence [Doc Id: 297].

254 Non-confidential version of the Monitoring Trustee submission of 17 February 2017[Doc Id: 1042].

255 See [Doc Ids:415; 958; 1039; and 1040].

256 See cover email sent by Merck's external lawyer to the Commission introducing an additional submission and related annexes dated 27 March 2018 [Doc Id: 1926] and Letter by Merck's external lawyer to the Commission dated 16 April 2018 [Doc Id: 1931].

257 Reply to SO dated 30 April 2018 [Doc Id: 1187]. The initial deadline to reply to the SO was 31 August 2017. This deadline was extended on several occasions, namely on 20 July 2017 (until 29 September 2017), on 11 September 2017 (until 31 October 2017), on 17 October 2017 (until 30 November 2017), on 22 November 2017 (until 22 December 2017), on 13 December 2017 (until 15 February 2018), on 12 February 2018 (until 1 March 2018), on 21 February 2018 (until 15 March 2018), on 2 March 2018 (until 31 March 2018) and on 4 April 2018 (until 30 April 2018). The deadline extensions were primarily granted in order for the Commission to determine the possible range of fines that might be imposed on Merck as well as the fines reduction that Merck would benefit from in the event of cooperation. Merck was informed of the fine ranges and the fine reduction percentage for cooperation on 5 February 2018 and initially given until 12 February to inform the Commission whether it would be willing to cooperate or not. This deadline was extended several times, ultimately until 30 April 2018.

Hearing"), which took place on 11 September 2018.[258] Merck and Sigma-Aldrich also requested additional access to the file, which was granted on 12 and 15 June 2018, 20 and 24 July 2018, 1 August 2018, and 10 October 2018.

(156) On 12 November 2018, Merck and Sigma-Aldrich provided a supplementary reply to the SO, in particular including their observations following the additional access to the file.

(157) On 30 June 2020, the Commission addressed a Supplementary Statement of Objections ("SSO") to Sigma-Aldrich. This SSO constituted a stand-alone statement of objections and fully replaced the SO. In so doing, the SSO took into account the Parties' Reply to the SO, the First Oral Hearing, and the Parties' Supplementary reply to the SO. In the SSO, the Commission noted that it no longer maintained the SO's allegations concerning Merck.

(158) On 15 September 2020, Sigma-Aldrich submitted the Reply to the SSO and requested an Oral Hearing (the "Second Oral Hearing"), which took place on 13 November 2020.

2.3.2. Legal privileged claims

(159) The Commission's Article 11(3) Decisions of 14 October 2016 required internal documents from Merck and Sigma-Aldrich setting a deadline of 3 November 2016.[259] Merck failed to provide internal documents in response to these Article 11(3) Decisions by 3 November 2016. For this reason, the Commission adopted the Article 11(3) Decisions of 1 December 2016, requesting information that was not provided in response to the Article 11(3) Decisions of 14 October 2016 subject to periodic penalty payments.[260]

(160) The total number of documents requested from Merck and Sigma-Aldrich under the Article 11(3) Decisions of 14 October 2016 and 1 December 2016 was approximately 200,000.[261] Merck replied to the Article 11(3) Decisions of 14 October 2016 and 1 December 2016 on 16 January 2017. Of the approximately 200,000 responsive to the Commission's Article 11(3) Decisions, Merck claimed that more than 43,000 were covered by LPP.[262]

(161) Given the large amount of documents over which LPP was claimed, on 8 February 2017, the case team requested Merck to review the LPP claims.[263] Following this request, on 1 March 2017, Merck provided over 15,000 documents reducing the number of their LPP claims.[264] On 16 March 2017, the case team requested again Merck to review the remaining LPP claims.[265] On 8 April 2017, Merck provided 4,000 documents further

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258 See Merck's First Oral Hearing Presentation [Doc Id: 1986] and First Oral Hearing Recording [Doc Ids: 1982 to 1985].

259 Article 11(3) Decisions of 14 October 2016 to Merck [Doc Id: 2039] and to Sigma-Aldrich [Doc Id: 2041].

260 Article 11(3) Decisions of 1 December 2016 to Merck [Doc Id: 273] and to Sigma-Aldrich [Doc Id: 270].

261 Reply to SSO, para. 352.

262 Email from Merck's legal counsel to the Commission dated 7 February 2017 [Doc Id: 341].

263 Email from the Commission to Merck's legal counsel dated 8 February 2017 [Doc Id: 341].

264 Merck's submission of 1 March 2017 [Doc Id: 356]. See also cover email from Merck's external counsel dated 1 March 2017 [Doc Id: 353], which reads: "[f]*urther to this additional review and upon the Case Team's request, Merck has been able to significantly reduce the number of privilege claims formerly submitted... [a]ll documents hereby submitted by Merck are provided without concluding on the privileged nature thereof*".

265 Email from the Commission to Merck's legal counsel dated 16 March 2017 [Doc Id: 411].

reducing the number of its LPP claims.[266] On 6 June 2017, Merck submitted 159 new documents which it considered no longer covered by LPP.[267] The case team requested Merck to review again its LPP claims concerning some of the remaining 25,030 documents.[268] On 17 August 2017, Merck refused to provide any additional documents and suggested the matter be brought before the Hearing Officer;[269]

(162) Merck classified the remaining 25,030 documents in three categories: (i) each of Merck and Sigma-Aldrich and its own external legal counsel (15,395 documents); (ii) internal communications within each of Merck and Sigma-Aldrich (without involvement of external counsel); and (iii) cross-party communications (9,635 documents). On 30 August 2017, Merck sent a letter seeking the Hearing Officer's views in relation to the LPP claims for the 9,635 documents of categories (ii) and (iii).[270] On 23 May 2018, Merck withdrew LPP claims on 1,655 documents following discussions with the Hearing Officer.[271]

(163) As regards the remaining 7,980 documents, on 1 August 2018, the Hearing Officer issued a Preliminary View[272] for the purposes of Article 4(1)(a) of Decision 2011/695/EU.[273] In his Preliminary View, the Hearing Officer considered (as a "working assumption") that the case law of the Union Courts allows for LPP protection in connection with proceedings for the application of Article 14 of the Merger Regulation.[274] The Hearing Officer noted that if LPP protection were to be recognised in connection with proceedings for the application of Article 14 of the Merger Regulation, such protection should relate, in essence, to the seeking or provision of legal advice, by an independent lawyer qualified to practise in a Member State, on a point of law concerning Union rules with which a failure to comply could give rise to subsequent judicial proceedings.[275] Against this background, the Hearing Officer reviewed a sample of the LPP claims made by the Parties. The Hearing Officer concluded that Merck had not demonstrated that, on the whole, its LPP claims in respect of the 7,980 documents were even plausible.[276]

(164) On 8 September 2018, Merck replied to the Hearing Officer contesting his findings and encouraging him to propose appropriate steps to promote a "*mutually acceptable*

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266 See Merck's and Sigma-Aldrich's submission of 8 April 2017 [Doc Id: 368]. See also cover email from Merck's and Sigma-Aldrich's legal counsel dated 8 April 2017 [Doc Id: 367], which reads: "[f]*urther to this additional review and upon the Case Team's request, Merck has been able to further reduce the number of privilege claims formerly submitted... all documents hereby submitted by Merck are provided without concluding on the privileged nature thereof...*".

267 Email from Merck's legal counsel to the Commission dated 6 June 2017 [Doc Id: 411].

268 Email from the Commission to Merck's legal counsel dated 11 August 2017 [Doc Id: 1080].

269 Email from Merck's legal counsel to the Commission dated 17 August 2017 [Doc Id: 1085].

270 Letter from Merck's external counsel to the Hearing Officer, 29 August 2017 [Doc Id: 2020]. Sigma-Aldrich is thus incorrect to state in the Reply to the SSO that it "*reduced the number of documents considered partially or fully privileged first to approximately 25,000, then to 9,635 and ultimately to 7,980*". Merck and Sigma-Aldrich maintained their LPP claims on the 15,395 documents in category (i) above in addition to their claims to 9,635 (and ultimately 7,980) documents from categories (ii) and (iii).

271 Email from Merck's external counsel to the Commission, 23 May 2018, [Doc Id: 1198].

272 Hearing Officer's Preliminary View, 1 August 2018, [Doc Id: 1810-1812].

273 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29).

274 Hearing Officer's Preliminary View, 1 August 2018, para. 55 [Doc Id: 1810-1812].

275 Hearing Officer's Preliminary View, 1 August 2018, para. 171 [Doc Id: 1810-1812].

276 Hearing Officer's Preliminary View, 1 August 2018, para. 177 [Doc Id: 1810-1812].

solution" of the matter pursuant to Article 4(2)(a) of Decision 2011/695/EU.[277] On 16 October 2018, the Hearing Officer organised a meeting with Merck and the case team.[278]

(165) Following this meeting, on 9 November 2018, Merck agreed to a protocol allowing the Commission to have access to the 7,980 documents in a data room setting.[279] This protocol made clear that the Parties did not waive their legal privilege over the 7,980 documents.[280] The protocol also made clear that by agreeing to this data room procedure, Merck would avoid "*[INFORMATION ON LEGAL PRIVILEGE CLAIMS]*".[281]

(166) On 23 November 2018, the Commission identified 15 documents that it wished to rely on in its investigation and invited Merck to waive its LPP claims regarding these documents.[282] On 12 December 2018, Merck decided to partly or fully waive its LPP claims over 4 of these documents, which it shared with the Commission.[283] On 14 February 2019, it sent a submission to the Commission concerning 5 of the remaining 11 documents and stating that they are "*fully protecting by LPP claims that would be inappropriate to waive*".[284] Regarding these 5 documents, on 2 May 2019, members of the case team attended a meeting with Merck's legal counsel so that the case team could take notes on the 5 documents discussed in Merck's submission. Merck's legal counsel reviewed these notes and submitted that it had no comments on 6 May 2019.[285] The agreed notes were added in the Commission's file in the present case for the sole purpose of a possible procedure rejecting Merck's legal privilege claim on those specific documents.

2.3.3. Sigma-Aldrich's claims concerning procedural rights

(167) In the course of these proceedings, Sigma-Aldrich submitted that the Commission infringed its procedural rights,[286] arguing that the organisation of the investigation was incompatible with the principles of impartiality and good administration.[287] Sigma-Aldrich raised the following main arguments:

(a) Some individuals leading the investigation in the present case also led the investigation into the related merger control case (Case M.7435).[288] This "*setup*" meant that the Commission's investigation could not be objectively impartial;[289]

(b) In addition, Sigma-Aldrich argued that members of the case team might not have been completely subjectively impartial during the investigation;[290]

277 Letter from Merck's external counsel to the Hearing Officer, 8 September 2018, p. 14 [Doc Id: 1933].
278 Data Room Protocol, 9 November 2018, para. 6 [Doc Id: 2012].
279 Data Room Protocol, 9 November 2018 [Doc Id: 2012]. Merck's external counsel has reviewed, proposed changes and ultimately signed off on this Protocol. See email from Merck's external counsel to the Commission, "RE: [Ext] Meeting Merck 16/10/2018 - DG COMP - Case M.8181 - Merck/Sigma-Aldrich (Article 14(1) procedure) – LPP", 8 November 2018 [Doc Id: 1963].
280 Data Room Protocol, 9 November 2018, para. 7 [Doc Id: 2012].
281 Data Room Protocol, 9 November 2018, paragraph 8 [Doc Id: 2012].
282 Email from the Commission to Merck's legal counsel dated 23 November 2018 [Doc Id: 1978].
283 Documents for which Merck has decided to partly or fully waive its LPP claims [Doc Ids: 2001 to 2006].
284 Merck's Submission on LPP Claims, 14 February 2019 [Doc Id: 2008].
285 Email from Merck's legal counsel to the Commission dated 6 May 2019 [Doc Id: 2037].
286 Reply to SSO, paras. 276-302; See also Second Oral Hearing recording.
287 Reply to SSO, paras. 287-288.
288 Reply to SSO, para. 284 (footnote 360); See also Second Oral Hearing recording.
289 Reply to SSO, para. 287.
290 Reply to SSO, paras. 289-294.

(c) In Sigma-Aldrich's view, neither the involvement of the Commission's hierarchy nor the availability of oral hearings was able to remedy the objective or subjective impartiality affecting these proceedings.[291]

(168) As an initial matter, the Commission observes that the composition of the case team both across the two proceedings, and within the present proceeding, varied significantly.[292] Sigma-Aldrich's claim that the Commission entrusted the case management to "*the same individuals*" in both cases is therefore inaccurate.[293] Nonetheless, as outlined below, even if the composition of the respective case teams across the two proceedings had been identical (*quod non*), this would not have affected the conclusion reached in this Decision.

(169) Article 41 of the Charter of Fundamental Rights of the Union[294] codifies the principle of good administration. It is settled case-law that the Commission is required, also in the context of proceedings concerning the imposition of fines under Article 14(1) of the Merger Regulation, to respect the applicable fundamental procedural rights and principles of Union law, including the right to good administration,[295] the principle of impartiality, and the presumption of innocence.[296] The principle of good administration entails every person's right to have their "*affairs handled impartially by the institutions.*"[297] According to settled case-law, the requirement of impartiality "*encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned*".[298] The Court of Justice further emphasised (albeit in relation to a court) that there is a "*presumption of personal impartiality in the absence of evidence to the contrary*" and that the fact that the same individuals examine the same case in succession, cannot, by itself, give rise to doubt as to their impartiality in the absence of other objective evidence.[299] Sigma-Aldrich's claims going to subjective impartiality[300] do not meet this standard because Sigma-Aldrich did not identify any objective evidence to support the claim that members of the case team in these proceedings "*show*[ed] *bias or personal prejudice*". Notably, first, Sigma-Aldrich's claim that some members of the case team might have been "*annoyed*" is neither supported by evidence nor could it, even if it were true, demonstrate to the

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291 Reply to SSO, paras. 299-301.

292 While some individuals were involved as case handlers and/or case managers across the two cases (M.8181 and M.7435), the case teams in the two proceedings were not identical. In fact, only 3 out of 14 case team members were active in both cases.

293 Reply to SSO, para. 284.

294 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391-407).

295 Case T-180/15 – *Icap*, 10 November 2017, paras. 271-272.

296 Case T-180/15 – *Icap*, 10 November 2017, paras. 256-257.

297 Case T-180/15 – *Icap*, 10 November 2017, para. 272.

298 Case C-439/11 P – *Ziegler*, 11 July 2013, para. 155.

299 Case C-341/06 P *Chronopost SA/UFEX and others*, 1 July 2008, paras. 54 and 56; see, by analogy, also Case T-351/03 *Schneider Electric SA*, 11 July 2007, paras. 186-188 (noting, at para. 188, that "*the fact that the teams of officials responsible for the various stages of investigation of the transaction were composed wholly or partly of the same members does not constitute a sufficiently serious breach by the Commission of a rule of law intended to confer rights on individuals*."); see also, by analogy, *Golubović v. Croatia* (Application no. 43947/10), ECtHR, Judgment of 27 November 2021, para. 52 ("*the fact that [a judge] did not withdraw from dealing with the civil action on appeal following his earlier participation in another related set of civil proceedings, does not constitute the required proof [to rebut the presumption of judicial impartiality]*.").

300 Reply to SSO, paras. 289-294.

requisite standard that the case team was subjectively biased in its investigation of the present case. Second, the wording of the press release of 6 July 2017, to which Sigma-Aldrich objects, is comparable to similar press releases issued in like cases, and emphasises the conditional and preliminary nature of the Commission's investigation. Such press release, therefore, in no way demonstrates that the case team exhibited "*bias or personal prejudice*". Third, Sigma-Aldrich's claim that the case team may have been biased in these proceedings because it could have identified the existence of iCap in the Excluded Assets Schedule is unsupported by any objective evidence of "*bias or personal prejudice*".[301]

(170) With respect to the requirement of objective impartiality, the Court has held that "*where a number of EU institutions or bodies are given separate responsibilities of their own in the context of a procedure that is liable to result in a decision adversely affecting a party, each of those institutions and bodies is required, in respect of its own activities, to comply with the requirement of objective impartiality.*"[302] It is therefore by reference to the competent Union institution as a whole that the compliance with the principle of impartiality is to be assessed. The fact that the Commission's conduct as a whole is to be considered in assessing allegations of objective impartiality is also reflected in the Commission's decisional practice. In *GE/LM Wind*, the Commission rejected GE's argument that "*the assignment of the case team for the substantive case and the infringement case*" represented a conflict of interest and had breached GE's procedural rights.[303] As the Commission noted in *GE/LM Wind*, "[t]*he retention of the same case team serves efficiency goals, as it is instrumental in retaining knowledge of the case and thus speeds up the administrative process, which is also to the benefit of* [the Party]. *Moreover, different individuals with the Directorate General for Competition, as well as other services of the Commission are consulted, review, decide, and actually lead the decision-making process, throughout the numerous internal procedural steps, for such cases. The case team is also not acting independently from the Commission's internal checks and balances. In addition, the final decision is taken by the College of Commissioners*."[304] Moreover, in *GE/LM Wind*, the Commission found that, given the procedural safeguards in place on the Commission level, "*any hypothetical impropriety or bias of the case team would in any case not affect the final*" assessment or decision on the infringement. [305] As a result, the same reasoning articulated in *GE/LM Wind*, which is based on settled case-law of the Union courts, also addresses Sigma-Aldrich's argument here that the design of the present proceedings suffers from objective and/or subjective bias.

(171) Sigma-Aldrich attempts to distinguish this case from *GE/LM Wind*.[306] First, it argues that, contrary to GE, Sigma-Aldrich brought forward convincing evidence attesting the "*appearance of bias*" during the investigation. Second, it argues that, while GE had declined the opportunity of an oral hearing, Sigma-Aldrich defended itself at the First Oral Hearing, but that the oral hearing could not "*dissipate the appearance of bias*"[307] and the Commission could not remedy "*the impact and appearance of certain past acts*" in the course of the investigation, in particular by issuing an

301 See also the discussion concerning the relevance of the Excluded Assets Schedule in Section 4.3.3.
302 Case C-680/16 P August Wolff, 27 March 2019, para. 28.
303 Case M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2019, paras. 225-226.
304 Case M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2019, paras. 227-229.
305 Case M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2019, para. 230.
306 Reply to SSO, paras. 295-301.
307 Reply to SSO, para. 299.

SSO.[308] Finally, Sigma-Aldrich argues that the involvement of numerous actors as part of the proceedings could not provide "*a sufficient safeguard when the overall setup of the case is affected by objective bias*".[309]

(172) Sigma-Aldrich's claim that this case should be distinguished from *GE/LM Wind* because the "*numerous actors*"[310] usually involved in the decision-making process could not form an independent opinion because they were not sufficiently involved in the case, is not credible. First, Sigma-Aldrich does not substantiate how the involvement of these "*numerous actors*" was deficient in this particular case, thereby preventing them from "*carry*[ing] *out a detailed review of the facts and documents to form an independent, informed opinion*".[311] Second, Sigma-Aldrich's claim is factually incorrect, since the involvement of such actors was instrumental in significantly reducing the scope of the Commission's case, which no longer addresses any objections to Merck. Moreover, Sigma-Aldrich itself acknowledged the efficacy of the First Oral Hearing process in comments during the Second Oral Hearing. This can be understood as meaning that the First Oral Hearing provided an effective forum for the Parties to present their case to the case team's hierarchy, the Member States' National Competition Authorities, and other Commission Services, which led to the scope of the case being narrowed.

(173) Moreover, in addition to having been able to present its submissions orally at two oral hearings, before members of the case team, members of the hierarchy of DG Competition and cabinet members of the Commissioner for Competition, other Commission services (including the Hearing Officer), and members of National Competition Authorities, Sigma-Aldrich submitted detailed arguments in the context of its replies to the SO and the SSO, as well as additional submissions with respect to the objections made against it.[312] Following the First Oral Hearing, the Commission addressed some of Sigma-Aldrich's concerns by issuing a stand-alone SSO that fully replaced the SO.

(174) Finally, to the extent that Sigma-Aldrich challenges the design of the Commission's workings as a whole in the field of competition law, its suggestion that the "*setup*" in this case attributed powers of a "*judge*" to the Commission[313] is without foundation. It is settled case-law that the Commission is not a "*tribunal*" within the meaning of Article 6 of the ECHR[314] and that the fact that the Commission both investigates and makes findings of infringements of competition law does not of itself constitute a breach of the requirement of an independent and impartial tribunal.[315] The Court of Justice also has jurisdiction to conduct "*an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of those facts*"[316] as well as unlimited jurisdiction with respect to fines. Contrary to Sigma-Aldrich's suggestion, the Court has explicitly recognised, while analysing the Commission's objective impartiality that, because of the system of judicial review that Union law lays down,

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308 Reply to SSO, para. 299.
309 Reply to SSO, paras. 300-301.
310 Final Report of the Hearing Officer in case M.8436, *General Electric Company/LM Wind Power Holding*, 2020/C24/05, para. 17.
311 Reply to SSO, para. 301.
312 Reply to SSO; Reply to SO; see also Section 2.3.1.
313 Reply to SSO, para. 285.
314 Joined Cases T-25/95 etc., *Cimenteries CBR*, para. 717; and C-204/00 P, *Aalborg Portland AS*, para. 49.
315 Case T-348/94 *Enso Española*, para. 56 ; Joined Cases T-25/95 etc., *Cimenteries CBR*, para. 718.
316 Joined Cases T-25/95 etc., *Cimenteries CBR*, para. 719.

the Commission "*cannot* […] *in any event be regarded as both the victim of an infringement and the judge responsible for imposing penalties for the infringement*".[317]

(175) As a result, the Commission considers that Sigma-Aldrich's claims on these points are unfounded.

3. LEGAL FRAMEWORK FOR DISCLOSURE OBLIGATIONS UNDER THE MERGER REGULATION

3.1. Obligation to supply correct and complete information to the Commission

3.1.1. Background

(176) Pursuant to Article 4(1) of the Merger Regulation, concentrations with a Union dimension shall be notified to the Commission prior to their implementation. Recital (5) of the Implementing Regulation describes that the notifying parties have the obligation to "*make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration*".[318]

(177) The General Court confirmed this in its judgment in *NVV*, which reads: "*the notifying parties have an express obligation to make a full and honest disclosure to* [the Commission] *of the facts and circumstances which are relevant for the decision (recital 5 in the preamble to, Article 4(1) and Article 6(2) of Regulation No 802/2004) – that obligation being confirmed by Article 14 of Regulation No 139/2004*".[319]

(178) The decisional practice of the Commission also consistently requires undertakings to submit a complete and comprehensive set of information for the Commission to be able to make the assessment of the case.[320]

(179) Those obligations related to the supply of information under the Merger Regulation "*apply objectively, irrespective of any conclusions that might be drawn from the facts that have to be provided*".[321] Causality between not submitting certain information and a potentially different outcome of the Commission procedure "*is not necessary for a finable infringement of the information requirement to be committed*".[322] In the same decision, the Commission added: "*[t]he information provided under the Merger Regulation must not contain any incorrect and misleading particulars. The requirement that all the information called for under the Merger Regulation be provided in a correct and complete manner serves an objective purpose. It is intended to enable the Commission to take a decision on the basis of all the relevant*

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317 Case C-439/11 P, *Ziegler*, para. 159.

318 Preamble, recital (5) of the Implementing Regulation.

319 Case T-151/05 – *NVV and Others*, 7 May 2009, para. 185.

320 COMP/M.2624 - *BP/Erdölchemie*, 19 June 2002, para. 39: "*A complete Form CO with comprehensive information is of crucial importance for the Commission's merger control procedure, inter alia due to the tight legal deadlines the Commission is required to meet in these procedures, and the notifying parties must be aware of this importance*"; see also para. 36. See also IV/M.1543 - Sanofi/Synthélabo, 28/07/1999, para. 31: "*It is the Commission's duty to uphold the basic principle underlying the exercise of its task of control of concentrations having a Community dimension, namely that parties notifying a merger must supply full and correct information.*"

321 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 106 [*original in German*].

322 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 111 [*original in German*].

information within the time limits set. It is, however, not necessary that the incorrect and misleading information should result in an incorrect assessment.".[323]

(180) In its decisional practice, the Commission also made clear, in particular, that parties should avoid selectivity in setting out the relevant facts included in notifications, submissions, or when replying to RFIs: "*There is a duty to supply all the factual information called for by the Merger Regulation. It is not permissible for the notifying parties to select the facts to be provided on the basis of their own subjective interpretation of those facts, and any such selection constitutes an infringement of the information requirements."*[324]

(181) During the merger review proceedings, undertakings disclose information to the Commission in various submissions including but not limited to replies to the Commission's requests for information pursuant to Article 11 of the Merger Regulation and the Form RM (in case of remedies). The remainder of this Section looks into the obligation to supply correct and complete information in each of these submissions.

3.1.2. RFIs pursuant to Article 11(2)

(182) When the Commission considers that it is not in possession of all the information *"necessary"* to decide on the compatibility of a concentration with the internal market, it can request such information from the parties, using the powers under Article 11 of the Merger Regulation. The Commission has discretion as to the information it can request but the Union Courts can review the Commission's assessment of the necessity of the information requested pursuant to Article 11 of the Merger Regulation.

(183) The Commission can ask information under Article 11 by simple request or by decision. Article 11(2) which relates to simple requests states: *"when sending a simple request for information […] the Commission shall […] specify what information is required and fix the time limit within which the information is to be provided, as well as penalties provided for in Article 14 for supplying incorrect or misleading information".*

(184) Per Article 14(2) of the Merger Regulation, the Commission may by decision impose fines not exceeding 1% of the aggregate turnover of an undertaking, where the undertaking to which the Article 11(2) request for information was addressed, supplies incorrect or misleading information intentionally or negligently.

3.1.3. Form RM

(185) Article 23(1)(c) of the Merger Regulation provides that the Commission is empowered to lay down, *inter alia*, the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) thereof. Accordingly, the Commission adopted the Implementing Regulation,

(186) Article 20(1a) of which provides that, when offering commitments, the "*undertakings concerned*"[325] shall submit "*the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Annex IV*

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323 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 111 [*original in German*].

324 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 106 [*original in German*].

325 Under the Merger Regulation, in case of acquisition of sole control, "*the undertakings concerned [are] the acquiring undertaking and the target undertaking*" (see Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p.1) (the "Consolidated Jurisdictional Notice"), para. 134).

to the Implementing Regulation".[326] The Form RM, whose existence derives from the Merger Regulation,[327] requires detailed information on the business to be divested,[328] and in particular on its current operation and changes planned for the future. Article 20(1a) of the Implementing Regulation states that the information submitted in the Form RM "*shall be correct and complete*".

(187) According to Article 14(1)(a) of the Merger Regulation, the Commission may impose fines not exceeding 1% of the aggregate turnover of an undertaking, where that undertaking, intentionally or negligently, supplies incorrect and/or misleading information in a "*submission*, […] *notification or supplement thereto, pursuant to Article 4*" of the Merger Regulation.

(188) The information and documents relating to remedies that were submitted in the form prescribed at Annex IV to the Implementing Regulation constitute a "submission" within the meaning of Article 14(1)(a) of the Merger Regulation.

(189) The 2008 Implementing Regulation[329] introducing the Form RM, as well as the Remedies Notice emphasise the close link between the submission of the commitments[330] and the Form RM submission.[331] The latter should contain "*detailed information concerning the commitments offered and, in particular, […] specific information if the commitments offered consist in the divestiture of a business*"[332] as well as "*detailed information on the […] the conditions for their implementation and showing their suitability to remove any significant impediment of effective competition."*[333] The submission of the commitments introduces a modification to the concentration as notified to the Commission[334] and the submission of the information required under the Form RM allows the Commission to conclude whether such a modification renders a concentration compatible with the internal market. The submission of the commitments and the Form RM are thus closely linked to the notification of the concentration under Article 4 of the Merger Regulation. The General Court has also confirmed that "*since the existence of the Form RM derives from the Merger Regulation, the terms of the Final Commitments must…be interpreted in the light of that form and of what the Parties indicate in it*."[335]

(190) The information required by the Form RM is critical for the Commission to assess the compatibility of a concentration with the internal market within short legal deadlines. Where the information prescribed by the Form RM is submitted by the notifying (acquiring) party together with other undertakings concerned by the transaction, whose input is necessary for determining the scope of the commitments (for example if the

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326 This is in line with Article 6(2) and Article 8(2) of the Merger Regulation, which states that modifications to a notified concentration must be made "*by the undertakings concerned.*"

327 Case T-430/18 – *American Airlines*, 16 December 2020, paras. 122-123.

328 Section 5 of the Final Form RM [Doc Id: 849].

329 Commission Regulation (EC) No 1033/2008 of 20 October 2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("the 2008 Implementing Regulation").

330 Implementing Regulation, Chapter VI.

331 Per Article 20(1a) of the Implementing Regulation, "*the undertakings concerned*" shall submit the Form RM at the same time as offering commitments. The introduction to the Form RM confirms that the "*form specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004*" (Implementing Regulation, Annex IV: Form RM, Introduction).

332 2008 Implementing Regulation, para. 4.

333 Remedies Notice, para. 7.

334 Article 6(2) of the Merger Regulation.

335 Case T-430/18 – *American Airlines*, 16 December 2020, para. 123.

business to be divested is part of their activities), both the notifying (acquiring) party and such other undertakings concerned are responsible for incorrect or misleading information. Under Article 14(1) of the Merger Regulation, the Commission may impose fines "*on the persons referred to in Article 3(1)b [of the Merger Regulation]*", which refers to both the acquiring undertakings and the target undertakings.[336] Thus, both the notifying (acquiring) party and the other undertakings concerned can be held liable pursuant to Article 14(1)(a) of the Merger Regulation if they, intentionally or negligently, supply incorrect or misleading information on a Form RM submission.

3.2. Infringement of the obligation to supply correct and complete information to the Commission

3.2.1. Incorrect and/or Misleading Information

(191) Pursuant to Article 14(1) of the Merger Regulation, the Commission may impose fines where undertakings supply *"incorrect or misleading information"*, among others, in response to requests for information under Article 11(2) of the Merger Regulation (Article 14(1)(b)) or in notifications or submissions to the Commission (Article 14(1)(a)).

(192) Within the context of Article 14(1) of the Merger Regulation and in light of the requirements described above,[337] "*incorrect or misleading information*" is to be understood as meaning information that deviates from what is true, correct and complete.[338]

(193) In line with the case-law,[339] undertakings should behave like diligent operators, and it follows therefrom that they should provide a full analysis of the facts, including all information available to them. According to the Commission's long-standing decisional practice, incorrect information consists in information which is inaccurate[340] in the sense that it does not reflect reality. For instance, the Commission identified as incorrect a party's response which "*did not give the Commission a true picture as regards the specific aspects of the conditions of competition on the* [markets involved]*"*.[341]

(194) Although the Union Courts have not precisely defined "*misleading information*" in this context, the Commission's decisional practice and other uses of the terms "*incorrect*" and "*misleading*" information in Union law suggest that misleading information is information that is incorrect and/or so incomplete as to reasonably suggest to the Commission that a situation is other than it is in reality. As the Commission has noted in a previous decision, "*[w]here a statement is thus false or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information…*".[342] Incorrect and/or incomplete information can thus render a statement misleading, when taking into account the circumstances (for example considering the specific question or disclosure requirement, at the specific terms used in the question or at the type of

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336 Under the Merger Regulation, in case of acquisition of sole control, "*the undertakings concerned [are] the acquiring undertaking and the target undertaking*" (Consolidated Jurisdictional Notice, paras. 133-134).

337 See Section 3.1.

338 Article 4 of the Implementing Regulation and Section 11 of Annex I to that Regulation. See also Preamble, recital (5) of the Implementing Regulation and Commission Decision of 17 May 2017, M.8228 – Facebook/Whatsapp, para. 78.

339 Case T-704/14 – *Marine Harvest*, 26 October 2017, para. 288, upheld in C-10/18 P, 4 March 2020.

340 M.1610 – Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 120 [*original in German*].

341 M.3255 – Tetra Laval/Sidel, 7 July 2004, para. 94. See also para. 74.

342 IV/29.895 – *Telos*, 25 November 1981, para. 21.

information not provided in reply to the question) and the overall context of Union merger control (in particular the need for speed and the very tight deadlines to which the Commission is subject in the procedure for the control of concentrations),[343] because, when reviewing them, the Commission would reasonably understand that the situation is other than it is in reality.[344] As the Commission put it in its decisional practice, "*by failing to supply information needed for the assessment of* [a merger], *the account given by the* [acquirer] *distorted the facts… such omission can result in a misleading representation of the facts. If it was not to be incomplete and misleading, an account of the takeover should have contained the… information*".[345] In another decision, the Commission added that "*the failure to mention the limitation of Asahi's activities… and the fact that it has a cooperation agreement with BP… has to be considered as at least misleading, as it gives the impression that Asahi is active without any geographic restrictions and completely independently from BP*".[346]

(195) In addition, it follows from the case-law that the Commission must be provided with all the information it considers "*necessary to enable it to decide on the compatibility of the concentration concerned with the common market*".[347] The Court also considers that the errors must be "*material*" in the sense that "*there is a risk that the errors identified could have a significant impact on* [the Commission's] *assessment of whether the concentration at issue is compatible with the common market*."[348] That said, the Court also specified that the Commission enjoys "*discretion*" when applying the two above-mentioned criteria (as their application involves complex economic assessment), which shall not be interpreted *"strictly*" on the ground that "*the requirement for speed which characterises the general scheme of Regulation No 139/2004 […] must be reconciled with the objective of effective review of the compatibility of concentrations with the common market, which the Commission must carry out with great care (Commission v Tetra Laval, paragraph 42) and which requires that it obtains complete and correct information*". [349]

(196) Correct and non-misleading information should appear in the relevant parts of replies to the Commission's requests for information and submissions such as the Form RM. Other forms of disclosure are insufficient if the information supplied in replies to the Commission's requests for information and in a Form RM submission is incorrect and/or misleading. In its decisional practice, the Commission has found that discussions during a meeting or information supplied in an annex are not sufficient to overwrite incorrect information supplied in the Form CO: "*This* [discussion during a meeting] *does not, however, remove the obligation of KLM to include full information*

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343 Cases T-145/06 *Omya*, 4 February 2009, para. 33; and T-151/05 – *NVV and Others*, 7 May 2009, para. 184.

344 Contrary to the Parties' claim (Reply to SSO, paras. 134-138), the Commission does not argue that, under Articles 14(1)(a) and 14(1)(b) of the Merger Regulation, the supply of 'incomplete information' is in itself sufficient to qualify an infringement or is a synonymous of incorrect and/or misleading information.

345 M.1610 – Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 128 [*original in German*].

346 M.2624 - BP/Erdölchemie, 19 June 2002, para. 29.

347 Case T-145/06 *Omya*, 4 February 2009, para. 28. In this case, the Court also held that the "*need for the information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*" (see para. 30).

348 Case T-145/06 *Omya*, 4 February 2009, para. 31.

349 Case T-145/06 *Omya*, 4 February 2009, paras. 32 and 33.

on those activities, at least in response to Question 6.2 of Form CO… the information provided in the appendix to the SH&E study cannot serve to rectify the incorrect information given in the appropriate Section of Form CO of the notification".[350] In another decision, the Commission stated: "*if information is not presented in the notification, the information requirement is infringed… the notification form must be comprehensible in its own right, and the annexes must be used only to illustrate or confirm the information supplied in the form*".[351] In this regard, the General Court has confirmed that "*[a]n undertaking which has provided information in the Form RM cannot, in principle, claim that the Commission must disregard that information and examine more closely the wording of the proposed commitments*."[352]

(197) In view of the above, under Article 14(1) of the Merger Regulation, (i) information which does not reflect reality is incorrect and (ii) information which may not be inaccurate taken in isolation but which, taking into account the particular circumstances of the case and the overall context of the Union merger control (in particular the need for speed and the very tight deadlines to which the Commission is subject), is so incomplete as to reasonably suggest to the Commission that the situation is other than it is in reality is misleading. In this respect, failure to supply information needed for the assessment of a merger amounts to misleading information when it suggests that a situation is different to reality. The incorrect and/or misleading character of the information has to be assessed in light of the actual content and presentation of the information in a specific notification, submission, or in reply to an RFI.

3.2.2. Negligent or Intentional supply of Incorrect and/or Misleading Information

(198) Pursuant to Article 14(1) of the Merger Regulation, the Commission may impose fines where undertakings have provided incorrect and/or misleading information "*intentionally or negligently*".

(199) The General Court recalled that "*in relation to the question whether an infringement has been committed intentionally or negligently, it follows from well-established case-law that that condition is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing the competition rules*".[353] This Decision concerns an infringement of procedural, rather than substantive, rules. However, the general test for intention and/or negligence applied in *Marine Harvest* is equally applicable to conduct that may breach procedural obligations; and moreover, it places no additional requirements on the affected undertaking. As a result, the standard articulated in *Marine Harvest* ("*cannot be unaware*") applies *mutatis mutandis* to the submission of incorrect or misleading information.

(200) In the context of the supply of incorrect and/or misleading information during the merger review process, the Commission also recalls that, pursuant to the case-law,[354] undertakings should behave like diligent operators, and conduct a "*full analysis*" of the

350 M.1608 – KLM/Martinair III, 14 December 1999, paras. 53 and 29.

351 M.1610 – Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, paras. 113 and 115 [*original in German*]. See also T-430/18 – *American Airlines*, 16 December 2020, para. 199.

352 T-430/18 – *American Airlines*, 16 December 2020, para. 193.

353 Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

354 Case T-704/14 – *Marine Harvest*, 26 October 2017, para. 288, upheld in C-10/18 P, *Marine Harvest*, 4 March 2020.

facts "*from the aspect of competition law*". The above requires diligent operators to conduct a proper analysis of their obligations under the Merger Regulation taking into consideration all information available to them. In *Marine Harvest*, the General Court noted that in case of any doubt as to the relevant obligations, "*the appropriate course of conduct for an undertaking is to contact the Commission*".[355] It is also worthwhile to note that as a rule, and as in the present case, the Commission's merger control jurisdiction encompasses transactions involving very large undertakings with substantial economic and legal expertise, including in competition law. As the General Court noted, "*the experience of an undertaking in the field of concentrations and in notification procedures is a relevant factor in assessing negligence*."[356]

(201) The Court also ruled that "*in view of the need for speed and the very tight deadlines to which the Commission is subject in the procedure for the control of concentrations, the Commission cannot be required, in the absence of evidence indicating that information provided to it is inaccurate, to verify all the information it receives*" and that "*the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust"*, with the notifying parties having "*an express obligation to make a full and honest disclosure to it of the facts and circumstances which are relevant for the decision*".[357] In line with this principle, the General Court recently noted that while the Commission must "*display the utmost diligence in performing its supervisory duties in the field of concentrations … that obligation is not intended to relieve the notifying undertakings of their obligation to provide complete and accurate information in the Form RM*."[358]

(202) Moreover, pursuant to the case-law, undertakings must take "*all necessary measures*" to ensure compliance with competition law[359] and are responsible for informing all employees and people acting on their behalf, who are directly or indirectly involved in the proceedings with the Commission, of the relevant competition law requirements and obligations.[360]

(203) In its previous decisions, the Commission has also stated that "*the degree of diligence required in providing correct and complete information can reasonably be expected to be high*"[361] and that the undertakings "*must be particularly careful when submitting details of their merger*".[362]

(204) Article 14(1) of the Merger Regulation prohibits the supply of incorrect and/or misleading information, where it was intentional or by negligence.

(205) In the Reply to the SSO, Sigma-Aldrich further submitted that the Commission failed to set out the legal standards necessary to properly analyse the facts and reach a

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355 Case T-704/14 – *Marine Harvest*, 26 October 2017, para. 256, upheld in C-10/18 P, *Marine Harvest*, 4 March 2020. The obligation of undertakings to provide complete and accurate information in the Form RM includes the obligation to inform the Commission of any intention of giving a different meaning to the Final Commitments than previously assumed in communications between the respective undertaking and the Commission by clearly indicating this in the Form RM (see T-430/18 – *American Airlines*, 16 December 2020, paras. 192 and 199).

356 Case T-704/14 – *Marine Harvest*, 26 October 2017, para. 257, upheld in C-10/18 P, *Marine Harvest*, 4 March 2020.

357 Case T-151/05 – *NVV and Others*, 7 May 2009, paras 184 and 185.

358 Case T-430/18 – *American Airlines*, 16 December 2020, paras. 191-192.

359 Cases T-141/108 - *E.ON Energie AG*, 15 December 2010, paras 208 and 260; T-272/12 – *EPH*, 26 November 2014, paras 45-46.

360 Case T-141/08 – *E.ON Energie*, 15 December 2010, paras. 208 and 260.

361 M.3255 – *Tetra Laval/Sidel*, 7 July 2004, para. 103.

362 M.1543 – *Sanofi/Synthélabo*, 28 July 1999, para. 28.

conclusion in this case.[363] In particular, Sigma-Aldrich argued that the Commission did not "*clearly define*" (i) the appropriate standard of proof needed to prove an infringement,[364] (ii) the legal test for determining whether information is misleading or incorrect,[365] (iii) the legal test for determining a company's intent when supplying misleading or incorrect information,[366] and (iv) the legal test for negligent conduct.[367] In addition, Sigma-Aldrich submitted that the Commission did not cite any relevant precedent supporting the legal test for intent or negligence applicable in this case.[368]

(206) According to settled case-law, a statement of objections concerning an infringement under the Merger Regulation serves the purpose of giving the undertakings concerned all the information necessary to enable them properly to defend themselves before the Commission adopts a final decision.[369] To fulfil this function, a statement of objections needs to be sufficiently clear, in order to enable the parties concerned to identify the conduct complained of by the Commission. It must not allege that persons other than those referred to have committed infringements.

(207) At the same time, the content of the final decision of the Commission need not be identical to the statement of objections. In fact, as the Court of Justice has held, "*the Commission is not bound by the assessments of facts or of law set out in the statement of objections. On the contrary, it must give as reasons for its ultimate decision its final assessments based on the results of the whole of its investigation as they stand at the time when the formal procedure is closed, and it is not obliged to explain any differences in relation to its provisional assessments contained in the statement of objections*".[370] The Commission will assess Sigma-Aldrich's arguments in respect of the SSO in light of these principles.

(208) Sigma-Aldrich's arguments in respect of the SSO are not persuasive notably for the following reasons:

(a) The prevailing evidentiary rules applicable in proceedings concerning Article 14(1) of the Merger Regulation were set out in the SSO.[371] Moreover, in the course of these proceedings, the Commission did not espouse or apply a test concerning the relevant standard of proof that would be at odds with these rules;

(b) In relation to "*misleading information*", Sigma-Aldrich submits that the Commission failed to provide a relevant legal test or provided one that is incorrect.[372] In particular, Sigma-Aldrich argues that "*the definition of misleading information and incomplete information provided by the Commission […] is incorrect and, in any event, not supported by the cited precedent*";[373] However, the SSO and this Decision clearly set out an applicable standard for "*misleading information*" based on applicable case law;[374]

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363 Reply to SSO, para. 86.
364 Reply to SSO, paras. 87-95.
365 Reply to SSO, paras. 96-108.
366 Reply to SSO, paras. 109-113.
367 Reply to SSO, paras. 114-118.
368 Reply to SSO, paras. 119-128.
369 Case T-86/95 – *Compagnie générale maritime and others*, 28 February 2020, para. 442.
370 Case C-466/19 P – *Qualcomm*, 28 January 2021, paras. 66-67.
371 SSO, Section 3.2.
372 Reply to SSO, paras. 96 and 108.
373 Reply to SSO, paras. 97-100.
374 Reply to SSO, para. 184. See Section 3.

(c) Moreover, Sigma-Aldrich objects to the Commission's reliance on *Omya* in the context of its discussion of the meaning of incorrect and/or misleading information.[375] However, both in the SSO and in this Decision, the Commission refers to *Omya* not for purposes of defining "*misleading*" information, but for the proposition the Commission is entitled to request "*all the information necessary to enable it to decide on the compatibility of the concentration*";[376]

(d) Sigma-Aldrich submits that Union law requires intent to be established on the basis of both subjective and objective elements.[377] The test set out and applied in the SSO[378] and this Decision,[379] constitutes established case-law of the Union Courts relating to how intent and/or negligence are to be established, including in proceedings relating to Article 14(1) of the Merger Regulation. Notably, the case-law relied on by the Commission, in particular *Marine Harvest*, explicitly identifies both "*conduct*" (an objective element) and "*awareness*" (a subjective element) as relevant for establishing intent and/or negligence.[380]

4. THE INFRINGEMENTS

(209) Against the legal framework set out above and based on the information available to it, the Commission considers that information pertaining to iCap should have been disclosed: (a) in response to two requests for information, namely RFI I-3 and RFI I-4; and (b) in the Final Form RM.[381]

(210) In Section 4, the Commission explains why it considers that the non-disclosure of iCap and/or the cooperation agreement between Sigma-Aldrich and Metrohm in response to two RFIs and in the relevant parts of the Final Form RM constitutes incorrect and/or misleading information.

4.1. Supply of incorrect and/or misleading information in RFI I-3 and RFI I-4, adopted pursuant to Article 11(2) of the Merger Regulation, and in the Final Form RM

4.1.1. Introduction

(211) Annex IV to the Implementing Regulation sets out the Form RM as the model which the Parties must follow when submitting information and documents together with the commitments.[382] The information requirements of the Form RM are designed to allow the Commission to examine, within the tight legal deadlines characteristic of the Merger Regulation, whether the commitments proposed by the parties can render the concentration compatible with the internal market, namely, whether they will prevent a significant impediment of effective competition[383] materialising in the relatively near future.[384] In case of clearance following a Phase I investigation, the information and documents provided in accordance with the Form RM should enable the Commission to conclude that the notified concentration (as modified by the

375 Reply to SSO, paras. 101-105.
376 See recital (195); SSO, para. 182.
377 Reply to SSO, para. 109.
378 SSO, para. 186.
379 See recital (199).
380 See recital(199).
381 Final Form RM [Doc Id: 849]; RFI I-3 [Doc Id: 812] and RFI I-4 [Doc Id 829].
382 Implementing Regulation, Article 20, para. 1a, Annex IV: Form RM.
383 Implementing Regulation, Annex 4, Introduction.
384 Cases T-162/10 *Niki Luftfahrt*, 13 May 2015, para. 294; T-342/07 *Ryanair*, 6 July 2010, para. 453.

remedies) no longer raises serious doubts for its compatibility with the internal market. In case of clearance following a Phase I investigation, these remedies should be "*so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of the Merger Regulation*".[385]

(212) The assessment of the submissions made according to the Form RM, whether marked as drafts, amended drafts or final versions, is an inherent part of the assessment of the notified transaction, where it is being modified by commitments pursuant to Article 6(2) of the Merger Regulation. This information is critical for the Commission to investigate the feasibility and adequacy of the proposed remedy as well as its likely effectiveness in practice, the viability of the business divested (in case of divestiture remedies) and the sufficiency of the package to remove the serious doubts. While market participants can provide useful insights on the proposed commitments and their ability to exclude competition concerns, certain data is naturally expected to originate from one or more of the parties concerned by the transaction. This is especially the case for pipeline products or R&D and innovation efforts, which are often not publically known. In this context the Remedies Notice stresses the importance of full disclosure: "*Only the parties have all the relevant information necessary for such an assessment, in particular as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed for divestiture. It is therefore the responsibility of the parties to provide all such information available that is necessary for the Commission's assessment of the remedies proposal. […] For commitments consisting in the divestiture of a business, parties have to describe in detail how the business to be divested is currently operated. This information will enable the Commission to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments*".[386] Given the tight deadlines for the Commission's assessment of the commitments (which involves *first*, a decision whether the commitments are *prima facie* suitable and should be market tested and, *second*, whether the results of the market test should be accepted), all relevant information as requested in the Form RM needs to be provided promptly.[387]

(213) The General Court has confirmed the above stating that "*given the large amount of facts and data that* [the Commission] *has to assess in proceedings under the Merger Regulation and the 'need for speed' that governs such proceedings, notably in case of approvals at the end of 'Phase I' with remedies, the information provided by an undertaking in a Form RM is of utmost importance to allow the Commission to evaluate properly the content, aim, viability and effectiveness of proposed commitments within the limited time available. The Form RM aims to ensure clarity of proposed commitments and to avoid 'Trojan Horses' from being included in them. Moreover, the Form RM sets out the undertaking's own understanding of the commitments it proposes*."[388] It follows that the commitments offered by the parties

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385 Remedies Notice, para. 81. See also Case T-430/18 *American Airlines*, 16 December 2020, para. 120 (and the case law cited).

386 Remedies Notice, para. 7.

387 Remedies Notice, para. 82.

388 Case T-430/18 *American Airlines*, 16 December 2020, para. 133 (emphasis added).

to a transaction must be "*interpreted in light of* [the Form RM] *and of what the parties indicate in it*".[389]

(214) The Commission expects that the party operating the divestment business (be it the acquirer or the target)[390] will provide the requested information at the time of submitting the commitments, including data on the current operation of the divestment business and any changes planned for the future.[391] Among other things, the Form RM requires information on innovation and new products/services planned in the divestment business (Section 5.3 of the Form RM); the R&D functions in the relevant business (Section 5.4 of the Form RM); and assets excluded from the scope of the business subject to the divestment (Section 5.12 of the Form RM).

(215) Moreover, pursuant to Article 11(2) of the Merger Regulation, in order to carry out its obligation and properly appraise concentrations, the Commission may request that undertakings provide all necessary information to decide on the compatibility of a concentration with the internal market,[392] including in the context of remedy discussions where the Commission "*can adapt the precise requirements to the information necessary in the individual case at hand*".[393]

(216) In Case M.7435 – *Merck/Sigma Aldrich*, the Parties submitted commitments pursuant to Articles 6(2) of the Merger Regulation within 20 working days from the date of receipt of the notification, as required in Article 19 of the Implementing Regulation. Those Initial Commitments were submitted on 22 May 2015 together with the Initial Form RM. The Parties modified the Initial Commitments[394] and submitted their Final Commitments on 11 June 2015.[395] On 12 June 2015, the Parties submitted their Final Form RM to accompany the submission of the Final Commitments.

(217) In order to assess whether the remedy proposed by the Parties was sufficient to eliminate the serious doubts raised by the Transaction, the Commission also sent two requests for information under Article 11(2) of the Merger Regulation, jointly addressed to Merck and Sigma-Aldrich,[396] namely RFI I-3 and RFI I-4. In line with Article 11(2) of the Merger Regulation, both RFI I-3 and RFI I-4 specified that "*this request constitutes a request for information under Article 11(2) of the Merger Regulation"* and that *"pursuant to Article 14(1)(b) of the Merger Regulation, the Commission may impose fines for the submission of incorrect or misleading information in reply to this request*".[397]

(218) With RFI I-3, on 29 May 2015, the Commission asked both Parties to clarify information in the Initial Commitments and the Initial Form RM and requested

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389 Case T-430/18 *American Airlines*, 16 December 2020, paras. 121-123. See also para. 144: "*the applicant cannot successfully argue that the Commission, rather than relying on what the Parties indicated in the Form RM, should have assessed the meaning of the wording [of the commitments] while disregarding what the Parties had indicated in the Form RM*."

390 Section 3.1.3.

391 Final Form RM, introduction to Section 5, Information on a business to be divested [Doc Id: 849].

392 Preamble, recital 38 of the Merger Regulation.

393 Remedies Notice, para. 7.

394 In line with the Remedies Notice, para. 83.

395 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer [Doc Id: 840] and Final Commitments signed by the Parties [Doc Id: 938].

396 Both Merck's and Sigma-Aldrich's legal counsel were addressees of the email. See emails from the services of the Commission to Merck's and Sigma-Aldrich's external counsel, "M.7435 Merck / Sigma Aldrich - Article 11(2) request for information RFI I-3 - deadline 1/6/2015" [Doc Id: 811] and "M.7435 Merck / Sigma Aldrich - Article 11(2) request for information RFI I-4 - deadline 3/6/2015" [Doc Id: 828].

397 RFI I-3 [Doc Id: 812] and RFI I-4 [Doc Id: 829].

additional data necessary for the completeness of the information and documents provided pursuant to the Form RM.[398] The instructions included in RFI I-3 specifically indicated "*Questions on your* [Initial] *Form RM submitted on 22 May 2015 – all answers should be incorporated in a new version of the* [Initial] *Form RM*".[399] In particular, Question 6 of RFI I-3 read: "*Section 5.12* [of the Initial Form RM]*: Please elaborate and include a description of all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA".*[400]

(219) On 2 June 2015, the Parties provided their replies to RFI I-3, with the exception of their replies to question 10. On that date, the Commission received replies both as a separate document[401] and incorporated in the First updated version of the Initial Form RM.[402] Those replies were described as "*the Parties' replies*" by Merck's counsel who sent them to the Commission with Sigma-Aldrich's counsel in copy.[403]

(220) On the same day, the Commission shared with the Parties the results of the market test on the Initial Commitments,[404] and addressed them another request for information (RFI I-4). The information requested in RFI I-4 was necessary to clarify certain issues and request additional information following the results of the market test.[405] In particular, Questions 12, 13 and 16 of RFI I-4 focused on the R&D activities of Sigma-Aldrich's solvents and inorganics business in the EEA, reflecting the comments received from the market participants during the market test:[406]

(a) Question 12: "*Does Sigma have any R&D agreements with third parties related to solvents and inorganics in the EEA?*";

(b) Question 13: "*Please describe the personnel responsible for R&D of solvents and inorganics and indicate in which plants they were working.*";

(c) Question 16: "*Could you please provide a list of the personnel working in Buchs for solvents and inorganics, together with their functions? Is there any personnel specialized in R&D for solvents and inorganics or the Fluka branded products in general?*".[407]

(221) On 5 June 2015, the Parties sent a new version of the Initial Commitments including edits that appeared to take into account questions of RFI I-4.[408] On 8 June 2015, the Parties submitted the Second updated version of the Initial Form RM which incorporated the final replies to RFI I-4 (including questions 12, 13 and 16). Those

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398 RFI I-3. The Commission set the deadline to reply to the RFI I-3 on 1 June 2015 ([Doc Ids: 811 and 812]). On 1 June 2015, the Parties requested an extension of the deadline to 2 June 2015 ([Doc Id: 826]).

399 RFI I-3 [Doc Id: 812].

400 Question 6 of RFI I-3 [Doc Id: 812].

401 Email from Merck's external lawyers "Re: M.7435 Merck / Sigma Aldrich - Article 11(2) request for information RFI I-3 - deadline 1/6/2015" [Doc Id: 826].

402 "*enclosed is an updated version of the Form RM incorporating the Parties' replies to RFI I 3*" [Doc Id: 826].

403 Email from Merck's external lawyers "Re: M.7435 Merck / Sigma Aldrich - Article 11(2) request for information RFI I-3 - deadline 1/6/2015" [Doc Id: 826].

404 See list of attendees from the Parties [Doc Id: 949].

405 RFI I-4 [Doc Id: 829]. The Commission set the deadline to reply to this questionnaire on 3 June 2015 ([Doc Ids: 828 and 829]). On 3 June 2015, the Parties requested an extension of the above deadline to 5 June 2015, specifying that they would submit the replies on a rolling basis ([Doc Id: 909]).

406 See recital (41).

407 See questions 12, 13 and 16 of RFI I-4 [Doc Id: 829].

408 The cover email from Merck's external lawyers to the Commission stated: "*Attached is the revised version of the Commitments incorporating the changes agreed today as well as the responses to RFI I-4*" ([Doc Id: 911]).

replies were described as "*the Parties' answers to RFI I 4*" by Merck's counsel who sent them to the Commission with Sigma-Aldrich's counsel in copy.[409]

(222) The Final Form RM, including the replies to RFI I-3 and RFI I-4, was submitted on 12 June 2015.[410] More specifically, the reply to question 6 of RFI I-3 was incorporated in Section 5.12 of the Final Form RM, and the replies to questions 12, 13 and 16 of RFI I-4 were incorporated in Section 5.4 of the Final Form RM.

(223) As explained in the remainder of Section 4.1, the Commission finds that:

(i) the non-disclosure of iCap, together with the statement pursuant to which no imminent innovation projects or new products were planned constitute incorrect and/or misleading information supplied in Section 5.3 of the Final Form RM (Section 4.1.2);

(ii) the non-disclosure of the R&D agreement with Metrohm on iCap or the existence of R&D personnel for solvents and inorganics in Buchs and elsewhere, in combination with the statements on R&D functions, constitute incorrect and/or misleading information supplied in response to questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) (Section 4.1.3);

(iii) the non-disclosure of the exclusion of iCap from the scope of the Divestment Business, combined with the fact that several assets were listed as excluded, constitute incorrect and/or misleading information supplied in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) (Section 4.1.4).

4.1.2. Innovation in the business to be divested

4.1.2.1. The information requirements of Section 5.3 of the Form RM

(224) Section 5.3 of the Form RM explicitly requires a list and a description of "*any innovations or new products or services planned*" in relation to the divestment business. In response to the above, all innovations or new products planned in relation to the business to be divested must be disclosed.

(225) The remainder of this Section explains why and how iCap should have been disclosed in reply to section 5.3 of the Form RM.

4.1.2.1.1. iCap was developed for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents which were part of the business to be divested

(226) Under the Final Commitments, the Divestment Business included *"(a) Solvents: (i) high performance liquid chromatography* [HPLC] *solvents, (ii) regulated solvents, (iii) technical grade solvents, (iv) spectroscopy solvents and (v) gas chromatography solvents. (b) Inorganics: (i) volumetric/titration solutions, (ii) inorganic salts, (iii) acids, (iv) bases, (v) buffers, (vi) auxiliaries, (vii) indicators and (viii) Karl Fischer titration solutions*".[411]

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409 Cover email from Merck's external lawyers to the Commission (with Sigma-Aldrich's counsel among the addressees) "RE: STRICTLY CONFIDENTIAL M7435 COMMITMENTS 4 JUNE (2).DOCX", [Doc Id: 830]. In the Second updated version of the Initial Form RM, the replies to the Questions of RFI I-4 are identified. Before each reply, it is indicated "[QX RFI I 4]". They also appear clearly in the track changes version provided [Doc Id: 832].

410 Final Form RM [Doc Id: 849].

411 Final Commitments, Schedule, para. 1 [Doc Id: 938] (emphasis added). The Clearance Decision explains in great detail the importance of the overall scope of the Divestment Business, including the entire portfolio of Fluka branded solvents and inorganics and the "*premium*" or "*best-in-class*" Karl Fischer titration solutions and the associated Hydranal brand. *"The Divestment Business includes*

(227) iCap was linked to volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents for the following reasons.

(228) *First*, HPLC solvents, volumetric titration solutions and Karl Fischer titration solutions were the original applications for which iCap was developed, since its launch in 2011:[412]

(a) In March 2011, when discussing the launch of iCap, [NAME OF INDIVIDUAL] stated that any reagent partner developing an intelligent cap to work with Metrohm "*will gain share in all titration markets, including Karl Fischer*".[413] A 24 February 2014 presentation titled "*Analytical Standards & Reagents, Overview Innovation Pipe Mid Term Strategy*" foresees that Sigma-Aldrich would be able to sell Hydranal (for Karl Fischer titration) and "*volumetric* [titration]" solutions with iCap;[414]

(b) HPLC solvents were also amongst the applications of iCap, as originally planned by Sigma-Aldrich. In a July 2011 report, Helbling (which assisted Sigma-Aldrich with the development of iCap) detailed the "*use cases*" of iCap.[415] This report clearly refers to titration solutions[416] and the Fluka brand[417]

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worldwide rights and worldwide customer base of the Fluka and associated brands in relation to solvents and inorganics. This, on the one hand, mitigates any risk of brand confusion and enhances chances for a long-term viability of the Divestment Business and, on the other hand, enlarges the scope of the Divestment Business beyond the EEA in relation to the main brand, and in particular the one under which the signature Karl Fisher titration solutions and many other premium quality solvents and inorganics are successfully sold worldwide"; (Clearance Decision, para. 250 [Doc Id: 356-4023]); "*It does not include only assets but also critical elements to make a player successful in the solvents and inorganics markets in the EEA, which are a well-known brand, a wide portfolio of products, including high margin inorganics such as Karl Fisher titration solutions, various key customers information and the channels to the market*" (Clearance Decision, para. 253 [Doc Id: 356-4023]) *'The divestiture of a wide portfolio of solvents and inorganics is crucial to the viability of the Divestment Business, in line with the findings of the market investigation and the market test, according to which it is indispensable for a player to establish itself as a competitor that it is capable to offer a broad range of products across the entire spectrum of solvents and inorganics. The product portfolio of solvents and inorganics under the Divestment Business is sufficiently broad to ensure viability as divested solvents and inorganics cover a wide spectrum of laboratory and inorganics, including best-in-class Sigma products such as Karl Fisher titration solutions*" (Clearance Decision, para. 254 [Doc Id: 356-4023]) The Commission insisted, already before launching the market test that Karl Fisher titration solutions and Hydranal brand should be included in the Commitments.

412 See Section 2.2.2.

413 See notably Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "DCF Metrohm iCAP" dated 29 March 2011 [Doc Id: 28-53].

414 See notably "Analytical Standards & Reagents, Overview Innovation Pipe Mid Term Strategy", 24 February 2014, slide 15 [Doc Id: 29-1488]. See also Presentation Metrohm-Sigma-Aldrich, new titration platform, 2011 [Id28-17]; "Analytical Standards & Reagents, Business Review and Planning", slide 17 [Doc Id: 29-334]; Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Metrom and iCap" dated 14 June 2015 [Doc Id: 29-2549]; Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603]; Merck's presentation "OP 2016 – Applied Solutions", 17 November 2015, slide 22 [Doc Id 29-3419]. See also Reply to SSO, para. 55, expressly acknowledging that, in 2011, the approval for iCap's funding was requested "*only*" for volumetric titration. Sigma-Aldrich's development partner Metrohm explained that "*the iCap project was developed essentially for Sigma-Aldrich's titration chemicals, which were sold under the Fluka brand*" (see minutes of the conference call between Metrohm and the Commission on 21 April 2016, para. 5 [Doc Id: 107]). This is consistent with the fact that Metrohm is *"a global market leader in analytical instruments for titration"* and thus an ideal partner for Sigma-Aldrich's landmark products in this area (see reply to question 3 of RFI iCap 1 [Doc Id: 59]; Metrohm also identifies itself as the "*global market leader in analytical instruments for titration*" (https://www metrohm.com/en/company (last accessed on 10 March 2021)).

415 Project report "Projekt iCap" by Helbling dated 19 July 2011 [Doc Id: 30-31].

under which Sigma-Aldrich sells its titration solutions and HPLC solvents. The DCFs on Buchs expansion mention both titration chemicals and HPLC solvents as potential applications for iCap.[418]

(229) The evidence in the file also reveals that, at the time of the merger review, in 2015, Sigma-Aldrich was still envisaging the same applications for iCap. For instance, a few days before the submission of the Final Form RM, iCap was described internally as a project "*inter linked w Metrohm instruments (KF titration)*" and "*driven by Buchs/Fluka*".[419]

(230) Merck and Sigma-Aldrich originally did not contest that iCap's applications included volumetric titration, Karl Fischer titration, and HPLC solvents. In their responses to RFI-iCap 2,[420] the Parties themselves identified volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents as the main applications of iCap for the period May 2011 and 22 September 2014.[421]

(231) In the Reply to the SO and in the Reply to the SSO, the Parties stated that as of 2015, iCap's main application was volumetric titrations, but not Karl Fischer titration. The Parties even stated that they "*started looking at iCap's development for Karl Fischer titration only in 2016*".[422] The Parties supported their claim by indicating that the NPV of the project calculated by Sigma-Aldrich in its 2011 and 2014 DCFs was based only on sales of volumetric titration solutions.[423] In this respect, the Commission notes that:

(a) Those arguments are not supported by the evidence in the file. In several DCFs and internal presentations, already in 2011 Sigma-Aldrich identified Karl Fischer titration and HPLC solvents as possible applications for iCap. For instance, the 2011 DCF on iCap estimates the sales and the market shares of Sigma-Aldrich's reagents for Karl Fischer (and "other" titration), with and without iCap, while the projections in HPLC solvents are left "*t*[o] *b*[e] *d*[efined or discussed]".[424] The DCFs dated between 2013 and 2015 concerning

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416 The use cases include the products "TitraLAB 960 and 965 Titration Workstations" (see pp. 17 and 18) and a non-exclusive list of titration products is contained on page 36 of the report.

417 Project report "Projekt iCap" by Helbling dated 19 July 2011, page 34 [Doc Id: 30-31].

418 See notably Excel file with [Doc Id: 29-2361], sheets "base DCF" and "DCF realistic".

419 Email chain between [NAMES OF INDIVIDUALS] "R n d", 5 June 2015 [Doc Id: 329-40603]. It is only as of June/July 2015 that another possible application for iCap is mentioned, namely [SIGMA'S R&D] ([Doc Ids: 123 and 29-2363]).

420 See Reply to question 4 of RFI iCap-2. In response to a question "*Please provide a complete list of products for which Sigma-Aldrich envisaged at any point in time from May 2011 to 22 September 2014 to use the iCap technology and indicate for each product: a. to which product category it belongs* […], *b. if it was a divested product or a retained product; c. the revenue generated in the EEA and globally by the product in 2014.*" The Parties responded that volumetric titration solutions, Karl Fisher titration solutions and HPLC solvents applications (all markets affected by the transaction and part of Divestment Business) represented sales of [SIGMA'S R&D] in the EEA compared to [SIGMA'S R&D] in the whole EMEA for another envisaged application, namely [SIGMA'S R&D] (not part of the Divestment Business). If the worldwide sales were to be compared it would [SIGMA'S R&D] versus [SIGMA'S R&D]. [Doc Id: 84].

421 22 September 2014 corresponds to the announcement of the transaction between Merck and Sigma-Aldrich.

422 Reply to SO, para. 54 [Doc Id: 1187].

423 Reply to SO, paras. 52ff, and para. 114 [Doc Id: 1187] and Reply to SSO, paras. 55-58.

424 See [Doc Id: 28-123] according to which, Sigma-Aldrich's market share in KF titration would be 25 percentage points higher with iCap than without iCap (65% *vs.* 40%). Similarly, a presentation titled "*Metrohm-Sigma Aldrich: new titration platform*" dated 31 March 2011 described the value proposition of iCap and potential it may have over the years, among which "*defending our position for Hydranal*

[SIGMA'S R&D AND BUSINESS STRATEGIES] took into account the [SIGMA'S R&D AND BUSINESS STRATEGIES] (as did the 2011 DCF) [SIGMA'S R&D AND BUSINESS STRATEGIES].[425] Moreover, in 2015, a few days before the submission of the Final Form RM, iCap was described internally as a project "*[SIGMA'S R&D AND BUSIENSS STRATEGIES]*".[426] The fact that iCap NPV was calculated based only on sales of volumetric titration solutions does not mean that iCap was only developed for this application. Indeed, reviewing the 2011 DCF, [NAME AND JOB TITLE OF INDIVIDUAL], Sigma-Aldrich Analytical noted the NPV of the project (based on volumetric titration only) but added: [SIGMA'S R&D AND BUSINESS STRATEGIES]". Moreover, the Parties' claim is contradicted by the witness statements submitted by the Parties together with the Reply to the SO;[427]

(b) In any event, even if iCap had been developed for volumetric titration only (*quod-non*), this would not change the conclusion that the project related to the Divestment Business. Volumetric titration products were a key part of the Divestment Business.

(232) *Second*, the vast majority of products that Sigma-Aldrich was planning to use iCap with were included in the scope of the Divestment Business. In a 2011 Project Report,[428] Helbling compiled a non-exclusive list of [SIGMA'S R&D] Sigma-Aldrich products with which iCap could be combined. [SIGMA'S R&D] of these products (namely, all but one) were part of the Divestment Business and were listed in Schedule 1.11(i) to the SPA between Merck, Sigma-Aldrich and Honeywell dated 19-20 October 2015.[429]

(233) The Parties themselves seem to confirm that iCap was related to the Divestment Business and that post-divestment there would be essentially no Sigma-Aldrich products left to be used in combination with iCap. In their replies to RFI iCap-2, Merck and Sigma-Aldrich explained that out of the EEA sales of products that could be combined with iCap, [SIGMA'S R&D] concerned volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which were all part of the Divestment Business.[430] The fact that Sigma-Aldrich deemed it necessary to include

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[Sigma-Aldrich KF brand] titration products" and included HPLC in the other "*options*" to "*evaluate*" as iCap applications ([Doc Id: 28-722], page 12, emphasis added).

425 DCFs dated 31 May 2013 [Doc Id: 28-1018]; 22 July 2013 [Doc Id: 29-1131]; 28 August 2013 [Doc Id: 29-1212]; 5 September 2013 [Doc Id: 29-1228]; 23 January 2014 [Doc Id: 28-1384]; and 27 April 2015 [Doc Id: 29-2361]. DCFs on [SIGMA'S R&D AND BUSINESS STRATEGIES] dated 28 August 2013, 5 September 2013, 23 January 2014, and 27 April 2015 estimated that iCap incremental sales for HPLC would be [SIGMA'S R&D AND BUSINESS STRATEGIES] higher than iCap incremental sales in titration applications. In a presentation titled "[SIGMA'S R&D AND BUSINESS STRATEGIES]" dated 23 July 2013, iCap was listed [SIGMA'S R&D AND BUSINESS STRATEGIES] ([Doc Id: 28-1118], slides 16-17).

426 Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603] (emphasis added).

427 Witness statements of [NAME AND JOB TITLE OF INDIVIDUAL] at Merck, Annex 1.21, para. 8 [Doc Id: 1179-14] ("*From the beginning, iCap was intended to be used, in the first phase, for volumetric solutions and Karl Fischer solutions and, in the second phase, for other applications, including HPLC solvents […]*" (emphasis added)); and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), Annex 1.22, para. 12 [Doc Id: 1179-15] ("*In my mind, the project was supposed to launch on Karl Fischer titration instruments first and then expand to other applications*" (emphasis added)).

428 Project report "Projekt iCap" by Helbling, 19 July 2011, p. 36 [*original in German*] [Doc Id: 30-31].

429 The only product not included in the SPA is listed under [SIGMA'S R&D]".

430 Reply to Question 4, RFI iCap-2 [Doc Id: 91].

iCap on the Excluded Assets Schedule also shows that it was aware of the links between iCap and the Divestment Business.

(234) *Third*, post-divestment, virtually no Sigma-Aldrich products were left to be combined with iCap. As a result, the combined entity would have to use iCap in combination with products of Merck that closely compete with the products included in the Divestment Business (namely Merck's solvents and inorganics). Contemporaneous evidence confirms this:

(a) On 3 June 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) sent an email to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), who was directly involved in the negotiations of the Commitments with the Commission. [NAME OF INDIVIDUAL] wrote: "*just to make sure I understand: whatever we curve* [sic] *out from our SiAl portfolio – this will NOT affect any of the Merck products, right? In other words, we can go on with pipeline projects (iCap, iBarrel, GCAT ...) with the existing Merck products. I just want to get this confirmed as we have the deal with Metrohm (iCap) where we launch at Analytica 2016*".[431]

(b) On 14 June 2015, replying to a question of [NAME OF INDIVIDUAL] on the future of iCap after the divestiture of Hydranal, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) suggested that the combined entity would use iCap to strengthen Merck's products: "*Well. We will make Apura* [in toher words, Merck's brand for Karl Fischer titration solutions] *the number one brand!*".[432]

(235) In view of the above, iCap was developed for Sigma-Aldrich's volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, all of which were products that belonged to the Divestment Business.

4.1.2.1.2. iCap together with the solvents and inorganics it was offered with constituted new products planned and iCap was an innovation project

(236) As recalled at recital (224) above, Section 5.3 of the Form RM explicitly requires a list and a description of "*any innovations or new products or services planned*" in relation to the divestment business. For the reasons set out below, iCap together with the solvents and inorganics it was offered with constituted new products planned and iCap was an innovation project within the meaning of Section 5.3 of the Form RM and should, therefore, have been disclosed to the Commission.

(237) *First*, iCap used in combination with volumetric titration and Karl Fischer titration solutions and HPLC solvents qualified as pipeline products, namely new products planned to be brought to the market in the short or medium term.

(238) Contemporaneous evidence in the file shows that Sigma-Aldrich saw iCap used in combination with volumetric solutions ("*ready-for-use volumetric solutions*") as "*new <u>product</u> launches*"[433] and listed iCap among "*<u>product</u> examples*"[434]. In an

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431 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "short question" dated 3 June 2015 [Doc Id: 29-2475].

432 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Metrom and iCap" dated 14 June 2015 [Doc Id: 29-2552].

433 "Analytical Standards & Reagents, Overview Innovation Pipe Mid Term Strategy", 24 February 2014, slide 9, see also slides 14-17 [Doc Id: 29-1488].

434 Science & Technology Committee Meeting, 29 April 2014, slide 10 [Doc Id: 26-27].

internal discussion, the launch strategy for projects such as iCap is described as follows: "*we take ideas and new technologies and turn <u>them into products</u> that we bring to market successfully*".[435] Sigma-Aldrich consistently noted that iCap was not (just) packaging but rather a "*new technology*"[436], which could be seen as an "*innovative titration solution*"[437] or a "*titration feature*".[438]

(239) The way Merck ultimately commercialised iCap together with volumetric titration agents confirms this. The relevant chemicals form a separate product category called "*3S Reagents for Volumetric Titration*".[439] Each of the reagents combined with iCap has a dedicated SKU number, as shown today on Merck's website.[440] During the First Oral Hearing, Merck confirmed that a chemical with a single-use iCap and a chemical without a single-use iCap have different SKU numbers.[441]

(240) Moreover, iCap used in combination with the volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents also qualified as new products that were likely to be brought to the market in the short or medium term. Per Section 8.7 of the Form CO, the short or medium term covers in particular a launch within the "*next three to five years*".[442]

(241) In April 2015 (at the time of Form CO notification), Sigma-Aldrich planned to launch single-use iCap with volumetric titration solutions in May 2016 (at the Analytica Fair), i.e. less than a year after the submission of the Final Form RM.[443] The launch of single-use iCap with Karl Fischer titration solutions[444] and HPLC solvents[445] was planned to follow soon thereafter, later in 2016 or in 2017.

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435 Email from [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: Besuch am Freitag", 20 May 2014 [Doc Id: 29-1619].

436 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", 5 June 2015 [Doc Id: 329-40603]. See also email from [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) "Re: Besuch am Freitag", 20 May 2014 [Doc Id: 29-1619].

437 Excel sheet, "Project Cockpit / Monthly Report", 5 November 2015 [Doc Id: 29-3223].

438 FMEA Analyse iCap, tab "iCap titrat single use Start" [*original in German*] [Doc Id: 30-800].

439 See https://www.sigmaaldrich.com/technical-documents/articles/analytical/titration/3s.html (last accessed on 18 June 2020). 3S is an alternative name for iCap (see recital (55)).

440 See https://www.sigmaaldrich.com/technical-documents/articles/analytical/titration/3s.html (last accessed on 18 June 2020).

441 First Oral Hearing Recording [Doc Ids: 1982-1985, Doc Id: 1803 and Doc Id:1910]. In the Reply to the SSO (para. 151), Sigma-Aldrich asserted that different SKUs to differently packaged products does not mean that the packaging itself was a new product, without substantiating its claim.

442 Section 8.7 of the Form CO requires to "*provide an estimate of the projected sales and market shares of the parties to the concentration over the <u>next three to five years</u>*".

443 Internal discussion dated April 2015 on the May 2016 launch can be found in [Doc Id: 29-2475]. See also other internal documents ([Doc Ids: 329-40603; 28-1881; 28-1885; 29-3223; 30-799; and 29-2945]); Reply to SO, footnote 171 [Doc Id: 1187]; Merck reply to RFI i-Cap 1 [Doc Id: 59]; Minutes of the conference calls with Metrohm dated 21 April 2016 [Doc Id: 413] and 4 October 2016 [Doc Id: 1830-22]; Email from Metrohm to the case team dated 2 September 2016 [Doc Id: 3]. Tooling and moulds for the different iCap parts had been produced between May 2013 and June 2015 and the first 25 assembled iCap bottle-heads were delivered in February 2015 to Sigma-Aldrich for testing (Reply to question 3, RFI iCap 2 [Doc Id: 84]).

444 Merck's presentation "OP 2016 – Applied Solutions", slide 22, dated 17 November 2015 mentions "Q2 2016" for titration (volumetric and Karl Fischer) [Doc Id: 29-3419]; another internal discussion dated December 2015 suggests "2017" for Karl Fischer titration solutions [Doc Id: 330-11595]; Merck reply to RFI i-Cap 1 mentions "mid-2017" for i-Cap on Karl Fischer titration [Doc Id: 59].

445 Merck's presentation "OP 2016 – Applied Solutions", slide 22, dated 17 November 2015 mentions "second half of 2016" for HPLC solvents [Doc Id: 29-3419]; an internal presentation of Sigma dated 2015 mentions "autumn 2016" for iCap launch with [SIGMA'S R&D AND BUSINESS STRATEGIES] [Doc Id: 28-1462]; DCF dated 27 April 2015 envisaged the launch of "iCap HPLC"

(242) In view of the above, iCap used in combination with volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents constituted "*new products... planned*" in the sense of Section 5.3 of the Form RM.

(243) *Second*, iCap also qualifies as an innovation project within the meaning of Section 5.3 of the Form RM. Within Sigma-Aldrich, iCap was developed under the responsibility of [NAME AND JOB TITLE OF INDIVIDUAL].[446] At least part of the development costs came "*through Buchs R&D expense[s]*".[447] In a presentation titled "*Analytical Standards & Reagents – Overview Innovation Pipe"* and dated 24 February 2014, [NAME OF INDIVIDUAL] included a slide titled "*Cooperation SiAI (CH) with Metrohm*" which mentioned "*R&D coop[eration]*" as "*focussed to convenient chemicals/containers for new instrument generation*", namely, iCap. [448]

(244) iCap was part of Sigma-Aldrich's research planning and priorities for 2015 (i.e., the year of the notification of the Transaction). An April 2015 report titled "*the Sigma-Aldrich analytical business*" referred to the need for "*Next Generation Packaging*" projects and added that "[f]*irst projects like iCap and iBarrel are already in development and will be launched within the next 12 month*[s]".[449]

(245) In addition, at the time of the submission of the Final Commitments in June 2015, key individuals in Sigma-Aldrich considered that iCap was a R&D project within the Divestment Business. On 5 June 2015, following the Commission's recommendation to include explicitly R&D related to solvents and inorganics in the Commitments text,[450] [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) explained to other Sigma-Aldrich employees that "*the Commission is asking us to include all pipeline project for R&D within the divested business*".[451] In this context, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) compiled a list of all innovations that may be concerned by the Commission's request. Among those innovations was iCap with the following description: "*New versatile packaging technology. Intelligent cap. Cooperation with Metrohm (contract) to be launched 2016, with inter linked w Metrohm instruments (KF titration) This is driven by Buchs/Fluka PM*".[452]

4.1.2.1.3. Conclusion

(246) In view of the above, iCap was developed for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents which were part of the business to be divested. iCap was an innovation project and iCap used in combination with volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents

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[SIGMA'S R&D AND BUSINESS STRATEGIES] [Doc Id: 29-2361]; another internal document dated 2015 includes as planned launch date for "iCap (HPLC)" "[SIGMA'S R&D AND BUSINESS STRATEGIES]" [Doc Id: 29-2945].

446 Presentation "Analytical Standards & Reagents", Business Review and Planning, dated 9 March 2012, p. 9 [Doc Id: 29-334].

447 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "ICAP – Expense, not capital", dated 6 May 2012 [Doc Id: 28-148].

448 Presentation "Analytical Standards & Reagents: overview, innovation pipe, mid term strategy" dated 24 February 2014, slides 14-17 [Doc Id: 28-581].

449 Report "the Sigma-Aldrich analytical business", [NAMES OF INDIVIDUALS], April 2015 [Doc Id: 28-1881]. According to the Word document properties, it was last modified on 25 June 2015.

450 Redline of the Commitments compared to the version sent by the Commission on 5 June 2016 (attachment to email dated 8 June "strictly confidential M7435 Commitments 4 June (2).docx" [Doc Ids: 954 and 956].

451 Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603].

452 Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603].

constituted new products planned in the sense of Section 5.3 of the Form RM. For these reasons, iCap was responsive to and, thus, should have been disclosed in Section 5.3 of the Final Form RM.

4.1.2.2. The content of Section 5.3 of the Final Form RM

(247) Section 5.3 of the Final Form RM states only that "*there are no new products or innovations imminently planned with regard to Fluka Business or the Sigma-Aldrich Business*".[453] For completeness, the Commission notes that the Parties did not request any waivers relating to the above-mentioned parts of the Final Form RM.

(248) The wording in Section 5.3 remained unchanged in the Initial Form RM (submitted on 22 May 2015);[454] the First and Second updated versions of the Initial Form RM (submitted respectively on 2 June 2015 and on 8 June 2015);[455] and the Final Form RM (submitted on 12 June 2015).[456]

4.1.2.3. Incorrect and/or misleading information in Section 5.3 of the Final Form RM

(249) Section 5.3 of the Form RM explicitly requires a list and a description of "*any innovations or new products or services planned*" in relation to the divestment business.

(250) In response, Section 5.3 of the Final Form RM does not include any mention of iCap as an innovation project or a new product planned. Instead, the Final Form RM states that "*there are no new products or innovations imminently planned with regard to Fluka Business or the Sigma-Aldrich Business*".[457]

(251) As explained in detail in Sections 2.2.2 and 4.1.2.1, the evidence in the Commission's file shows that iCap was an innovation project and that iCap used in combination with volumetric titration and Karl Fischer titration solutions and HPLC solvents constituted new products planned years ahead, developed since 2011 and specifically for applications included in the business to be divested. Several DCF analyses were prepared between 2011 and 2015 referring to iCap. At the time of the submission of the Final Form RM (June 2015), iCap launch was expected to take place at the 2016 Analytica Fair (April/May 2016), namely within less than 12 months.[458] It is clear from the above that iCap was responsive to and, thus, should have been disclosed in Section 5.3 of the Final Form RM. Its non-disclosure combined with the above-mentioned statement gives the impression that there are no new products planned or innovations related to the business to be divested, namely, solvents and inorganics, which is factually incorrect and does not reflect reality.

(252) In this respect, the Commission notes that:

(a) Given the terms of Section 5.3 of the Form RM (requiring the disclosure of "*<u>any</u> innovations or new products or services planned*" <u>related</u> to Sigma-Aldrich's solvents and inorganics business in the EEA)[459] and the absence of

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453 Para. 107 of the Final Form RM [Doc Id: 849].

454 Initial Form RM, para. 61 [Doc Id: 804].

455 First updated version of Initial Form RM, para. 81 [Doc Id: 815] and Second updated version of Initial Form RM, para.107 [Doc Id: 833].

456 Final Form RM, para. 107 [Doc Id: 849].

457 Final Form RM, para. 107 [Doc Id: 849].

458 Email by [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL], both Sigma-Aldrich, re "Analytica Booth" dated 19 April 2015 and Email by [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL], both Sigma-Aldrich, re "Re: Analytica Booth" dated 20 April 2015 [Doc Id: 29-2319].

459 Emphasis added.

waiver requests, the information supplied by Sigma-Aldrich was supposed to be exhaustive;

(b) In the context of the remedy discussions, the Commission explicitly and repeatedly stressed the importance of packaging and R&D and the need to include them in the scope of the remedies.[460] In particular, the Commission (i) informed the Parties that "*any IP and know how [packaging]"* (on 19 May 2015)[461] and all pipeline projects and R&D agreements related to the Divestment Business (on 2 June 2015) had to be part of the remedies;[462] and (ii) suggested to specify in the Commitments that "*To the extent it concerns products included in the Divestment Business, the Parties shall transfer all R&D and pipeline projects and related information to the Purchaser"* (on 5 June 2015); [463]

(c) Sigma-Aldrich did not bring to the Commission's attention the fact that it did not follow the Commission's guidance and intended to exclude iCap from the scope of the Divestment Business. Instead, Sigma-Aldrich's responses and submissions (including Section 5.3 of the Final Form RM) were worded in a way that suggested that it had followed the Commission's guidance.[464]

(253) When taking into account those circumstances and the overall context of Union merger control, the information supplied in Section 5.3 of the Final Form RM is both incorrect and incomplete in a manner that is misleading because it (i) reasonably and objectively suggests a situation other than it is in reality; and (ii) prevented the Commission from understanding the intended scope of the Divestment Business.[465]

(254) In light of the above, the Commission considers that the non-disclosure of iCap together with the statement pursuant to which there are no new products or innovations imminently planned, constitute incorrect and/or misleading information supplied in response to Section 5.3 of the Form RM.

(255) That incorrect and/or misleading information had an impact on the Commission's ability to review the Transaction and thus carry out its obligations under the Merger Regulation. Indeed, regardless of the impact of the incorrect and/or misleading information on the ultimate outcome of the case, the validity of the Commission's assessment of the Transaction is jeopardised when it is based on incorrect and/or misleading information.[466]

(256) In any event, contrary to Sigma-Aldrich's' claim,[467] the Commission further notes that the supply of that incorrect and/or misleading information did have an impact on

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460 Section 4.2.2.3.

461 Comments on Commitments [Doc Id: 787].

462 Email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948] and RFI I-4, questions 12, 13 and 16 [Doc Id: 829].

463 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Commitments was proposed [Doc Ids: 954 and 956] (emphasis added).

464 Section 4.2.2.3 below. For instance, on 19 May 2015, the Commission sent comments to the Parties specifying that for "[p]*ackaging… any IP and know how should be included*" in the Divestment Business ([Doc Id: 787], emphasis added). On 21 May 2015, the Parties submitted a new version of the Draft Commitments (using the same wording as that used in the Final Form RM) assuring the Commission that the revised draft was "*incorporating your comments*" ([Doc Id: 996]). This suggests that the Parties had followed the guidance provided by the Commission on 19 May 2015, which was not the case. See also Case T-430/18 *American Airlines*, 16 December 2020, paras. 174-177.

465 See recital (256). See also Section 4.2.2.3.

466 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 187.

467 Reply to SSO, paras. 336-341.

the outcome of the case as it affected the scope of the Divestment Business offered and accepted in the Clearance Decision. Under the Final Commitments, "*Packaging R&D (including iCap) was excluded*" from the Divestment Business[468] as a result of the language introduced by Sigma-Aldrich in the Final Commitments and the Final Form RM (including the replies to RFI I-3 and RFI I-4) by which it distinguished between "*Product R&D*" and "*Packaging R&D*" and between R&D "*used*" or "*not used*" in the Divestment Business.[469] Sigma-Aldrich did not draw the Commission's attention to those distinctions nor their intended significance for the scope of the Divestment Business; nor did it disclose the existence of iCap. Furthermore, Sigma-Aldrich's responses and submissions (including Section 5.3 of the Final Form RM) were worded in a way that suggested that it had followed the Commission's guidance. Had the Commission known of the existence of iCap – an innovation project specifically developed for applications included in the Divestment Business – it would have required that it be transferred to the Purchaser. When commitments are offered during a Phase I investigation, the Commission accepts asset carve outs from the divestment business only in exceptional circumstances, when the parties can show that this does not affect the viability and competitiveness of the business.[470] Such circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents included in the Divestment Business.[471] The project had the potential to impact Sigma-Aldrich future sales[472] and ranked among the top R&D projects of Sigma-Aldrich for this business.[473] Moreover, participants to the market test of the Initial Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business.[474] For all those reasons, if iCap had been disclosed correctly, the Commission would have required its inclusion in the Divestment Business. Such transfer would mean that the Parties would not have been able to use iCap following transfer of the Divestment Business. In contrast, the licence that Merck (including Sigma-Aldrich) granted to Honeywell is non-exclusive, which means that the Parties are still able to use iCap. This arrangement could not be investigated or market tested in the framework of the merger review since the licence was granted in October 2016 (that is to say 16 months after the Clearance Decision). The Commission was not, therefore, in a position to understand, or verify on the basis of responses from market actors, whether the granting of a non-exclusive licence over iCap was appropriate and sufficient to overcome its serious doubts as to the Transaction's compatibility with the internal market.

(257) In the Reply to the SO and the Reply to the SSO, Merck and Sigma-Aldrich disputed the above on the following grounds.

(258) *First*, they argued that Section 5.3 of the Form RM requires the supply of information on innovations or new products planned "*only to the extent that these are*

468 Reply to SSO, para. 233. See also paras. 151 and 292(f).

469 See Sections 4.1.3.3 and 4.2.2.3.

470 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified.

471 See Section 4.1.2.1.1.

472 See recital (359)(b). See also Section 4.3.2.3.2.

473 See recitals (359)(b) and 478(c).

474 See recital (446).

part of the divestiture package agreed upon by the Parties in the commitments".[475] In this respect, contrary to the Parties' allegation, the Commission notes the following:

(a) The introduction to Section 5 of the Form RM states that "*the following information should be provided as to the current operation* [that is to say pre-divestment] *of the business to be divested and changes already planned for the future*".[476] Moreover, the Form RM expressly indicates when the information required is limited to the business as defined in the commitments. For instance, Section 5.12 of the Form RM refers to the "*business to be divested as set out in the commitments offered*" (emphasis added), which is not the case of Sections 5.3 and 5.4 of the Form RM.[477] iCap, which was an innovation project and, together with the solvents and inorganics it was offered with, constituted new products planned, was clearly related to the "*current operation* [that is to say pre-divestment] *of the business to be divested and changes already planned for the future"* within the meaning of Section 5 of the Form RM (and in particular Section 5.3). Therefore, it should have been disclosed in Section 5.3 of the Final Form RM regardless of whether Sigma-Aldrich intended to exclude it from the scope of the remedy.

(b) The above narrow interpretation of the Form RM information requirements would prevent the Commission from properly assessing the feasibility of the commitments offered and the viability and competitiveness of the assets proposed for divestiture. As stated in the Remedies Notice, "*the parties have to describe in details in particular how the business is currently operated*" in order to enable the Commission *"to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments*".[478] By not disclosing iCap in the Final Form RM (including in particular in Section 5.3), the Parties prevented the Commission from conducting such a comparison;

(c) The Parties' claim suggests that the information supplied in the Final Form RM has to be interpreted on the basis of the Final Commitments, which contradicts the purpose of the Form RM. Indeed, as previously explained,[479] the information requested in the Form RM is critical for the Commission's assessment of the proposed commitments and the sufficiency of the remedy package to remove the serious doubts. It follows that the Final Commitments have to be interpreted in light of the Final Form RM,[480] and not the other way around;

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475 Reply to SSO, paras. 140-142 and 145-146.

476 Final Form RM, Section 5 [Doc Id: 849] (emphasis added).

477 In this respect, the Commission also notes, on a subsidiary basis, that even if the Parties' narrow interpretation of the disclosure requirement of Section 5.3 was correct (*quod non*), it does not explain why Sigma-Aldrich did not disclose iCap in Section 5.12 of the Form RM, which expressly requires to identify the "*any area where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated*" (see Section 4.1.4).

478 Remedies Notice, para. 7. In view of Section 5.3 of the Form RM (requiring information on "*any innovations or new products or services planned*") and Section 5.4 of the Form RM (requiring information on R&D), the notion of "current operations" has to be interpreted as including pipeline products and R&D activities. This is also corroborated by the introduction to Section 5 of the Form RM, which states that "*the following information should be provided as to the current operation of the business to be divested and changes already planned for the future*" (emphasis added).

479 See recitals (212) to (213).

480 See Case T-430/18 *American Airlines*, 16 December 2020, paras. 121-123. See also para. 133 ("*the Form RM aims to ensure clarity of proposed commitments and to avoid 'Trojan Horses' from being included in them*") and para. 144 ("*the applicant cannot successfully argue that the Commission, rather*

(d) In line with the above, Sigma-Aldrich expressly stated in previous submissions that: "*Section 5 of the Form RM requires the provision of relevant information on the pre-divestment operation of the divestment business*".[481]

(259) *Second*, the Parties submitted that, since its inception, iCap "*has always been a cap that was expected to be broadly used with a variety of different products*" and therefore was not specifically (nor solely or predominantly) planned in relation to the business to be divested.[482] Citing a number of witness statements, the Parties indicated that other applications were envisaged for iCap, such as [SIGMA'S R&D AND BUSINESS STRATEGIES].[483] The Parties also quoted the patent application for iCap which refers to *"a closure for a container, in particular for fluids, in particular for liquids*".[484] Those arguments do not change the Commission's conclusion:

(a) The elements in the file do not support the Parties' claim. On the contrary, they reveal that, since the launch of the project in 2011 and until 2015, iCap was specifically developed for applications included in the scope of the Divestment Business.[485] In fact, applications included in the scope of the Divestment Business, namely volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, accounted for more than [SIGMA'S R&D AND BUSINESS STRATEGIES] of the EEA sales of products that could be combined with iCap.[486] The Parties did not provide any contemporaneous evidence showing that at the time of the submission of the Final Form RM, Sigma-Aldrich was planning to launch iCap for any application other than volumetric titration, Karl Fischer titration solutions and HPLC solvents. Nor did the Parties show that Sigma-Aldrich had done any development work to that effect (individually or in collaboration with third parties). The above shows that iCap was at least predominantly related to the Divestment Business and, thus, responsive to Section 5.3 of the Form RM;[487]

(b) In the context of the remedy implementation, Sigma-Aldrich identified a risk that the Purchaser of the Divestment Business may ask for the transfer of iCap and implemented measures to limit this risk.[488] Such action contradicts the claim that iCap was only "*vaguely linked to the Divestment Business*";[489]

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than relying on what the Parties indicated in the Form RM, should have assessed the meaning of the wording [of the commitments] while disregarding what the Parties had indicated in the Form RM").

481 Reply to SO, para. 337 (emphasis added).

482 Reply to SO, paras 104 and 342 [Doc Id: 1187]; Reply to SSO, para. 147.

483 Reply to SO, paras. 104-105. The Parties add that they have also considered extending iCap to [SIGMA'S R&D AND BUSINESS STRATEGIES] (Reply to SO, paras. 108).

484 Reply to SO, para. 109 [Doc Id: 1187].

485 See Section 4.1.2.1.1.

486 Reply to question 4, RFI iCap-2 [Doc Id: 91].

487 On the contrary, the Parties acknowledge that "*iCap was developed first for general volumetric titration solutions*" and that "*iCap's second application was Karl Fischer titrations*" (Reply to SO, para. 105)

488 E.g, in August 2015, Sigma-Aldrich set out mitigating measures to avoid the purchaser of the Divestment Business claiming rights on iCap consisting in "*emphasiz[ing] iCap as innovative packaging instead of a titration feature*" (FMEA Analyse iCap, risks no. 10.1 and 11.1 [*original in German*] [Doc Id: 30-799]). In September 2015, Sigma-Aldrich deemed necessary to include iCap in the Excluded Asset Schedule, its [NAME AND JOB TITLE OF INDIVIDUAL] being "*concerned that if this isn't addressed now, H[oneywell] will come back later and say that it should have included*" (email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS] "Fwd: Updated schedules", 26 September 2015 [Doc Id: 304-691]). In December 2015, [NAME OF INDIVIDUAL] (Sigma-Aldrich) recommended "*not to do anything visible on [iCap] for at least 6 months if a not a year*" because "*Honeywell can ask to add things*

(c) The generic language in iCap's patent claims is insufficient proof that Sigma-Aldrich was specifically developing iCap for other applications. Patent claims are typically drafted very broadly to cover as many future applications as possible. Moreover, the fact that iCap could potentially be used for other applications does not undermine the fact that it was predominantly developed for applications included in the scope of the Divestment Business, namely volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which accounted for more than [SIGMA'S R&D AND BUSINESS STRATEGIES] of the EEA sales of products that could be combined with iCap;[490] In any event, (i) Section 5.3 of the Form RM required the disclosure of "*any innovations or new products or services planned*" related to Sigma-Aldrich's solvents and inorganics business in the EEA[491] and not only the ones solely or predominantly related to it and (ii) "*R&D and pipeline projects"* that do *"not relate solely or predominantly to the Divestment Business*" were also included in the scope of the Final Commitments;[492]

(d) The argument according to which iCap could technically be used for any chemicals is contradicted by contemporaneous evidence. For example, on 25 June 2015, Helbling (a third party assisting Sigma-Aldrich with the development of iCap) identified risks from the use of iCap with Merck's products for which iCap was not originally conceived;[493]

(e) In any event, even assuming that the Parties' statement was not incorrect (*quod non*), it is misleading because, by failing to disclose an innovation project and new products planned from the description of the business to be divested, namely Sigma-Aldrich's solvents and inorganics business in the EEA, it gave the impression that there are no new products planned or innovations related to this business, despite the existence of iCap.

(260) *Third*, Sigma-Aldrich argues that the Final Form RM statement cannot be considered incorrect because the launch of iCap was not "*imminent*", since the single-use iCap for volumetric titration solutions and the multi-use iCap for Karl Fischer titration were actually launched in April 2018, almost three years after the Final Commitments were signed, and the launch of the single-use iCap for Karl Fischer titration is still uncertain.[494] That argument does not change the Commission's conclusion:

(a) The date of *launch* of an innovation project or a new product planned is irrelevant for Section 5.3 of the Form RM. This Section enquires about *all* the innovations and new products planned in relation to Sigma-Aldrich's solvents and inorganics business in the EEA – not just those to be launched "*imminently*";

(b) The *actual* date of launch of iCap is all the more irrelevant as (i) the existence of an infringement must be evaluated at the time when the undertaking engaged

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to the Divestment Business for the next six months" (email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595]).

489 See e.g, Reply to SSO, para. 293.

490 Reply to question 4, RFI iCap-2 [Doc Id: 91].

491 Emphasis added.

492 See Final Commitments signed by the Parties, para. 24 of the Schedule [Doc Id: 938]

493 FMEA Analyse iCap, risks no. 10.1. and 11.1 [*original in German*] [Doc Id: 30-799].

494 Reply to SO, para. 342 [Doc Id: 1187].

in the conduct, (*i.e. ex ante* and not *ex post*)[495] and (ii) the actual launch date may have been delayed as a result of the infringements. At the time of the submission of the Final Form RM, the anticipated launch of the single-use iCap for volumetric titration was expected for May 2016 (i.e. within less than 12 months) and for Karl Fischer titration and HPLC solvents in late 2016 or in 2017.[496] The timeline for the launch of iCap (2015-2016) had been set out years in advance;[497]

(c) In any event, even assuming that the Parties' statement is not incorrect (*quod non*), it is misleading since, by failing to disclose an innovation project and new products planned from the description of the business to be divested, it reasonably suggested to the Commission that there is no new product or innovation related to Sigma-Aldrich's solvents and inorganics business in the EEA, despite the existence of iCap.

(261) *Finally*, the Parties claim that the statement in Section 5.3 of the Final Form RM cannot be considered as misleading since there was no intention to mislead the Commission and the allegedly missing information had no impact on the outcome of the case.[498] This argument does not change the Commission's conclusion:

(a) Information is misleading when, taking into account the specific circumstances of the case and the overall context of the Union merger control,[499] it reasonably and objectively suggests to the Commission that the situation is other than it is in reality. Whether or not the misleading statement was made with an intention to mislead is irrelevant in that respect;[500]

(b) Moreover, as previously explained, causality between not submitting certain information and a potentially different outcome of the Commission procedure "*is not required for assuming a punishable violation of information obligations*".[501] In any event, contrary to the Parties' allegation, the missing information on iCap in Section 5.3 of the Final Form RM had an impact on the Commission's ability to review the Transaction and carry out its obligations under the Merger Regulation, as well as on the outcome of the case.[502]

4.1.2.4. Conclusion

(262) In view of the above, the Commission concludes that the non-disclosure of iCap, together with the statement pursuant to which there are no new products or innovations imminently planned constitute incorrect and/or misleading information supplied in Section 5.3 of the Final Form RM.

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495 Case C-457/10, *AstraZeneca*, 6 December 2012, para. 110.

496 See Section 2.2.2.

497 See Section 2.2.

498 Reply to SO, para. 340 [Doc Id: 1187].

499 Cases T-145/06 *Omya*, 4 February 2009, para. 33; and T-151/05 – *NVV and Others*, 7 May 2009, para. 184.

500 While the intention or negligence of Sigma-Aldrich is relevant for the purposes of determining whether sanctions can be imposed pursuant to Article 14(1) of the Merger Regulation (see Section 3.2.2), it is irrelevant for the objective assessment of whether the information supplied is incorrect and/or misleading (see Section 3.2.1).

501 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 111 [*original in German*]. See also Section 3.1.

502 See recital (256).

4.1.3. R&D functions in the business to be divested

4.1.3.1. The disclosure requirement of questions 12, 13, and 16 of RFI I-4 as incorporated into Section 5.4 of the Form RM

(263) Section 5.4 of the Form RM asks about the "*level on which the essential functions of the business to be divested are operated if they are not operated at the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relation with suppliers, IT systems, etc.*", including a description of "*the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function*".[503] In response to this Section, parties should explain if R&D activities or functions of the business to be divested are not operated at the level of the business to be divested, but rather at group level for instance, and, if so, provide a description of the resources (including personnel) involved in these R&D activities or functions. This Section makes no distinction between fully-dedicated personnel and shared functions. Indeed, functions such as R&D, marketing and sales or IT are typically shared.

(264) Following comments of market test respondents on R&D,[504] the Commission asked the Parties to specifically elaborate on the R&D activities or functions related to Sigma-Aldrich's solvents and inorganics EEA business to clarify certain issues and to request additional information.[505] RFI I-4 included the following questions:[506]

(a) *Question 12*: Does Sigma have any R&D agreements with third parties related to solvents and inorganics in the EEA?

(b) *Question 13*: Please describe the personnel responsible for R&D of solvents and inorganics and indicate in which plants they were working.

(c) *Question 16*: Could you please provide a list of the personnel working in Buchs for solvents and inorganics, together with their functions? Is there any personnel specialised in R&D for solvents and inorganics or the Fluka branded products in general?[507]

4.1.3.1.1. Sigma-Aldrich R&D agreement with Metrohm was related to solvents and inorganics in the EEA

(265) In 2011, Sigma-Aldrich concluded an agreement with Metrohm to "*collaborate on the mutual commercialization of a new analytical system, which combines an analytical instrument with chemical consumables and reagents in a new innovative concept and provides the users of the system a higher convenience, higher safety and quality in running their analysis*".[508]

(266) As explained in Section 4.1.2.1.1, still at the time of the submission of the Final Form RM, iCap was developed together with Metrohm for volumetric titration and Karl Fischer solutions which are both part of the Divestment Business. In fact, the R&D agreement with Metrohm was among Sigma-Aldrich's most important

503 Final Form RM, Section 5.4 (emphasis added) [Doc Id: 849].

504 See recital (31).

505 Remedies Notice, para. 7.

506 In relation to IP rights, question 11 of RFI I-4 was also "*As to Karl Fischer titration solutions, please confirm that IP rights includes all IP rights, know-how and related pipeline products on the second generation of Karl Fischer solutions and make it explicit in the Commitments*" [Doc Id: 829].

507 See questions 12, 13 and 16 of RFI I-4 [Doc Id: 829].

508 Mutual Agreement between Sigma-Aldrich and Metrohm dated 1 September 2011 [Doc Id: 60].

collaboration agreements for the solvents and inorganics business.[509] Focusing on innovation in the EU, iCap (titration) developed through the R&D agreement with Metrohm was the R&D agreement with the highest expected incremental sales according to an "*Innovation Pipeline Planner*" document dated October 2015.[510]

(267) In view of the above, Sigma-Aldrich's agreement with Metrohm about iCap constituted an R&D agreement of Sigma-Aldrich related to solvents and inorganics in the EEA and, thus, was responsive to and should have been included in response to question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

4.1.3.1.2. iCap was a project related to the business to be divested and it was developed by R&D personnel located in Buchs

(268) The Divestment Business included the manufacturing plant in Seelze (Germany), with all its personnel,[511] while solvents and inorganics produced in Buchs (Switzerland) and Steinheim (Germany) were also included. The Parties committed to transfer all relevant assets, equipment and personnel (including shared functions[512] such as IT or R&D) from sites other than Seelze if necessary and at the option of the Purchaser.[513]

(269) iCap, which was relevant to the Divestment Business, was developed in Sigma-Aldrich's plant in Buchs. As explained above, iCap constituted an R&D project related to solvents and inorganics.[514]

(270) [SIGMA'S R&D DETAILS] Sigma-Aldrich employees were working on iCap and were thus responsible (among other things) for R&D on solvents and inorganics. [SIGMA'S R&D DETAILS] out of [SIGMA'S R&D DETAILS] employees were based in Buchs.[515]

(271) In view of the above, Sigma-Aldrich's (shared) R&D functions concerning solvents and inorganics, including in particular the R&D personnel working on iCap, should have been described in response to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM). Employees working on iCap in Buchs constituted "*personnel responsible for R&D of solvents and inorganics*" within the meaning of question 13 of RFI I-4. The vast majority of these employees also qualified as "*working in Buchs for solvents and inorganics*", within the meaning of question 16 of RFI I-4.

4.1.3.1.3. Conclusion

(272) In view of the above, Sigma-Aldrich's (shared) R&D functions concerning solvents and inorganics, including the personnel working on iCap (in particular from Buchs), as well as Sigma-Aldrich's agreement with Metrohm regarding iCap, were responsive to and, thus, should have been disclosed in response to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

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509 See Section 2.2.2.

510 Spreadsheet "Innovation Pipeline Planner R&D – Innovation EU (WIP only)", dated 29 October 2015, tab "Overview" [Doc Id: 29-2985].

511 Para. 26 (a), Schedule, Final Commitments [Doc Id: 841].

512 Horizontal functions that are shared across different businesses.

513 Paras. 26 (d) and 15, Schedule, Final Commitments [Doc Id: 841].

514 See Section 2.2 and Section 4.1.2.1.1.

515 Except for [NAME AND JOB TITLE OF INDIVIDUAL] who was working in the Sigma-Aldrich plant in St Louis (United States), all other Sigma-Aldrich's employees working on iCap project, namely [NAMES AND JOB TITLES OF INDIVIDUALS], were located in Buchs (Switzerland) (Reply to RFI ICap 2 [Doc Ids: 73 and 85]).

4.1.3.2. The content of the replies to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM)

(273) Section 5.4 of the Final Form RM in relation to R&D, which includes the replies to questions 12, 13 and 16 of RFI I-4, reads:

"119. Research and development does not play an important role in this industry with the ratio of R&D expenditure to sales revenues in the EEA for solvents and inorganics being less than [SIGMA'S R&D DETAILS]. In particular, there has been no significant development of solvents or inorganics by the Parties in recent years. In any event, the Purchaser will likely already have the necessary R&D capabilities.

120. [Q12 RFI I-4] Sigma does not have any formal R&D agreements with respect to its current solvents and inorganics products in the EEA.

121. [Q13 RFI I-4] Sigma does not have any dedicated R&D resources assigned to any solvents and inorganics except in a limited QC [quality control] *testing role for a limited number of products, and within that function, the QC* [quality control] *testing R&D function accounts for less than half the workload.*

122. [Q16 RFI I-4] No specific employees within the Supply Chain in Buchs are primarily assigned to solvents and inorganics, and there are no specialized R&D personnel for solvents, inorganics, or Fluka-branded products at Buchs..."[516]

(274) For completeness, the Commission notes that the parties did not request any waivers relating to those parts of the Final Form RM.

4.1.3.3. Incorrect and/or misleading information in reply to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM)

4.1.3.3.1. R&D Agreements

(275) Under question 12 of RFI I-4, Sigma-Aldrich was required to identify "*<u>any</u> R&D agreements with third parties related to solvents and inorganics in the EEA*".[517]

(276) In response, Sigma-Aldrich's R&D agreement with Metrohm on iCap was not disclosed. Instead, the reply to question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) states that "*Sigma does not have any formal R&D agreements with respect to its current solvents and inorganics products in the EEA*".[518]

(277) As explained in detail in Section 4.1.3.1.1, the evidence in the file shows that Sigma-Aldrich did have an R&D agreement with a third party (Metrohm), signed on 1 September 2011, pertaining to the development of iCap, which related to Sigma-Aldrich's solvents and inorganics in the EEA at the time of the submission of the Final Form RM. It is clear from the above that the R&D agreement with Metrohm on iCap was responsive to and, thus, should have been disclosed in the reply to question 12 of RFI I-4. Its non-disclosure combined with the statement that there is no formal R&D agreement "*with respect to [Sigma-Aldrich's] current solvents and inorganics products in the EEA*" gives the impression that there is no R&D agreement related to the business to be divested, which is inaccurate and does not give a true picture of reality.

(278) In this respect, the Commission notes that:

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516 Final Form RM, paras. 119-122 [Doc Id: 849].

517 See question 12 of RFI I-4 [Doc Id: 829].

518 Final Form RM, para. 120 [Doc Id: 849], emphasis added.

(a) Given the terms of question 12 of RFI I-4 (requiring the disclosure of "*<u>any</u> R&D agreement with third party related to solvents and inorganics in the EEA*")[519] and the absence of waiver requests, the information supplied by Sigma-Aldrich was supposed to be exhaustive;

(b) In the context of the remedy discussions, the Commission explicitly and repeatedly stressed the importance of packaging and R&D and the need to include them in the scope of the remedies.[520] In fact, RFI I-4 was sent to the Parties on 2 June 2015, as a follow-up of a meeting held on the same day during which the Commission had informed the Parties orally that all pipeline projects and R&D agreements related to the Divestment Business had to be part of the remedies (which is not disputed by Sigma-Aldrich).[521] A few days later, on 5 June 2015, the Commission suggested to specify in the Commitments that "*To the extent any such agreement exist and concern the products included in the Divestment Business, the Parties will transfer to the Purchaser all R&D agreements with third parties*".[522] Prior to that, on 19 May 2015, the Commission had also informed the Parties orally and in written that for "[p]*ackaging* […] *any IP and know how should be included"* in the Divestment Business;[523]

(c) Sigma-Aldrich did not bring to the Commission's attention the fact that it did not follow the above guidance and intended to exclude iCap from the scope of the Divestment Business. Instead, Sigma-Aldrich's responses and submissions (including reply to question 12 of RFI I-4) were worded in a way suggesting that it had followed the Commission's guidance.[524]

For instance, when submitting the reply to question 12 of RFI I-4 stating that "*Sigma does not have any formal R&D agreements with respect to its <u>current</u> solvents and inorganics <u>products</u> in the EEA*" (emphasis added), Sigma-Aldrich did not bring to the Commission's attention that the above statement referred only to existing and commercialised SKUs and excluded "packaging R&D" which would be commercialised as a new SKU.[525]

However, such distinctions between "*Product R&D*" and "*Packaging R&D*" and between R&D "*used*" or "*not used*" in the Divestment Business are neither supported by the phrasing of question 12 or RFI I-4 nor by the title of Section 5.4 of the Form RM. The Commission never made such distinctions at the time of the Clearance Decision – and had no reasons to do so in light of the results of the market investigation and the market test, which were communicated to the Parties during the Phase I investigation.

If Sigma-Aldrich intended to make the above distinctions to exclude the R&D agreement with Metrohm from the Divestment Business, it could and should have informed the Commission accordingly. Since Sigma-Aldrich failed to do

519 Emphasis added.

520 See Section 4.2.2.3.

521 See email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948] and RFI I-4, questions 12, 13 and 16 [Doc Id: 829].

522 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Commitments was proposed [Doc Ids: 954 and 956].

523 Comments on Commitments [Doc Id: 787].

524 See Section 4.2.2.3.

525 Reply to SO, para. 349 [Doc Id: 1187]. See also Reply to SSO, para. 163.

so, it is not entitled to rely on these distinctions to support its narrow interpretation of the statements made in response to question 12 of RFI I-4.[526]

(279) When taking into account those circumstances and the overall context of Union merger control, the information supplied in response to question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) was both incorrect and incomplete in a manner that was misleading because it (i) reasonably and objectively suggested that there was no R&D agreement related to the Divestment Business, and (ii) prevented the Commission from understanding the intended scope of the Divestment Business.

(280) In view of the foregoing, the Commission, considers that the non-disclosure of Sigma-Aldrich's R&D agreement with Metrohm on iCap, in combination with the statement that there are no formal R&D agreements related to Sigma-Aldrich's "*current solvents and inorganics products in the EEA*", constitute incorrect and/or misleading information supplied in response to question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

(281) The above incorrect and/or misleading information had an impact on the Commission's ability to review the Transaction and thus carry out its obligations under the Merger Regulation. Indeed, regardless of the impact of the incorrect and/or misleading information on the ultimate outcome of the case, the validity of the Commission's assessment of the Transaction is jeopardised when it is based on incorrect and/or misleading information.[527]

(282) In any event, contrary to Sigma-Aldrich's' claim,[528] the Commission further notes that the supply of that incorrect and/or misleading information did have an impact on the outcome of the case as it affected the scope of the Divestment Business offered and accepted in the Clearance Decision. Under the Final Commitments, "*Packaging R&D (including iCap) was excluded*" from the Divestment Business[529] as a result of the language introduced by Sigma-Aldrich in the Final Commitments and the Final Form RM (including the replies to RFI I-3 and RFI I-4) by which it distinguished between "*Product R&D*" and "*Packaging R&D*" and between R&D "*used*" or "*not used*" in the Divestment Business.[530] Sigma-Aldrich did not draw the Commission's attention to those distinctions nor their intended significance for the scope of the Divestment Business; nor did it disclose the existence of iCap. Furthermore, Sigma-Aldrich's responses and submissions (including the reply to question 12 of RFI I-4 as incorporated in Section 5.4 of the Final Form RM) were worded in a way that suggested that it had followed the Commission's guidance. Had the Commission known of the existence of an R&D agreement related to the Divestment Business, such as the R&D agreement with Metrohm on iCap, it would have required its inclusion in the scope of the Divestment Business. When commitments are offered during a Phase I investigation, the Commission accepts asset carve outs from the divestment business only in exceptional circumstances, when the parties can show that this does not affect the viability and competitiveness of the business.[531] Such

526 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

527 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 187.

528 Reply to SSO, paras. 336-341.

529 Reply to SSO, para. 233. See also paras. 151 and 292(f).

530 See Sections 4.1.3.3 and 4.2.2.3.

531 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified.

circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, under the R&D agreement with Metrohm, iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents included in the Divestment Business.[532] The project had the potential to impact Sigma-Aldrich future sales[533] and ranked among the top R&D projects of Sigma-Aldrich for this business.[534] Moreover, participants to the market test of the Initial Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business.[535] For all those reasons, if the R&D agreement with Metrohm concerning iCap had been disclosed correctly, the Commission would have required its inclusion in the Divestment Business. This could mean that the Parties would no longer be able to use iCap or benefit from the R&D agreement with Metrohm. In contrast, the Parties retained the R&D agreement with Metrohm and granted Honeywell a licence that is non-exclusive, which means that the Parties are still able to use iCap. This arrangement could not be investigated or market tested in the framework of the merger review since the licence was granted in October 2016 (that is to say 16 months after the Clearance Decision). The Commission was not, therefore, in a position to understand, or verify on the basis of responses from market actors, whether the granting of a non-exclusive licence over iCap was appropriate and sufficient to overcome its serious doubts as to the Transaction's compatibility with the internal market.

(283) In the Reply to the SO and the Reply to the SSO, Merck and Sigma-Aldrich disputed the above conclusion on the following grounds.

(284) *First*, the Parties argue that the scope of question 12 of RFI I-4 should be interpreted narrowly in accordance with the information requirements of Section 5.4 of the Form RM, which according to them did not require the disclosure of iCap.[536] For the reasons set out below, this claim does not change the Commission's conclusion:

(a) In question 12 of RFI I-4, the Commission specifically asked Sigma-Aldrich to disclose "*any R&D agreements with third parties related to solvents and inorganics in the EEA*" (emphasis added). The claim according to which the scope of this question should be interpreted restrictively in light of the disclosure requirements of the Form RM is not consistent with the fact that in the context of remedy discussions, the Commission "*can adapt the precise requirements to the information necessary in the individual case at hand*".[537] In this context, it is the scope of the question in RFI I-4 that determines the answer required rather than the disclosure requirements of Section 5.4 of the Form RM. The supply of the incorrect and/or misleading information in response to RFI I-4 and to the Form RM constitute distinct infringements based on different legal basis;[538]

(b) In any event, R&D activities on iCap fall within the scope of the disclosure requirements of Section 5.4 of the Form RM, which (i) requires not only information on the business to be divested as set out in the Final Commitments but also information on "*the current operation* [that is to say pre-divestment] *of*

532 See Section 4.1.2.1.1.
533 See recital (359)(b). See also Section 4.3.2.3.2.
534 See recitals (359)(b) and 478(c).
535 See recital (446).
536 Reply to SSO, para. 190.
537 Remedies Notice, para. 7.
538 See Section 4.4.

the business to be divested and changes already planned for the future",[539] and (ii) expressly "*includ[es] such functions as research and development*".[540]

(285) *Second*, the Parties argued that the statement "*Sigma does not have any formal R&D agreements with respect to its current solvents and inorganics products in the EEA*" is factually correct "*given that Sigma-Aldrich at the time of drafting the Form RM focused on existing and commercialised SKUs and R&D agreements solely or predominantly related to the Divestment Business*".[541] This argument does not change the Commission's conclusion:

(a) It is factually incorrect to state that the R&D agreement with Metrohm on iCap was not "*solely or predominantly*" related to the Divestment Business (and, thus, did not have to be disclosed). As explained in detail above,[542] a large body of contemporaneous evidence confirms that, since its start in 2011 and until 2015, iCap was developed specifically for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which (i) were all part of the Divestment Business and (ii) accounted for more than 97% of the EEA sales of products that could be combined with iCap;

(b) Even assuming that the R&D agreement with Metrohm was not *"solely or predominantly*" related to the Divestment Business and that Sigma-Aldrich's above statement is factually correct *(quod non*), it is at the very least misleading given that it was provided in response to question 12 of RFI I-4 requiring Sigma-Aldrich to disclose *"any R&D agreements with third parties related to solvents and inorganics in the EEA*" (emphasis added). If Sigma-Aldrich intended to give a different meaning to the notion of *"R&D agreement* […] *related to solvents and inorganics in the EEA*", it could and should have informed the Commission accordingly by clearly indicated it in its response to RFI I-4 (as incorporated in Section 5.4 of the Form RM), which it did not. Similarly, there is nothing in the Parties' Final Form RM or the reply to RFI I-4 which demonstrates that Sigma-Aldrich was "*focusing on existing and commercialised SKUs and R&D agreements solely and predominantly related to the Divestment Business*". Since Sigma-Aldrich failed to bring this distinction to the attention of the Commission, in breach of the requirements under RFI I-4, it is not entitled to rely on it to support its interpretation of the response given to question 12 of RFI I-4.[543]

4.1.3.3.2. R&D Personnel

(286) Section 5.4 of the Form RM asks about the "*level on which the essential functions of the business to be divested are operated if they are not operated at the level of the business to be divested itself, including such functions as research and development*, […]", including a description of "*the role performed by those other levels, the*

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539 Final Form RM, Section 5 [Doc Id: 849] (emphasis added). See recitals (258)(a) to (258)(d). As previously explained, the Final Commitments have to be interpreted in light of the Final Form RM, and not the other way around (see also Remedies Notice, para. 7 and Case T-430/18 *American Airlines*, 16 December 2020, paras. 121-123).

540 See Section 4.1.3.3.2.

541 Reply to SO, para. 349 [Doc Id: 1187]. See also Reply to SSO, para. 163.

542 See Section 4.1.2.1.1.

543 See by analogy Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function".[544]

(287) RFI I-4 required Sigma-Aldrich to "*describe the personnel responsible for R&D of solvents and inorganics and indicate in which plants they were working*" (question 13), to "*provide a list of the personnel working in Buchs for solvents and inorganics, together with their functions*" (question 16), and to specify whether there was "*any personnel specialized in R&D for solvents and inorganics or the Fluka branded products in general*" (question 16).[545]

(288) In response, Sigma-Aldrich's R&D personnel working on iCap (in Buchs or elsewhere) was not disclosed in reply to questions 13 and 16 of RFI I-4 or in Section 5.4 of the Final Form RM. Instead, Section 5.4 of the Final Form RM claims that R&D "*does not play an important role in this industry*", with limited R&D expenditure and "*no significant development of solvents or inorganics by the Parties in recent years*". The replies to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) also stated that "*[Q13 RFI I-4] Sigma does not have any dedicated R&D resources assigned to any solvents and inorganics except in a limited QC [Quality Control] testing role for a limited number of products, and within that function, the QC [Quality Control] testing R&D function accounts for less than half the workload"* and that *"[Q16 RFI I-4] no specific employees within the Supply Chain in Buchs are primarily assigned to solvents and inorganics, and there are no specialized R&D personnel for solvents, inorganics, or Fluka-branded products at Buchs*" (emphasis added).[546]

(289) As detailed in Section 4.1.3.1.2, the evidence in the file shows that personnel were working on the iCap project and thus, on R&D for solvents and inorganics.[547] As explained above,[548] [SIGMA'S R&D DETAILS] employees were working directly on the iCap project,[549] whose activities were in any event not limited to quality control (contrary to the Parties' claim). In fact, 6 of those employees were specialised in R&D and business development.[550] In addition, [SIGMA'S R&D DETAILS] out of the [SIGMA'S R&D DETAILS] persons working on iCap were located at the Sigma-Aldrich site in Buchs.[551] Out of the [SIGMA'S R&D DETAILS] employees based in Buchs and working on iCap, [SIGMA'S R&D DETAILS] were specialised in R&D and business development: [NAMES AND JOB TITLES OF INDIVIDUALS].[552] It is clear from the above that the detail of the R&D personnel working on iCap was responsive to and, thus, should have been disclosed in reply to question 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM). The non-disclosure of any details on the employees working on iCap, combined with the above statements, suggests that there was no personnel (not even on a part-time basis) involved in R&D

544 Final Form RM, Section 5.4 (emphasis added) [Doc Id: 849].

545 See questions 12, 13 and 16 of RFI I-4 [Doc Id: 829].

546 Final Form RM, para. 121 [Doc Id: 849].

547 See recital. (273).

548 See recital (270).

549 Other individuals, including the reporting lines, were also involved and/or aware of the iCap project (See email from Merck and Sigma-Aldrich's external lawyers to the Commission "M.7435 Merck / Sigma Aldrich - iCap - Request for Information 2", dated 23 March 2016 [Doc Id: 73]).

550 In addition, two persons were specialised in packaging and three persons in quality control and assurance.

551 Only [NAME AND JOB TITLE OF INDIVIDUAL] was working in Sigma-Aldrich site located in Saint Louis (US).

552 Reply to RFI iCap-2 [Doc Ids: 73, 85 and 91] The other employees were specialised in filling/packaging ([NAMES AND JOB TITLES OF INDIVIDUALS]).

activities for solvents and inorganics at any Sigma-Aldrich plant including at Buchs, which does not give a true picture of reality and is incorrect and/or at the very least, misleading.

(290) In this respect, the Commission notes that:

(a) Even assuming that the Parties' statement according to which there were no "*dedicated*" R&D employees for solvents and inorganics was factually correct (*quod non*),[553] the disclosure requirements of Section 5.4 of the Form RM and questions 13 and 16 of RFI I-4 are not limited to R&D "*dedicated*" or "*primarily assigned*" to the business to be divested. For instance, question 16 required Sigma-Aldrich to specify whether there was "*<u>any</u> personnel specialized in R&D for solvents and inorganics*",[554] while question 13 required the description "*the personnel responsible for R&D of solvents and inorganics"* in general terms. Similarly, Section 5.4 of the Form RM requires a description of the resources (including personnel) involved in the R&D functions that are not operated at the level of the business to be divested, without making a distinction between fully-dedicated personnel and shared functions. In fact, functions such as R&D are typically shared. Therefore, the absence of waiver requests, the information supplied by Sigma-Aldrich was supposed to be cover both fully-dedicated and shared R&D personnel;

(b) As previously explained,[555] in the context of the remedy discussions, the Commission stressed several times the importance of packaging and R&D and the need to include them in the scope of the remedies. In particular, RFI I-4 was sent to the Parties on 2 June 2015, as a follow-up of a meeting held on the same day during which the Commission had informed them that all pipeline projects and R&D agreements related to Sigma-Aldrich's solvents and inorganics business in the EEA had to be included in the scope of the Final Commitments (which is not disputed by the Parties);[556]

(c) Sigma-Aldrich did not bring to the Commission's attention the fact that it did not follow the above guidance and intended to exclude iCap from the scope of the Divestment Business. On the contrary, the language used in Sigma-Aldrich's responses and submissions suggested that the Commission's guidance had been addressed.[557]

For instance, Sigma-Aldrich did not bring to the Commission's attention the fact that by referring to product R&D, it intended to exclude packaging R&D.[558] The replies to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) never made clearly the distinction between product R&D and packaging R&D regarding solvents and inorganics and never specified that they would only be focusing on the former. Nowhere in the Final Form RM is the term "*product R&D*" explained nor is it indicated that

553 Reply to SSO, paras. 162-164.

554 Emphasis added.

555 See recital (278). See also Section 4.2.2.3.

556 See email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948] and RFI I-4, questions 12, 13 and 16 [Doc Id: 829].

557 See recital (278). See also Section 4.2.2.3.

558 Reply to SO, paras. 347-348 [Doc Id: 1187] and Reply to SSO, para. 171 arguing that Sigma-Aldrich "*explicitly and consistently referred only to product R&D in all its* submissions" (while iCap concerned R&D for solvents and inorganics packaging), which could not have misled the Commission, who "*clearly realised what was Sigma's understanding of the question*".

packaging R&D would be excluded. In this context, the Parties cannot credibly argue that, by agreeing to the wording of the Final Commitments, the Commission "*signed off on the exclusion of packaging R&D*".[559] The fact that the Commission did not further question Sigma-Aldrich's reference to "*product R&D*" does not mean that the Commission should have concluded that this language was material to the interpretation of the scope of the Final Commitments. In that regard, the Court recently recalled that the Commission's obligation to 'display the utmost diligence in performing its supervisory duties in the field of concentrations' "*is not intended to relieve the [concerned] undertakings of their obligation to provide complete and accurate information in the Form RM*".[560]

In the circumstances of this case, where the Commission has explicitly and repeatedly stressed the importance of R&D and packaging for the Divestment Business, Sigma-Aldrich's implicit distinction between "*product R&D*" and "*packaging R&D*" is far from obvious. This is notably illustrated by (i) contemporaneous internal documents showing that Sigma-Aldrich referred to iCap as a "*product*";[561] and (ii) Sigma-Aldrich included iCap in the Excluded Assets Schedule, which would not have been necessary if the above distinction was obvious.

In any event, if Sigma-Aldrich intended to distinguish between "*product R&D*" and "*packaging R&D*", it could and should have informed the Commission accordingly by clearly indicated it in its response to RFI I-4 or in Section 5.4 of the Final Form RM, which it did not. Since Sigma-Aldrich failed to bring this distinction to the attention of the Commission, it is not entitled to rely on it to support its narrow interpretation of the statements made in response to RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).[562]

(291) When taking into account those circumstances and the overall context of Union merger control, the information supplied in response to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) was both incorrect and incomplete in a manner that is misleading because it (i) reasonably and objectively suggested that there were no personnel (not even on a part-time basis) involved in R&D for solvents and inorganics, and (ii) prevented the Commission from understanding the intended scope of the Divestment Business.

(292) In view of the foregoing, the Commission considers that the non-disclosure of any details on the employees working on iCap (in Buchs or elsewhere), in combination with the statements on R&D resources and R&D personnel, constitute incorrect and/or misleading information in response to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

(293) The above incorrect and/or misleading information had an impact on the Commission's ability to review the Transaction and thus carry out its obligations under the Merger Regulation. Indeed, regardless of the impact of the incorrect and/or misleading information on the ultimate outcome of the case, the validity of the

559 Reply to SSO, para. 171.

560 Case T-430/18 *American Airlines*, 16 December 2020, paras. 191-192.

561 See notably "Analytical Standards & Reagents, Overview Innovation Pipe Mid Term Strategy", 24 February 2014, slide 9, see also slides14-17 [Doc Id: 29-1488]; and Science & Technology Committee Meeting, 29 April 2014, slide 10 [Doc Id: 26-27].

562 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

Commission's assessment of the Transaction is jeopardised when it is based on incorrect and/or misleading information.[563]

(294) In any event, contrary to Sigma-Aldrich's' claim,[564] the Commission further notes that the supply of that incorrect and/or misleading information did have an impact on the outcome of the case as it affected the scope of the Divestment Business offered and accepted in the Clearance Decision. Under the Final Commitments, "*Packaging R&D (including iCap) was excluded*" from the Divestment Business[565] as a result of the language introduced by Sigma-Aldrich in the Final Commitments and the Final Form RM (including the replies to RFI I-3 and RFI I-4) by which it distinguished between "*Product R&D*" and "*Packaging R&D*" and between R&D "*used*" or "*not used*" in the Divestment Business.[566] Sigma-Aldrich did not draw the Commission's attention to those distinctions nor their intended significance for the scope of the Divestment Business; nor did it disclose the existence of iCap. Furthermore, Sigma-Aldrich's responses and submissions (including the reply to questions 13 and 16 of RFI I-4 as incorporated in Section 5.4 of the Final Form RM) were worded in a way that suggested that it had followed the Commission's guidance. Had the Commission known of the existence of a projects related to solvents and inorganics (such as iCap) and involving R&D personnel, it would have required its transfer to the Purchaser (including potentially the R&D personnel). When commitments are offered in a Phase I investigation, the Commission accepts asset carve outs from the divestment business only in exceptional circumstances, when the parties can show that this does not affect the viability and competitiveness of the business.[567] Such circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, several R&D employees were working on a project (iCap), which was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents included in the Divestment Business[568] and ranked among the top R&D projects of Sigma-Aldrich for this business.[569] The activities of the above R&D personnel on iCap had the potential to impact Sigma-Aldrich future sales.[570] Moreover, participants to the market test of the Initial Commitments stressed the importance of including R&D activities in the scope of the remedy.[571] For all those reasons, if iCap had been disclosed correctly, the Commission would have required its inclusion in the Divestment Business. This could mean that the Parties would no longer be able to use iCap and that the R&D personnel working on this project might have been transferred to the Purchaser as part of the Divestment Business. On the contrary, the Parties retained the above R&D personnel and granted Honeywell a licence that is non-exclusive, which means that the Parties are still able to use iCap. This arrangement could not be investigated or market tested in the framework of the merger review since the licence was granted in October 2016 (that is to say 16 months after the Clearance Decision). The Commission was not, therefore, in a position to understand, or verify on the basis of responses from market actors,

563 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 187.

564 Reply to SSO, paras. 336-341.

565 Reply to SSO, para. 233. See also paras. 151 and 292(f).

566 See Sections 4.1.3.3 and 4.2.2.3.

567 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified.

568 See Section 4.1.2.1.1.

569 See recital (359)(b).

570 See recital (359)(b). See also Section 4.3.2.3.2.

571 See recital (446).

whether the granting of a non-exclusive licence over iCap was appropriate and sufficient to overcome its serious doubts as to the Transaction's compatibility with the internal market.

(295) In the Reply to the SO and the Reply to the SSO, Merck and Sigma-Aldrich disputed the above on the following grounds.

(296) *First*, the Parties claimed that Section 5.4 of the Form RM did not require the disclosure of iCap since (i) R&D was not an *"essential function […]*" of the Divestment Business; (ii) iCap was *"not operated only at corporate group level*"; and (iii) Section 5.4 does not require the Parties to provide information on all projects associated with the R&D functions of the Divestment Business but just the *"level on which* [these] *functions are operated*".[572] Similarly, they claim that the scope of questions 13 and 16 of RFI I-4 should be interpreted narrowly in line with the disclosure requirements of Section 5.4 of the Form RM, which does not require (i) information on assets that are not included in the scope of the commitments and (ii) the disclosure of all R&D personnel.[573] These arguments do not change the Commission's conclusion:

(a) The claim that the scope of questions 13 and 16 of RFI I-4 should be interpreted restrictively in light of the disclosure requirements of the Form RM is contradicted by the fact that the Remedies Notice expressly provides that the Commission "*can adapt the precise requirements to the information necessary in the individual case at hand*".[574] In this context, it is the scope of the questions in RFI I-4 that determines the answer required rather than the disclosure requirements of Section 5.4 of the Form RM. Moreover and in any event, the supply of the incorrect and/or misleading information in response to RFI I-4 and to Section 5.4 of the Form RM constitute distinct infringements based on different legal bases;[575]

(b) In any event, R&D activities (including the personnel involved in R&D) fall within the scope of the disclosure requirements of Section 5.4 of the Form RM, which (i) requires not only information on the business to be divested as set out in the Final Commitments but rather information on "*the <u>current operation</u>* [i.e. pre-divestment] *of the business to be divested and changes already planned for the future*",[576] and (ii) expressly "*includ[es] such functions as <u>research and development</u>*" and requires a description of the resources involved in these R&D functions, including "*personnel*". Moreover, contemporaneous internal documents of Sigma-Aldrich, as well as the market test confirmed that R&D was *essential* for the business to be divested, with, for example, several market participants stressing the importance of pipeline projects and R&D agreements and the need to include them in the scope of the Divestment Business, which was communicated to the Parties on 2 June 2015;[577]

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572 Reply to SSO, paras. 155-162.

573 Reply to SSO, para. 190.

574 Remedies Notice, para. 7.

575 See Section 4.4.

576 Final Form RM, Section 5 [Doc Id: 849] (emphasis added). See recitals (258)(a) to (258)(d). As previously explained, the Final Commitments have to be interpreted in light of the Final Form RM, and not the other way around (see also Remedies Notice, para. 7 and Case T-430/18 *American Airlines*, 16 December 2020, paras. 121-123).

577 See Section 2.1.2.2. On 2 June 2015, the Commission held a meeting with the Parties to communicate the results of the market test (see email from Merck's legal counsel to the Commission case team including a

(c) Nothing in the language of Section 5.4 of the Form RM supports the claim that Sigma-Aldrich was exclusively required to provide information on the functions of the Divestment Business which are "*operated only at corporate group level*". The use of the plural in the second sentence of Section 5.4 of the Form RM, stating "*those other levels*", shows that it does not refer to the "*corporate*" level only. Moreover, the information on the "*essential functions*" of the divested business is by nature crucial for the assessment of the commitments. In particular, if these essential functions are not operated at the level of the divested business and not included in the scope of the commitments, it could put at risk the viability and competitiveness of the remedy. Therefore, the narrow interpretation suggested by Sigma-Aldrich, pursuant to which there is no obligation to provide information on the essential functions of the divested business as long as they are not operated at "*corporate*" level, would prevent the Commission from properly assessing the feasibility of the commitments and the viability and competitiveness of the assets proposed for divestiture.

(297) *Second*, Merck and Sigma-Aldrich argued that the statements in reply to questions 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) cannot be considered as misleading since there was no intention to mislead the Commission and the allegedly missing information had no impact on the outcome of the case.[578] However, information is misleading when, taking into account the specific circumstances of the case and the overall context of Union merger control,[579] it reasonably suggests to the Commission that the situation is other than it is in reality. Whether or not the misleading statement was made with an intention to mislead is irrelevant in that respect.[580] Moreover, as previously explained, causality between not submitting certain information and a potentially different outcome of the Commission procedure "*is not required for assuming a punishable violation of information obligations*".[581] In any event, contrary to the Parties' allegation, the missing information on iCap in replies to questions 13 and 16 of RFI I-4 as integrated into Section 5.4 of the Final Form RM had an impact on the Commission's ability to review the Transaction and carry out its obligations under the Merger Regulation, as well as on the outcome of the case.[582]

4.1.3.4. Conclusion

(298) In view of the above, the Commission concludes that the non-disclosure of the R&D agreement with Metrohm or the existence of R&D personnel for solvents and inorganics in Buchs and elsewhere, in combination with the statements on R&D functions, constitute the supply of incorrect and/or misleading information in response to questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

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list of attendees to the meeting, 1 June 2015, [Doc Id: 948]). In this meeting, the Commission informed the Parties that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments (which Sigma-Aldrich does not dispute). Consequently, on the same day, the Commission sent RFI I-4 to the Parties asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA (RFI I-4, questions 12, 13 and 16 [Doc Id: 829]; see also the cover email from the Commission to the Parties stating "*as announced this morning, please find attached an additional request for information*" [Doc Id: 828]).

578 Reply to SO, para. 347 [Doc Id: 1187].

579 Cases T-145/06 *Omya*, 4 February 2009, para. 33; and T-151/05 – *NVV and Others*, 7 May 2009, para. 184.

580 See Section 3.2.

581 M.1610 Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 111 [*original in German*]. See also Section 3.1.

582 See recitals (281) and (293).

4.1.4. Assets excluded from the business to be divested

4.1.4.1. The disclosure requirements of question 6 of RFI I-3 as incorporated into Section 5.12 of the Form RM

(299) Section 5.12 of the Form RM requires a description of *"any areas where the business to be divested as set out in the commitments offered differs from the nature and the scope of the business as currently operated*".

(300) This description is of key importance because the Commission needs to assess "*the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments*".[583] The current operation of a business includes all existing assets, such as marketed products but also R&D activities and pipeline products existing at the time of the divestment. If a party plans to retain some of these assets it needs to identify them clearly in Section 5.12 of the Form RM.

(301) Question 6 of RFI I-3 referred to Section 5.12 of the Form RM. It read: "*Section 5.12: Please elaborate and include a description of all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA.*"[584] With this question, the Commission requested that the Parties elaborate on the information supplied in Section 5.12 of the Initial Form RM of 22 May 2015.

(302) In Case M.7435 – *Merck/Sigma-Aldrich*, the Commission gave guidance to the Parties that there should not be any difference between the Divestment Business and the business as operated by Sigma-Aldrich at the time of the Final Form RM submission in terms of "*IP or know-how on labelling and packaging*".[585] The Commission asked the Parties to confirm in the Initial Commitments that all such assets were included in the Divestment Business.[586]

(303) As explained in Sections 4.1.2 and 4.1.3, iCap was closely related to the Divestment Business and had the potential to substantially increase sales of solvents and inorganics. Contemporaneous evidence in the file shows that Sigma-Aldrich sought to "*carve out*"[587] or "*ke*[ep] *out*"[588] iCap from the Divestment Business. When the

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583 Remedies Notice, para. 7.

584 See question 6 of RFI I-3 [Doc Id: 812].

585 On 19 May 2015, the Commission sent comments to the Parties regarding the scope of the Divestment Business as set out in the Draft Commitments. More specifically, the Commission included in their comments a separate section on "*IP, know-how, design and other*" which specifies that for "*packaging*" "*any IP or know how should be included*" (Comments on the Draft Commitments and Draft Form RM, page 2 [Doc Id: 787]).

586 Comments on the Draft Commitments and Draft Form RM, 19 May 2015, Part A, point 2 [Doc Id 787]. If the Parties intended to retain any brand, asset and/or personnel, they had to specify this (and the reasons why) in the Form RM Submissions. See Comments on the Draft Commitments and Draft Form RM, 19 May 2015, Part A, point 2: "*2. In the Schedule, please make explicit the following:* […] *o The brands to be retained (Sigma-Aldrich, Sigma, Aldrich)* […] *o Seelze - Mention that everything is transferred, except for a specific list of assets which is retained – to be explicitly listed* […] *o Personnel - All Seelze personnel (if some employees are excluded, mention expressly the functions, and explain why in the Form RM) - If applicable, personnel to be transferred from other sites* […] *o IP, know-how, design and other […] - Packaging – any IP or know-how should be included*" [Doc Id: 787].

587 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "short question" dated 3 June 2015 [Doc Id: 29-2552].

588 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804]. See also Email from [NAME OF INDIVIDUAL] to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), copying [NAME OF INDIVIDUAL], "Divested products list, [NAME OF INDIVIDUAL] request plus add-remove", 31 July 2015 [Doc Id: 304-1179] and Email from [NAME

Divestment Business was subsequently sold to Honeywell, iCap was mentioned in the Schedule of Excluded Assets of the SPA.[589]

(304) In view of the above, iCap was an asset excluded from the Divestment Business and in this sense, it constituted a difference between the "*business to be divested as set out in the commitments offered*" and the solvents and inorganics business operated by Sigma-Aldrich within the meaning of question 6 of RFI I-3 and Section 5.12 of the Form RM.

4.1.4.2. The content of the reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM

(305) Section 5.12 of the Final Form RM, including the reply to question 6 of RFI I-3, reads: "*[SIGMA'S R&D AND BUSINESS STRATEGIES]*".[590]

(306) For completeness, the Commission notes that the Parties did not request any waivers from the Commission relating to the above-mentioned parts of the Final Form RM.

4.1.4.3. Incorrect and/or misleading information in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM)

(307) Section 5.12 of the Form RM requires a description of *"any areas where the business to be divested as set out in the commitments offered differs from the nature and the scope of the business as currently operated*". Question 6 of RFI I-3 required Sigma-Aldrich to "*elaborate*" on the information supplied in Section 5.12 of the Initial Form RM and, in particular to "*include a description of all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA".*[591]

(308) In response, Sigma-Aldrich did not mention iCap as an asset excluded from the scope of Divestment Business. By contrast, Section 5.12 of the Final Form RM (including the reply to question 6 of RFI I-3)[592] explicitly identified other assets as being excluded from the scope of the Divestment Business, such as the chemical substances NMR and Dried Anhydrous solvents.[593] Nothing in the nature of these assets justified the difference of treatment with iCap (which came to light subsequently). The Final Form RM also specifies that a number of brands, as well as derivatisation reagents and ionophores are excluded.[594] The Parties even took care to specifically clarify the exclusion of certain items by using the expression "*for the avoidance of doubt*". Yet, there was no mention of iCap.[595]

OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich "Re: URGENT – Customer & Supply Contracts", 29 August 2015 [Doc Id: 28-1937].

589 Schedule 2.4.1 (i) of the purchase agreement (Appendix A) [Doc Id: 46]. See reply to question 7, RFI iCap 1 [Doc Id: 59].

590 Final Form RM, para. 140 [Doc Id: 849].

591 See question 6 of RFI I-3 [Doc Id: 812].

592 On 2 June 2015, the Parties provided their replies to RFI I-3 both as a separate document ([Doc Id: 826]) and incorporated in the First updated version of the Initial Form RM ("enclosed is an updated version of the Form RM incorporating the Parties' replies to RFI I 3" [Doc Id: 826]).

593 As per discussions and agreement with the Commission [Doc Id: 962].

594 Final Form RM, para. 24. [Doc Id: 849].

595 Identifying iCap among the excluded assets would be all the more important for the Parties, given the increasing role of the (divested) Seelze plant in the development of the project. On 24 February 2014, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) and based at Buchs, visited Seelze (see Presentation "Analytical Standard & Reagents, Overview Innovation Pipe, Mid-Term Strategy", 24 February 2014 [Doc Id: 29-1488]). A few days later, [NAME OF INDIVIDUAL] reported on his visit: "*iCap – certified volumetric solutions (and later Hydranal): project has been presented, pilot plant is to be created at Buchs, with a upper limit in terms of volume. Seelze is to stay onboard, in case we would have to consider an early technology transfer – that would need EU operations involvement*". See

(309) As explained in detail in Sections 2.2.2 and 4.1.2.1.1, the evidence in the Commission's file shows that since the launch of the project in 2011 and until 2015, iCap was specifically developed for applications included in the scope of the Divestment Business, namely volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which accounted for more than [SIGMA'S R&D] of the EEA sales of products that could be combined with iCap.[596] It is clear from the above that iCap was part of "*Sigma's business for solvents and inorganics in the EEA"* (question 6 of RFI I-3) and included in the "*scope of the business as currently operated [pre-divestment]"* (Section 5.12 of the Form RM). It follows that its exclusion from the scope of the remedies constituted a difference between the Divestment Business and Sigma-Aldrich's solvents and inorganics business in the EEA pre-divestment, which was responsive to and, thus, should have been disclosed in reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM. Its non-disclosure combined with the fact that several assets were listed as excluded "*for the avoidance of doubt*" indicated that the list of excluded assets was exhaustive, which subsequently turned out to be factually incorrect. In other words, the information supplied suggested that there was nothing else, other than those assets, contributing to the current operation of the business which would be out of the scope of the Divestment Business.[597] This is at odds with the fact that iCap was also an asset excluded from the Divestment Business.

(310) In this respect, the Commission further notes that:

(a) Given the disclosure requirements of question 13 of RFI I-4 ("... *all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA"*) (emphasis added) and of Section 5.12 ("… *any areas where the business to be divested as set out in the commitments offered differs from the nature and the scope of the business as currently operated*") (emphasis added), as well as the absence of waiver requests, the information supplied by Sigma-Aldrich was supposed to be exhaustive;

(b) The Commission explicitly and repeatedly stressed the importance of packaging and R&D and the need to include them in the scope of the remedies.[598] Sigma-Aldrich did not bring to the Commission's attention the fact that it did not follow the above guidance and intended to exclude iCap from the scope of the Divestment Business. Instead, Sigma-Aldrich's responses and submissions were worded in a way suggesting that it had followed the Commission's guidance;[599]

(c) While iCap was not disclosed in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM), Sigma-Aldrich was unwilling to take the same risk of non-disclosure later on when the SPA with Honeywell was negotiated. In this context, it decided to include the iCap patent in the Excluded Assets Schedule. On 26 September 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) asked [NAME AND JOB TITLE OF INDIVIDUAL], and [NAME AND JOB TITLE OF INDIVIDUAL]

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email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: Follow-up von unserem Besuch" dated 6 March 2014 [*original in German*], emphasis added [Doc Id: 29-1456].

596 Reply to question 4, RFI iCap-2 [Doc Id: 91].

597 COMP/M.3255 – Tetra Laval/Sidel, 7 July 2004, paragraph 60.

598 See Section 4.2.2.3.

599 See Section 4.2.2.3.

(Sigma-Aldrich) whether the "*[SIGMA'S R&D AND BUSINESS STRATEGIES]*" should be included in the SPA's Excluded Assets Schedule, since "*while not solely or predominantly related, these could be seen as related*" and she was "*still concerned that if this isn't addressed now, HON will come back later and say that it should have included. There is already one published patent application, and a second product ready to go into testing*".[600] [NAME OF INDIVIDUAL] agreed that including the patent application would be diligent and suggested "*doing so with note to HON similar to the following, if true: [the foregoing is IP directed to packaging currently under research and development and not in use as packaging for any Products. To avoid all doubt, however, we are including it on the schedule of Excluded Assets]*".[601] In taking the above approach, Sigma-Aldrich implicitly acknowledged the link between iCap and the Divestment Business, which in turn was sufficient for iCap to fall within the ambit of question of 6 of RFI I-3 and Section 5.12 of the Form RM (given their broad disclosure requirement).

(311) When taking into account those circumstances and the overall context of Union merger control, the information supplied in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) was both incorrect and incomplete in a manner that is at least misleading because it (i) reasonably and objectively suggested that no other asset related to Sigma-Aldrich's pre-divestment solvents and inorganics business in the EEA was excluded from the scope of the Divestment Business, and (ii) prevented the Commission from understanding the intended scope of the Divestment Business.

(312) In view of the foregoing, the Commission considers that the non-disclosure of iCap, in combination with the list of other assets excluded from the scope of the Divestment Business, constitute incorrect and/or misleading information supplied in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM).

(313) The above incorrect and/or misleading information had an impact on the Commission's ability to review the Transaction and thus carry out its obligations under the Merger Regulation. Indeed, regardless of the impact of the incorrect and/or misleading information on the ultimate outcome of the case, the validity of the Commission's assessment of the Transaction is jeopardised when it is based on incorrect and/or misleading information.[602]

(314) In any event, contrary to Sigma-Aldrich's' claim,[603] the Commission further notes that the supply of that incorrect and/or misleading information did have an impact on the outcome of the case as it affected the scope of the Divestment Business offered and accepted in the Clearance Decision. Under the Final Commitments, "*Packaging R&D (including iCap) was excluded*" from the Divestment Business[604] as a result of the language introduced by Sigma-Aldrich in the Final Commitments and the Final Form RM (including the replies to RFI I-3 and RFI I-4) by which it distinguished between "*Product R&D*" and "*Packaging R&D*" and between R&D "*used*" or "*not*

600 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS] "Fwd: Updated schedules", 26 September 2015 [Doc Id: 304-691].

601 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL], "Re:Updated schedules", 26 September 2015. [Doc Id: 304-691].

602 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 187.

603 Reply to SSO, paras. 336-341.

604 Reply to SSO, para. 233. See also paras. 151 and 292(f).

used" in the Divestment Business.[605] Sigma-Aldrich did not draw the Commission's attention to those distinctions nor their intended significance for the scope of the Divestment Business; nor did it disclose the existence of iCap. Furthermore, Sigma-Aldrich's responses and submissions (including the reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM) were worded in a way that suggested that it had followed the Commission's guidance. Had the Commission known of the existence of an R&D project specifically developed for applications included in the Divestment Business, such as iCap, it would have required its transfer to the Purchaser. When commitments are offered in a Phase I investigation, the Commission accepts asset carve outs from the divestment business only in exceptional circumstances, when the parties can show that this does not affect the viability and competitiveness of the business.[606] Such circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents, which were included in the Divestment Business.[607] The project had the potential to impact Sigma-Aldrich future sales[608] and ranked among the top R&D projects of Sigma-Aldrich for this business.[609] Moreover, participants to the market test of the Initial Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business.[610] For all those reasons, if iCap had been disclosed correctly, the Commission would have required its inclusion in the Divestment Business. This could mean that the Parties would no longer be able to use iCap. On the contrary, Merck (including Sigma-Aldrich) granted to Honeywell a non-exclusive licence, which means that the Parties are still able to use iCap and retained the personnel involved in the R&D activities related to Sigma-Aldrich's solvents and inorganics business. This arrangement could not be investigated or market tested in the framework of the merger review since the licence was granted in October 2016 (that is to say 16 months after the Clearance Decision). The Commission was not, therefore, in a position to understand, or verify on the basis of responses from market actors, whether the granting of a non-exclusive licence over iCap was appropriate and sufficient to overcome its serious doubts as to the Transaction's compatibility with the internal market.

(315) In the Reply to the SO and the Reply to the SSO, Merck and Sigma-Aldrich disputed the above on the following grounds.

(316) *First*, the Parties contested the scope of the information requirements of Section 5.12 of the Form RM and question 6 of RFI I-3, arguing that iCap did not have to be disclosed.[611] In particular, the Reply to the SSO states that Section 5.12 of the Form RM does not require information (i) on divestment businesses that are not a pre-existing stand-alone businesses (such as the Divestment Business, which was made of a mix of assets from different locations/parts of Sigma-Aldrich) and (ii) on assets that are excluded from the scope of the remedy package (such as packaging R&D). It is also argued that the scope of the question 6 of RFI I-3, which expressly referred to

605 See Sections 4.1.3.3 and 4.2.2.3.

606 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified.

607 See Section 4.1.2.1.1.

608 See recital (359)(b). See also Section 4.3.2.3.2.

609 See recitals (359)(b) and (484)(c).

610 See recital (446).

611 Reply to SSO, paras. 167-174 and 184-185

Section 5.12 of the Form RM, should be interpreted in line with the information requirements of the Form RM.[612] These arguments do not change the Commission's conclusion for the following reasons:

(a) In question 6 of RFI I-3, the Commission expressly asked Sigma-Aldrich to elaborate and describe "*all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA"* (emphasis added). In this respect, it is wrong to state that the scope of the RFIs sent in the context of the remedy discussions must be interpreted restrictively to reflect the Form RM's disclosure requirements since the Commission "*can adapt the precise requirements to the information necessary in the individual case at hand*" and, thus, request additional information.[613] In this context, it is the scope of question 6 in the RFI I-3 that determines the answer required rather than the disclosure requirements of Section 5.12 of the Form RM. The supply of the incorrect and/or misleading information in response to RFI I-3 and to the Form RM constitute distinct infringements based on different legal bases;[614]

(b) In any event, the Form RM provides that the information requirements of Section 5 (including Section 5.12) apply to all cases "*where the commitments offered consist in the divestiture of a business*", without making any distinction between the divestiture of pre-existing stand-alone businesses and other types of divestiture.[615] On the contrary, when the divestiture consists of a mix of assets, the viability and competitiveness of the remedy is more at risk,[616] which makes the supply of the information required under Section 5.12 of the Form RM even more critical for the Commission's assessment. In this respect, the introduction of the Form RM expressly states that "*carve-out remedies will typically require more detailed information than divestitures of stand-alone businesses*";

(c) The claim according to which Sigma-Aldrich was not required to identify iCap in response to Section 5.12 of the Form RM because the scope of the remedy package excluded packaging R&D runs counter to the very purpose of Section 5.12 which requires undertakings to identify the areas where "*the business to be divested as set out in the Commitments offered differs from the nature and scope of the business as currently operated*".[617] If a party plans to retain some of these assets it needs to identify them clearly in Section 5.12 so as to allow the Commission to assess whether such carve out would affect the viability and competitiveness of the commitments offered.

(317) *Second*, the Parties argued that the absence of iCap from the list of excluded assets was not incorrect since Sigma-Aldrich had considered that iCap was not "*materially*

612 Reply to SSO, para. 190.

613 Remedies Notice, para. 7.

614 See Section 4.4.

615 See Section 1.2 of the Form RM: "*where the commitments offered consist in the divestiture of a business, Section 5 provides for a specific information required*". See also the introduction of Section 5.

616 Remedies Notice, para. 37.

617 The Parties' claim suggests that the information supplied in the Final Form RM has to be interpreted on the basis of the Final Commitments, which contradicts the purpose of the Form RM. Indeed, as previously explained in recitals (212) and (213) above, the information requested in the Form RM is critical for the Commission's assessment of the proposed commitments and the sufficiency of the remedy package to remove the serious doubts. It follows that the Final Commitments have to be interpreted in light of the Final Form RM, and not the other way around (see Case T-430/18 *American Airlines*, 16 December 2020, paras. 121-123).

or predominantly related to the Divestment Business or material for its success".[618] This argument does not change the Commission's conclusion. As indicated in Section 4.1.2.1.1:

(a) iCap was specifically developed for Sigma-Aldrich's solvents and inorganics business that was being divested. Therefore, its exclusion from the scope of the Divestment Business should have been mentioned explicitly in the reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM;

(b) In any event, the question whether iCap was "*materially*" or "*predominantly*" related to the Divestment Business or whether it was "*material*" for its commercial success is irrelevant in light of the disclosure requirements of question 6 of RFI I-3 ("...*all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA*") (emphasis added) and Section 5.12 of the Form RM ("… *any areas where the business to be divested as set out in the commitments offered differs from the nature and the scope of the business as currently operated*") (emphasis added).

(c) *Finally*, Merck and Sigma-Aldrich also claimed that the statements made in Section 5.12 of the Final Form RM (including the reply to question 6 of RFI I-3) cannot be considered as misleading since there was no intention to mislead the Commission.[619] This argument does not change the Commission's conclusion. As explained above, information is misleading when, taking into account the objective circumstances of the case and the overall context of Union merger control,[620] it is reasonably understood as suggesting to the Commission that the situation is other than it is in reality. Whether or not the misleading statement was made with an intention to mislead is irrelevant in that respect.[621]

4.1.4.4. Conclusion

(318) In view of the above, the Commission concludes that the information supplied in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) is incorrect and/or misleading.

4.1.5. Conclusion

(319) iCap was an innovation project developed under a cooperation agreement with Metrohm and iCap used in combination with solvents and inorganics constituted new products planned for the Divestment Business. The link between iCap and the Divestment Business is supported by the Parties' inclusion of iCap on the Excluded Assets Schedule provided to Honeywell (the remedy taker). Furthermore, R&D personnel within Sigma-Aldrich were working on, and responsible for, the development of iCap. Consequently, the existence of and details pertaining to iCap should have been disclosed: (i) in Section 5.3 of the Final Form RM; (ii) in the replies to questions 12, 13, and 16 of RFI I-4 that were incorporated in Section 5.4 of the Final Form RM; and (iii) in the reply to question 6 of the RFI I-3 that was incorporated in Section 5.12 of the Final Form RM.

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618 Reply to SO, para. 353 [Doc Id: 1187].

619 Reply to SO, para. 354 [Doc Id: 1187].

620 Cases T-145/06 *Omya*, 4 February 2009, para. 33; and T-151/05 – *NVV and Others*, 7 May 2009, para. 184.

621 While the intention or negligence of Sigma-Aldrich is relevant for the purposes of determining whether sanctions can be imposed pursuant to Article 14(1) of the Merger Regulation (see Section 3.2.2), it is irrelevant for the objective assessment of whether the information supplied is incorrect and/or misleading (see Section 3.2.1).

(320) Such non-disclosure was made in the context of other statements, in particular the provision of a list of excluded assets; statements suggesting that no "*imminently planned*" innovation projects or new products existed in solvents and inorganics; that there were no formal R&D agreements for solvents and inorganics; and that there was no dedicated R&D personnel for solvents and inorganics.

(321) In view of the above, the Commission concludes that the information supplied in reply to (i) question 6 of the RFI I-3 (as integrated into Section 5.12 of the Final Form RM); (ii) questions 12, 13, and 16 of RFI I-4 (as integrated into Section 5.4 of the Final Form RM); and (iii) Section 5.3 of the Final Form RM constitutes incorrect and/or misleading information.

4.2. Sigma-Aldrich's Liability

4.2.1. Responsibility for the content of the replies to Article 11(2) RFIs and the Final Form RM

(322) Pursuant to Article 6(2) of the Merger Regulation, the Commission may attach to its clearance decisions certain conditions and obligations that are binding on the addressees of the decision or other signatories of the commitments[622] (to the extent the implementation of the commitments requires their actions)[623] where such conditions and obligations are necessary to overcome the Commission's serious doubts as to whether the concentration would significantly impede effective competition in the internal market or a significant part of it.

(323) In Case M.7435 – *Merck/Sigma-Aldrich*, the Clearance Decision was conditional upon the divestment of a substantial portion of Sigma-Aldrich's solvents and inorganics business. The fact that the Parties intended to divest Sigma-Aldrich's business to alleviate the serious doubts raised by the Commission in relation to solvents and inorganics in the EEA, was made clear early on in the process, with the submission of the Draft Commitments and Draft Form RM on 18 May 2015.[624]

(324) In this case, the Commission addressed RFIs I-3 and I-4, adopted pursuant to Article 11(2) of the Merger Regulation, to both Merck and Sigma-Aldrich.[625] Merck and Sigma-Aldrich provided the replies to RFI I-3 and RFI I-4.[626] Under Article 14(1)(b) of the Merger Regulation, the Commission can impose fines where undertakings supply incorrect or misleading information in response to a request made pursuant to Article 11(2) of the Merger Regulation.

(325) Under Article 14(1)(a) of the Merger Regulation, the Commission can also impose fines on "*undertakings concerned*", including both the acquiring undertaking(s) and the acquired undertaking(s), that supply incorrect and/or misleading information in a submission, certification, notification, or supplement thereto.[627] In this case, the undertakings concerned are Merck and Sigma-Aldrich. The Final Commitments concerning the divestiture of Sigma-Aldrich's solvents and inorganics business were signed by both Merck and Sigma-Aldrich. They were submitted on behalf of both Parties together with the Final Form RM. In addition, as explained in Section 3.1.3, the

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622 Such as the target company when assets being divested are part of the target's operations.
623 See Section 4.2.1.
624 Draft Form RM of 18 May 2015 [Doc Id: 779], Draft Commitments [Doc Id: 781].
625 See recitals (36) and (41).
626 See recitals (40) and (44).
627 See Section 3.1.3.

information and documents relating to remedies prescribed by the Form RM constitutes a "submission" within the meaning of Article 14(1)(a) of the Merger Regulation.

(326) Sigma-Aldrich was closely involved in the preparation of RFI replies, the Commitments and the associated Form RM Submissions.[628] *First*, the Parties explained to the Commission that Sigma-Aldrich was directly involved in the drafting of the Commitments.[629] *Second*, both undertakings were also directly involved in the Form RM Submissions and discussed them with the Commission together, always presenting a joint position.[630] Merck and Sigma-Aldrich made clear to the Commission that they were acting in agreement with each other and were mutually aware of their respective positions. Sigma-Aldrich consistently appeared in all exchanges with the Commission as a Party that was aware of and approved all submitted information, including in particular the Form RM Submissions,[631] which explicitly referred to and incorporated "*the Parties*'" information.[632] *Third*, Sigma-Aldrich explained that it was directly involved in the preparation of the Form RM Submissions.[633] For example, Sigma-Aldrich provided an email dated 17 May 2015, the day before submitting the Draft Form RM of 18 May 2015, where [NAME OF INDIVIDUAL] requested other Sigma-Aldrich employees to provide information and clarification / confirmation on parts of the Draft Form RM, in particular regarding IP, and know-how in the Divestment Business.[634] *Fourth*, several Sigma-Aldrich employees participated in meetings with the Commission during the negotiation of the draft Commitments and were made aware of the Commission's specific guidance regarding the inclusion of packaging and R&D in the Divestment Business.[635]

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628 This is not uncommon in situations like in Case M.7435 – *Merck/Sigma-Aldrich*. In situations where the divested assets come from the target and where the remedy package contains an upfront buyer clause, the commitments are generally signed and submitted not just by the acquirer but also by the target. Without the cooperation of the target, the divestment business could not be sold as the acquiring party cannot control it before a binding agreement for the sale of business has been concluded by the target and the commitments could *de facto* not be executed. The target's involvement is also essential to reply to the Commission's RFIs concerning the divestment business, as the acquirer will not typically have access to sensitive commercial information on that business.

629 "*Sigma suggested revising the language* […] *The EC received the text proposed by Sigma on R&D* […] *Therefore, Sigma concluded that this position was deemed acceptable by the Commission*" (Letter submitted on 16 January 2017 "COMP/M.8181 – Merck / Sigma-Aldrich", para. 9 (f) (iii) and (g) [Doc Id: 327]).

630 See recitals (352) and (353).

631 The Parties were interchangeably sending e-mails, with the other party consistently in copy. See, for instance, cover emails for the Draft Form RM of 18 May 2015 [Doc Id: 945] and for the Initial Form RM of 22 May 2015 "Re:M.7435 Merck/Sigma-Aldrich" [Doc Id: 803]. See notably emails from Sigma-Aldrich "M.7435 - CONFIDENTIAL - Divestiture_Impact (1).xlsx" dated 29 May 2015 [Doc Id: 2691], "RE: M.7435 - STRICTLY CONFIDENTIAL COMMITMENTS 4 JUNE (2).DOCX" dated 9 June 2015 [Doc Id: 908]; "FW: M.7435 - Confidential - follow-up on personnel issues" dated 10 June 2015 [Doc Id: 2857]. Email from Sigma-Aldrich external counsel on the financial data of the Divestment Business "RE: M.7435 - STRICTLY CONFIDENTIAL COMMITMENTS 4 JUNE (2).DOCX" dated 9/06/2015 [Doc Id: 908].

632 See, for instance, cover emails for the First and Second updated versions of the Initial Form RM of 2 June 2015 "*incorporating the Parties' replies to RFI I 3*" [Doc Id: 813] and of 8 June 2015 "*incorporating the Parties' answers to RFI I 4*" [Doc Id: 830].

633 Reply of Sigma-Aldrich to question 5 of the Article 11(3) Decision of 14 October 2016 [Doc Id: 304-1602].

634 See email from [NAME OF INDIVIDUAL] dated 17 May 2015 [Id: 304-5] submitted in reply to question 5 of Article 11(3) Decision of 14 October 2016.

635 For instance, [NAME AND JOB TITLE OF INDIVIDUAL] participated in the meeting with the Commission on 19 May 2015 (see attendees' list [Doc Id: 785]), during which the Commission explained that for "*packaging*" "*any IP or know how should be included*" in the Divestment business (this was reflected in the written comments sent by the Commission to the Parties later on the same day

(327) It follows that Sigma-Aldrich is responsible for the information contained in: (i) the responses to the relevant questions in RFI I-3 and RFI I-4 (the responses to which were included in Sections 5.12 and 5.4 of the Final Form RM) and (ii) the Final Form RM (in particular, Section 5.3).

4.2.2. Sigma-Aldrich acted intentionally or at least negligently

(328) Article 14(1)(a) of the Merger Regulation empowers the Commission to impose fines on the persons referred to in Article 3(1)(b) of that Regulation, undertakings or associations of undertakings, "*where, intentionally or negligently: (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3)*".

(329) Article 14(1)(b) of the Merger Regulation allows the Commission to impose fines on undertakings or associations of undertakings "*where, intentionally or negligently* [...] *they supply incorrect or misleading information in response to a request made pursuant to Article 11(2)*".

(330) As explained in Section 3.2.2, in relation to the question whether an infringement has been committed intentionally or negligently, it follows from well-established case-law that "*that condition is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing the competition rules*".[636]

(331) The remainder of this Section sets out that, in Case M.7435 – *Merck/Sigma-Aldrich*, Sigma-Aldrich was aware (or could not have been unaware) of: (i) the fact that the information required was necessary and material for the Commission's assessment of the compatibility of the Transaction (Section 4.2.2.1); and (ii) the incorrect and/or misleading nature of the information supplied to the Commission (Section 4.2.2.2). Those points are sufficient to demonstrate that Sigma-Aldrich could not have been unaware of the nature of its conduct and thus committed an infringement intentionally or at least negligently.[637]

(332) Moreover, while not necessary for finding and sanctioning an infringement pursuant to Article 14(1)(a) or 14(1)(b), Section 4.2.2.3 finds that the supply of incorrect and/or misleading information was part of a strategy implemented by Sigma-Aldrich to avoid disclosing iCap to the Commission. That suggests the existence of a strategy to deceive the Commission, which further demonstrates that Sigma-Aldrich acted intentionally or at least negligently.

– Comments on the Draft Commitments and Draft Form RM, p. 2 [Doc Id: 787]). Similarly, [NAME AND JOB TITLE OF INDIVIDUAL] and [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) attended the meeting with the Commission on 2 June 2015 (see list of attendees from the Parties [Doc Id: 949]), during which the Commission informed the Parties that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments (see email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948]). [NAME OF INDIVIDUAL] had also been informed from Sigma-Aldrich's outside counsel that the Commission mentioned Sigma-Aldrich's packaging activities in HPLC and other solvents already on 5 May 2015, in an initial discussion concerning a possible remedy (see email from [NAME OF INDIVIDUAL AND LAW FIRM] reporting to [NAME OF INDIVIDUAL] (Sigma-Aldrich) on a telephone conference with Merck's counsel and the services of the European Commission, 5 May 2015, [Doc Id: 2002]).

636 See Section 3.2.2 and Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

637 Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

4.2.2.1. Sigma-Aldrich was aware (or could not have been unaware) of the fact that the information required was necessary and material for the Commission's assessment of the compatibility of the Transaction

(333) The Commission considers that Sigma-Aldrich was aware or could not have been unaware that the Commission considered the information required under the Article 11(2) RFIs I-3 and I-4 and under the Form RM (in particular Section 5.3) necessary and material for its assessment of the compatibility of the Transaction with the internal market.

(334) In this respect, it should be recalled that, pursuant to the case-law, the Commission enjoys "*discretion*" when assessing the necessity and the material nature of the information required for the assessment of the compatibility of the Transaction, which involve complex economic assessments and which shall not be interpreted "*strictly*" given the requirement for speed characterising the Union merger control.[638] The Court also ruled that the "*need for information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*".[639]

(335) In this context, the need for the information and its material nature cannot be assessed restrictively by reference to internal distinctions or understandings of the concerned undertaking – such as Sigma-Aldrich's distinction between product R&D and packaging R&D[640] – which have never been discussed with the Commission. If Sigma-Aldrich intended to distinguish between "*product R&D*" and "*packaging R&D*", it could and should have informed the Commission accordingly by clearly stating it, which it did not. Since Sigma-Aldrich failed to bring this distinction to the attention of the Commission, it is not entitled to rely on it to support its narrow interpretation of the statements made in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) and in Sections 5.3 of the Final Form RM.[641]

(336) In the present case, the need for the information on iCap and its material nature for the Commission at the time of its review are straightforward: such information was responsive to: (i) specific questions raised by the Commission in RFIs I-3 and I-4 – asked in the context of Sections 5.12 and 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated) – as well as to (ii) the Form RM (in particular Section 5.3) which requires information that is critical for the Commission's assessment of the compatibility of a concentration. The information on iCap was necessary for the Commission to assess the scope of the Final Commitments and, thus, to enable the Commission to conclude, within the strict deadline set by the Merger Regulation, whether the notified concentration (as modified by the remedies)

638 Case T-145/06 *Omya*, 4 February 2009, paras. 32 and 33.

639 Case T-145/06 *Omya*, 4 February 2009, para. 30. See also Case T-371/17 *Qualcomm*, 9 April 2019, paras. 108-109, upheld on appeal in Case C-466/19P *Qualcomm*, 28 January 2021, paras. 81-83.

640 See Section 4.1.3.3.

641 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

no longer raised serious doubts as to its compatibility with the internal market.[642] Had Sigma-Aldrich provided information regarding iCap, this project would have been transferred to the Purchaser together with the Divestment Business (and not just licensed to the Purchaser on a non-exclusive basis). Sigma-Aldrich was aware or could not have been unaware of the fact that, when commitments are offered in a Phase I investigation, the Commission accepts asset carve outs from the divestment business only in exceptional circumstances, when the parties show that this does not affect the viability and competitiveness of the business.[643] Such circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents, which were included in the Divestment Business.[644] In addition, the project appeared to have the potential to impact Sigma-Aldrich future sales of solvents and inorganics products in the EEA (to be sold as part of the Divestment Business)[645] and ranked among the top R&D projects of Sigma-Aldrich for the Divestment Business.[646] Moreover, participants to the market test of the Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business. This feedback was communicated to the Parties (including Sigma-Aldrich) on 2 June 2015.[647] For all those reasons, the information on iCap was necessary and material for the Commission's assessment at the time and under the specific circumstances of its merger review. Moreover, as previously explained, the incorrect and/or misleading information on iCap had an impact on the on the Commission's ability to review the Transaction and carry out its obligations under the Merger Regulation, as well as on the outcome of the case.[648]

(337) It is all-the-more likely that Sigma-Aldrich was aware (or ought to have been aware) that the information required under the RFI I-3 and RFI I-4 and the Form RM (in particular Sections 5.3) was necessary and material for the Commission to assess the Transaction given the advice it received during the merger review process from a team of in-house counsel (including counsel specialised in intellectual property), as well as specialised external competition lawyers.[649] The external lawyers of Sigma-Aldrich were closely involved in the merger review process, including the collection and submission of information to the Commission.[650] The external lawyers of Sigma-

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642 See also Case T-430/18, *American Airlines*, 16 December 2020, para. 133.

643 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified. See also Case T-430/18, *American Airlines*, 16 December 2020, para. 120 and the case-law cited.

644 See Section 4.1.2.1.1.

645 See recital (359)(b). See also Section 4.3.2.3.2.

646 See recitals (359)(b) and 478(c).

647 On 2 June 2015, the Commission held a meeting with the Parties to communicate the results of the market test (see email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948]). In this meeting, the Commission informed the Parties that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments (which Sigma-Aldrich does not dispute). Consequently, on 2 June 2015, the Commission sent RFI I-4 to the Parties asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA (RFI I-4, questions 12, 13 and 16 [Doc Id: 829]; see also the cover email from the Commission to the Parties stating "*as announced this morning, please find attached an additional request for information*" [Doc Id: 828]).

648 See recitals (281) and (293).

649 Sigma-Aldrich was advised by external lawyers from Sidley Austin LLP ("Sidley Austin").

650 See notably recitals (29) and (110) and recital (375). [NAME AND JOB TITLE OF INDIVIDUAL] (Merck) also described the collection of information process as follows: "*Sigma provided its*

Aldrich were specifically involved in the discussion on R&D projects that possibly related to the Divestment Business.[651] Sigma-Aldrich itself confirmed that it was advised by specialised external counsel and other firms in the preparation of both the Final Form RM and the replies to RFI I-3 and RFI I-4.[652] Moreover, the acquisition of Sigma-Aldrich by Merck was a major transaction from a commercial point of view (with a USD 17 billion transaction value), which should have further incentivised Sigma-Aldrich to be particularly diligent.

4.2.2.2. Sigma-Aldrich was aware (or could not have been unaware) that the information supplied to the Commission was incorrect and/or misleading

(338) At the time of submitting the Form RM Submissions, and in particular the Final Form RM (12 June 2015), and the replies to RFI I-3 (2 June 2015) and RFI I-4 (8 June 2015), Sigma-Aldrich was:

(a) aware (or could not have been unaware) that iCap was an innovation project related to solvents and inorganics; that iCap used in combination with solvents and inorganics constituted new products planned; that several of its employees were working on the iCap project, including personnel specialised in R&D; and that there was an R&D agreement between Sigma-Aldrich and Metrohm related to solvents and inorganics in the EEA (Section 4.2.2.1); and

(b) aware (or could not have been unaware) that iCap was responsive to and, thus, should have been disclosed in Section 5.3 of the Final Form RM, and in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13, and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) (Section 4.2.2.2).

4.2.2.2.1. iCap and the cooperation agreement with Metrohm

(339) The Commission considers that Sigma-Aldrich was aware (or could not have been unaware) that (i) iCap was an innovation project, (ii) iCap together with the solvents and inorganics it was offered with constituted new products planned, (iii) there was an R&D agreement related to Sigma-Aldrich's solvents and inorganics business in the EEA and (iv) eleven employees were working directly on this project, including 6 employees specialised in R&D and business development.

(340) As explained in Section 4.1 above, (i) Section 5.3 of the Form RM required the disclosure of any innovations or new products planned in the business to be divested; (ii) questions 12, 13 and 16 of RFI I-4 – asked in the context of Section 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated) – required the description of the (shared) R&D functions concerning solvents and inorganics (including the disclosure of any R&D agreement related to Sigma-Aldrich's solvents and inorganics business as well as of the personnel in charge of that project); and (iii) question 6 of RFI I-3 – asked in the context of Section 5.12 of the Form RM (into which Sigma-Aldrich's reply was integrated) – required the disclosure of any asset related to that business which was not being divested.

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information to its external counsel, [LAW FIRM], which shared this information with Merck's external counsel, [LAW FIRM]" (Annex 1.7 to the Reply to SO) [Doc Id: 1179-55].

651 See recital (103) and fn. 183 and recital (345).

652 See reply of Sigma-Aldrich to question 5 of the Article 11(3) Decision of 14 October 2016 [Doc Id: 304-1602].

(341) As previously explained, the elements in the file reveal that, since the launch of the project in 2011, iCap was an R&D project developed in cooperation with Metrohm and specifically for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which were all part of the Divestment Business and accounted for more than [SIGMA'S R&D] of the EEA sales of products that could be combined with iCap.[653] Moreover, in 2015, a few days before the submission of the Final Form RM, iCap was described internally as a project "*inter linked w Metrohm instruments (KF titration)*" and "*driven by Buchs/Fluka*".[654]

(342) At the time of submitting the Form RM Submissions, in particular the Final Form RM (12 June 2015), and the replies to RFI I-3 (2 June 2015) and RFI I-4 (8 June 2015), several Sigma-Aldrich employees were aware that iCap was part of the R&D activities related to the solvents and inorganics business that was being divested and that it should have been included in the Final Commitments and the Final Form RM (integrating the Parties' responses to RFI I-3 and RFI I-4).

(343) In an email of 22 May 2015, [NAME OF INDIVIDUAL][655] informed [NAME OF INDIVIDUAL] that the divestment of Sigma-Aldrich's Karl Fischer titration business could impact the R&D agreement between Sigma-Aldrich and Metrohm concerning iCap: "[a]*s we think about communication we are going to have to get to Metrohm when it comes out that we are divesting Hydranal.*[656] *We need to develop a strategy on how we are going to proceed"*.[657] The fact that the divestiture of Hydranal (as part of the Divestment Business) would require definition of a specific communication strategy with Metrohm shows that these employees of Sigma-Aldrich were aware of the fact the R&D agreement with Metrohm on iCap was related to products included in the Divestment Business.

(344) [NAME OF INDIVIDUAL] was involved in the discussion on the business to be divested and participated in the meeting with the Commission on 19 May 2015.[658] [NAME OF INDIVIDUAL] was involved in the discussions with Honeywell and the

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653 See Section 4.1.2.1.1. In several DCFs and internal presentations, already in 2011 Sigma-Aldrich identified Karl Fischer titration and HPLC solvents as possible applications for iCap. For instance, the 2011 DCF on iCap estimates the sales and the market shares of Sigma-Aldrich's reagents for Karl Fischer (and "other" titration), with and without iCap, while the projections in HPLC solvents are left "*t*[o] *b*[e] *d*[efined or discussed]".[653] The DCFs dated between 2013 and 2015 concerning a potential expansion of Sigma-Aldrich's plant in Buchs took into account the incremental sales that iCap could generate for titration applications (as did the 2011 DCF) but also incremental sales from the use of iCap in HPLC applications.[653]

654 Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603] (emphasis added).

655 At that time, [NAME OF INDIVIDUAL] was aware of iCap and had already discussed with others in Sigma-Aldrich the project's future after the Transaction. On 19 April 2015, [NAME AND JOB TITLE OF INDIVIDUAL] contacted [NAME OF INDIVIDUAL] in relation to that project: "*Hi [NAME OF INDIVIDUAL], We should be ready to launch iCap and iBarrel at the next Analytical in Munich in April 2016. Can you use any of your connections at Merck to see if we can get space on their booth for this? Otherwise we should consider paying for a booth of our own, which I don't really want to do*". The following day, [NAME OF INDIVIDUAL] responded: "*We should know the future leaders in the next 4 weeks. We can then make this a top priority with them. Is there a deadline for reserving space that is approaching?*" (Document "Re: Analytica Booth" by [NAME OF INDIVIDUAL] dated 20/04/2015 [Doc Id: 29-2319]).

656 Sigma-Aldrich's Karl Fischer titration solutions were part of the Divestment Business as defined in the Initial Commitments dated 22 May 2015.

657 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "iCap", 22 May 2015 [Doc Id: 330-47187].

658 See attendees' list [Doc Id: 785]. See also Reply to SO, Annex 1.17 [Doc Id: 1187]

submission of the Form RM Submissions (including the responses to RFI I-3 and RFI I4).[659] The email exchanges between them on 22 and 26 May 2015 show that they were also both aware of iCap; the agreement with Metrohm; and its link with the Divestment Business.

(345) On 5 June 2015, at 4:51PM, the Commission advised the Parties to include a new section in the Initial Commitments providing for the transfer to the Purchaser of all R&D and pipeline projects and all R&D agreements with third parties to the extent they concerned the Divestment Business.[660] Less than two hours later, at 6:31PM, [NAME OF INDIVIDUAL] sent a list of R&D projects that he considered responsive to the Commission's request to several employees of Sigma-Aldrich. In this list, [NAME OF INDIVIDUAL] included: "*iCap: New versatile packaging technology. Intelligent cap. Cooperation with Metrohm (contract) to be launched 2016, with inter linked w Metrohm instruments (KF titration) This is driven by Buchs/Fluka PM.*"[661] [NAME OF INDIVIDUAL] list was sent to [NAMES OF INDIVIDUALS].[662]

(346) [NAME OF INDIVIDUAL] set up a conference call at 7:30 PM to go through Mr [NAME OF INDIVIDUAL] list.[663] [NAMES OF INDIVIDUALS],[664] [NAME OF INDIVIDUAL][665], and [NAME OF INDIVIDUAL] attended that call. [NAME OF INDIVIDUAL], an EU qualified specialised competition lawyer, also accepted the invite.[666] [NAME OF INDIVIDUAL][667] also joined the call with a delay.[668/669]

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659 Email from [NAME OF INDIVIDUAL] "Re: Talking Points – Honeywell", dated 19 May 2015 [Doc Id: 329-45789], which reads: "*… we could go back to Honeywell and tell them that we should be able to get something in their hands no later than next Wednesday. Our priority is to get the final RM submission by this Friday and then to work on the package for potential buyers."*

660 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Commitments was proposed [Doc Id: 954 and Doc Id: 956], see recital (36).

661 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

662 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

663 Outlook invite by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], Sigma-Aldrich, and [NAMES OF INDIVIDUALS AND LAW FIRM], re "Invitation: R&D call", dated 5 June 2015 [Doc Id: 329/43588]. In his witness statement, [NAME OF INDIVIDUAL] stated that he did not attend the call (witness statement of [NAME OF INDIVIDUAL], Annex 1.4 to the Reply to SO, para. 7).

664 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich titled "Accepted: R&D call", dated 5 June 2015 [Doc Id: 356-10046].

665 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich titled "Tentatively Accepted: R&D call", dated 5 June 2015 [Doc Id: 329-43564].

666 Email by [NAME OF INDIVIDUAL AND LAW FIRM], to [NAME OF INDIVIDUAL], Sigma-Aldrich, titled "Accepted: Invitation: R&D call @ Fri Jun 5, 2015 7:30pm – 8:30pm)", dated 5 June 2015 [Doc Id: 356-10043].

667 [NAME OF INDIVIDUAL] was directly involved in the development of iCap, and together with [NAME OF INDIVIDUAL] was one of its inventors based on the patent application ([NAME OF INDIVIDUAL] contributed a "*substantial amount of work over shorter periods of time*" [Doc ID 304-3]). [NAME OF INDIVIDUAL] was aware of the importance of iCap for future sales in volumetric titration solutions (see Presentation "Analytical Standards & Reagents: overview, innovation pipe, mid term strategy", 24 February 2014, slides 14-17 [Doc Id: 29-1488]).

668 Outlook invite by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Einladung: R&D call", 5 June 2015 [Doc Id: 356/10062]. After the call, [NAME OF INDIVIDUAL] sent an email to [NAMES OF INDIVIDUALS], Sigma-Aldrich, and two outside legal counsel, apologizing for being late for the call. [NAME OF INDIVIDUAL] added: "*I will come back to you [NAME OF INDIVIDUAL] on this*" (Email chain between [NAMES OF INDIVIDUALS], Sigma-

(347) During the call, "*there was an approximately two-minute discussion on each project* […] *It was concluded that* […] *iCap was not primarily related to the Divestment Business and* […] *it was not important for the Divestment Business*".[670] On this basis, [NAMES OF INDIVIDUALS] agreed not to identify iCap for inclusion in the remedy package.[671]

(348) On the same date at 8:18PM, [NAME OF INDIVIDUAL] circulated a "*modified list*" which included "*no new substance, just some rewording and order change*". iCap was again included.[672]

(349) All the participants who reviewed the list of [NAME OF INDIVIDUAL] and discussed it during the call of 5 June 2015 were aware (or could not have been unaware) that iCap was an innovation; that iCap together with the solvents and inorganics it was offered with constituted new products planned; that several of employees were working on the iCap project, including personnel specialised in R&D, and that there was an R&D agreement related to Sigma-Aldrich's solvents and inorganics business in the EEA. This is confirmed by an email of 28 August 2015 that [NAME OF INDIVIDUAL] sent and which reads: "*what we should discuss* […] *are the technologies in the pipe that concern at least partially Solvents and Inorganics. We kept this deliberately out of the DB as agreed with [NAMES OF INDIVIDUALS]* […] *This concerns our bigger projects like iCap* […]".[673] *"[NAMES OF INDIVIDUALS]*" are Messrs. [NAMES OF INDIVIDUALS] who together with [NAMES OF INDIVIDUALS] attended the 5 June 2015 call.

(350) Sigma-Aldrich has not disputed the fact that, at the time of the submission of the response to RFI I-4 (on 8 June 2015) and of the Final Form RM and Final Commitments (on 11 June 2015), the above employees knew about the existence of the iCap R&D project.[674]

(351) In view of the above, the Commission finds that Sigma-Aldrich was aware (or could not have been unaware) that iCap was an innovation and R&D project, that iCap together with the solvents and inorganics it was offered with constituted new products planned, that several of its employees were working on the iCap project, including personnel specialised in R&D, and that there was an R&D agreement related to Sigma-Aldrich's solvents and inorganics business in the EEA.

Aldrich, and [NAMES OF INDIVIDUALS AND LAW FIRM], re "Re: call today", 5 June 2015 [Doc Id: 330-45194]).

669 Three of these Sigma-Aldrich employees were identified as "*antitrust helpers*" in response to question 5 of 11(3) RFI of 14 October 2016 [Doc ID 304-3]. In particular, [NAMES OF INDIVIDUALS] were part of the "*core group*". [NAME OF INDIVIDUAL] contributed a "*substantial amount of work over shorter periods of time*". [NAME OF INDIVIDUAL] participated in the meeting with the Commission on 19 May 2015 [Doc Id: 785]. [NAME OF INDIVIDUAL] participated in the meeting with the Commission on 2 June 2015 [Doc Id: 949].

670 Witness statement of [NAME OF INDIVIDUAL], Annex 1.18 to the Reply to SO, paras. 13 and 14 [Doc Id: 1179-10].

671 Witness statement of [NAME OF INDIVIDUAL], Annex 1.18 to the Reply to SO, para. 14 [Doc Id: 1179-10].

672 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

673 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804].

674 See notably Reply to SSO, Section 4.3.1.2 and the Second Oral Hearing recording.

4.2.2.2.2. iCap's responsiveness

(352) The 5 Sigma-Aldrich employees mentioned in the previous Section were closely involved in the preparation of the replies to RFI I-3 and RFI I-4 and the Form RM Submissions:[675]

(a) [NAME AND JOB TITLE OF INDIVIDUAL] was leading the team;

(b) [NAME AND JOB TITLE OF INDIVIDUAL] was directly supporting [NAME OF INDIVIDUAL] during the merger review;

(c) [NAME AND JOB TITLE OF INDIVIDUAL] was involved in particular in the discussion on the business to be divested and participated in the meeting with the Commission on 19 May 2015;[676]

(d) [NAME AND JOB TITLE OF INDIVIDUAL] was occasionally consulted during the merger review process and participated in the meeting with the Commission on 2 June 2015;[677]

(e) [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) was occasionally consulted during the merger review process. [NAME OF INDIVIDUAL] was involved in the discussions with Honeywell and the submission of the Form RM Submissions.[678]

(353) Moreover, Messrs. [NAMES OF INDIVIDUALS] were all made aware of the Commission's specific guidance regarding the inclusion of packaging[679] and R&D[680] in the Divestment Business:

(a) On 19 May 2015, [NAME OF INDIVIDUAL] participated in a meeting[681] with the Commission and the Parties regarding the Draft Commitments. Following this meeting, on the same day, the Commission sent comments to the Parties recapitulating the feedback provided orally during the meeting,[682] including in particular the comment that for "*packaging*" "*any IP or know how should be included*" in the Divestment business;[683]

(b) On 2 June 2015, [NAME OF INDIVIDUAL] participated in a meeting[684] with the Commission and the Parties regarding the results of the market test on the

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675 For the same reason (and given the frequent contacts with Sigma-Aldrich's external counsel), all these employees were aware or could not have been unaware of the obligation to provide correct and non-misleading information in the Final Form RM and in replies to Article 11(2) RFIs. See Section 4.2.2.1.

676 See attendees' list [Doc Id: 785]. See also Reply to SO, Annex 1.17 [Doc Id: 1187].

677 See reply of Sigma-Aldrich to question 5 of Article 11(3) Decisions of 14 October 2015 and 1 December 2015 [Doc Id: 304-1602]. See also Annex Q5i [Doc Id: 304-3] and attendees' list [Doc Id: 949].

678 Email from [NAME OF INDIVIDUAL] "Re: Talking Points – Honeywell", dated 19 May 2015 [Doc Id: 329-45789], which reads: "*… we could go back to honeywell and tell them that we should be able to get something in their hands no later than next Wednesday. Our priority is to get the final RM submission by this Friday and then to work on the package for potential buyers.*"

679 Mr [NAME OF INDIVIDUAL] participated in the meeting with the Commission on 19 May 2015 [Doc Id: 785].

680 Mr [NAME OF INDIVIDUAL] participated in the meeting with the Commission on 2 June 2015 [Doc Id: 949].

681 See list of attendees from the Parties [Doc Id: 785].

682 See Comments on the Draft Commitments and Draft Form RM [Doc Id: 787], See also cover email from Arthur Stril (case team) to [NAMES OF INDIVIDUALS AND LAW FIRMS] ("*Following the helpful meeting this afternoon, please find attached our comments on the draft Commitments and Form RM*") [Doc Id: 786].

683 Comments on the Draft Commitments and Draft Form RM, p. 2 [Doc Id: 787].

684 See list of attendees from the Parties [Doc Id: 949].

Initial Commitments. In this meeting, the Commission explained orally that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments (which Sigma-Aldrich does not dispute);[685] and

(c) On 5 June 2015, [NAME OF INDIVIDUAL] sent an email to Messrs. [NAMES OF INDIVIDUALS] (among others) stating "*the Commission is asking us to include all pipeline project for R&D within the divested business* [...] *keep in mind the divested business now includes solvents and inorganics out of all worldwide sites (including Sheboygan) going into the EEA and all Fluka global* [...]".[686]

(354) Moreover, in the context of the remedy implementation, Sigma-Aldrich identified a risk that the purchaser of the Divestment Business may ask for the transfer of iCap and implemented measures to limit this risk:

(a) On 28 August 2015, in a "*Failure mode and effects analysis (FMEA)*" report for iCap, Sigma-Aldrich set out mitigating measures to avoid the purchaser of the Divestment Business claiming rights on iCap. The strategy proposed was to "*emphasise iCap as innovative packaging instead of a titration feature*";[687]

(b) On 26 September 2015, Sigma-Aldrich deemed necessary to include iCap in the Excluded Asset Schedule, its [NAME AND JOB TITLE OF INDIVIDUAL] being "*concerned that if this isn't addressed now, H*[oneywell*] will come back later and say that it should have included*";[688]

(c) On 17 December 2015, [NAME OF INDIVIDUAL] recommended "*not to do anything visible on [iCap] for at least 6 months if a not a year*" because "*Honeywell can ask to add things to the Divestment Business for the next six months*" (corresponding to the term of the SPA catch-all clause).[689]

(355) In view of the above, the Commission finds that Sigma-Aldrich was aware (or could not have been unaware) (i) that iCap was responsive to question 6 of RFI I-3 (the response to which was included in Section 5.12 of the Final Form RM), questions 12, 13, and 16 of RFI I-4 (the response to which was included in Section 5.4 of the Final Form RM) and to Section 5.3 of the Form RM and did not disclose it to the Commission and (ii) that iCap's omission from these documents, together with the statements made in these documents, would not give the Commission a true picture of the scope of Sigma-Aldrich's solvents and inorganics business in the EEA as it was operated at the time of the remedy discussions.

(356) In the Reply to the SO and the Reply to the SSO, the Parties did not dispute that Sigma-Aldrich was aware of iCap and consciously decided not to disclose it to the Commission

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685 Consequently, on the same day, the Commission sent RFI I-4 to the Parties asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA (RFI I-4, questions 12, 13 and 16 [Doc Id: 829]; see also the cover email from the Commission to the Parties stating "*as announced this morning, please find attached an additional request for information*" [Doc Id: 828]).

686 Email chain between [NAME OF INDIVIDUAL], Sigma-Aldrich, and [NAME OF INDIVIDUAL], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

687 FMEA Analyse iCap, risks no. 10.1 and 11.1 [*original in German*] [Doc Id: 30-799].

688 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS] "Fwd: Updated schedules", 26 September 2015 [Doc Id: 304-691]. See also Section 4.3.2.1.2.

689 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595].

(in particular following the call dated 5 June 2015). However, they claimed that this decision was taken in *"good faith*", with no intention to mislead the Commission.[690]

(357) In this respect, the Commission notes that Sigma-Aldrich's behaviour cannot be justified because "*it decided, in good faith*" to withhold iCap from the Commission.[691] It is not a prerogative of Sigma-Aldrich to subjectively decide whether the information – expressly required by the Commission[692] – is necessary or not for the Commission's assessment of the Transaction. The Commission is entitled to request "*all the information necessary to enable it to decide on the compatibility of the concentration*"[693] and is responsible for assessing the feasibility of the commitments offered by the parties and the viability and competitiveness of the assets proposed for divestiture.[694] The Commission can make this assessment only if it has received from the parties all the information required. As such, Sigma-Aldrich was bound by the obligation to provide correct and non-misleading information in its submissions and in replies to RFIs.[695]

(358) In any event, the arguments raised by the Parties to support their "*good faith*" decision are irrelevant and do not change the Commission's findings for the following reasons.

(359) *First*, Sigma-Aldrich claims that it decided not to disclose iCap because it genuinely considered that (i) iCap was not solely or predominantly related to the Divestment Business; (ii) iCap was not important for the Divestment Business; (iii) iCap was not R&D on "products" but on packaging; and (iv) Sigma-Aldrich had doubts as to whether the agreement with Methrom could be transferred.[696] The above claims rely quasi-exclusively on a number of *ex-post* witness statements made after the opening of the infringement proceedings (that is, *in tempore suspecto*). The only supporting contemporaneous evidences cited by the Parties are (i) the email sent by [NAME OF INDIVIDUAL] on 5 June 2015 at 5:30 PM, explaining that "*the Commission is asking us to include all pipeline project for R&D within the divested business. Any concerns with this? I don't imagine there is anything…*"[697], which suggests that prior

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690 See notably Reply to SSO, Section 4.3.1.2 ("*Sigma made a good faith decision not to disclose iCap on the 5 June phone call*") and Reply to SO, para. 380.

691 Reply to SSO, para. 312.

692 See notably question 12 of RFI I-4 [Doc Id: 829]: "*Does Sigma have <u>any R&D agreements with third parties related to solvents and inorganics in the EEA</u>?*" (emphasis added).

693 Case T-145/06 *Omya*, 4 February 2009, para. 28. In this case, the Court also held that the "*need for the information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*" (para. 30). See also Remedies Notice, paragraph 7, according to which, in the context of remedy discussions, the Commission "*can adapt the precise requirements to the information necessary in the individual case at hand*".

694 Remedies Notice, para. 7.

695 In its past decisional practice, the Commission made clear that parties should avoid selectivity in setting out the relevant facts included in submissions or when replying to RFIs: "[The information obligations under the Merger Regulation] *include all the facts which are to be disclosed under the Merger Regulation. A selection of the facts that are to be submitted by the Notifying Party after applying its subjective interpretation of these facts is impermissible and a violation of the information obligations"* (COMP/M.1610 – Deutsche Post/Trans-O-Flex (Art.14 proc.), 14 December 1999, para. 106 [*original in German*]).

696 Reply to SO, para. 380 and Reply to SSO, paras. 205-217. See also transcript of the First and Second Oral Hearings.

697 Email chain between [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] "R n d", 5 June 2015 [Doc Id: 329-40603].

to the call held on the same day, Mr [NAME OF INDIVIDUAL] was not aware of iCap; and (ii) an email by [NAME OF INDIVIDUAL] dated 14 June 2015 where the latter explained that *"iCap is not seen as specifically related to the divested portfolio, as it isn't specifically linked and will support a larger group of other products*".[698] As set out hereinafter, those arguments do not change the Commission's conclusions:

(a) As explained in Section 4.1.2.1.1, a large body of contemporaneous evidence confirms that, since its start in 2011 and until 2015, iCap was developed specifically for volumetric titration solutions, Karl Fischer titration solutions and HPLC solvents, which were all part of the Divestment Business and accounted for more than [SIGMA'S R&D AND BUSINESS STRATEGIES] of the EEA sales of products that could be combined with iCap.

The email from [NAME OF INDIVIDUAL] cited by the Parties does not change this conclusion. [NAME OF INDIVIDUAL] sent his email in response to a question by [NAME OF INDIVIDUAL] who did not attend the 5 June 2015 call. On 13 June 2015, Mr [NAME OF INDIVIDUAL] wrote: "*I haven't been fully in the loop re the R&D activities and the pipeline products and projects for solvents and whether they are part of the divestiture package*". On 14 June 2015, [NAME OF INDIVIDUAL] replied: "*We have indicated that no specific R&D is taking place in the divested product portfolio… Fi [for your information] iCap is not seen as specifically related to the divested portfolio, as it isn't specifically linked and will support a larger group of other products*".[699] When read in context, it is clear that Mr [NAME OF INDIVIDUAL] email is reporting on the approach that the Parties took on R&D vis-à-vis the Commission. Hence, the use of the terms "*we have indicated*" and "*is not seen*". As such, [NAME OF INDIVIDUAL] email cannot demonstrate that he genuinely considered that no R&D was taking place in the Divested business or that iCap was not "*specifically related to the divested portfolio*". Indeed, less than two months later, [NAME OF INDIVIDUAL] discussed the assets that should or should not be included in the sales agreement with Honeywell and stated: "*Packaging Innovation line maybe has the biggest exposure. We really need to find another way to present/attack this. In the process of negotiation with the [C]ommission we always tried to keep R&D out and were successful doing so by always referring to product R&D. With this we tried to keep iCap, iBarrel, filtration etc. out of scope*."[700] In this respect, the Commission notes that the distinction between product R&D and packaging R&D has never been raised or discussed with the Commission.[701] If Sigma-Aldrich intended to make such a distinction, it could and should have informed the Commission accordingly by clearly stating it. Since Sigma-Aldrich failed to bring this distinction to the attention of the Commission, it is not entitled to rely on it to support its narrow interpretation of the statements made in response to RFI I-3 and RFI I-4 (as

698 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: Communicstion [sic] at Buchs – question" [Doc Id: 330-4839] referred to in the Reply to SSO, paras. 223-225.

699 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: Communicstion [sic] at Buchs – question" [Doc Id: 330-4839].

700 Email by [NAME OF INDIVIDUAL] to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), copying [NAME OF INDIVIDUAL], "Divested products list, Arnaud's request plus add-remove", dated 30 July 2015 (emphasis added) [Doc Id: 304-1179].

701 See Section 4.1.3.3.

incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM.[702]

Moreover, the fact that the person leading the Union merger control process for Sigma-Aldrich, namely [NAME OF INDIVIDUAL], was not aware of iCap before the call of 5 June 2015 is irrelevant.[703] What matters is that, after the call, being aware of iCap and having understood the Commission's requirements ("*all pipeline projects for R&D within the divested business*"), Sigma-Aldrich consciously decided not to disclose a project described internally as "*inter linked with Metrohm instruments (KF titration)*" and "*driven by Buch/Fluka*".[704]

(b) As highlighted in Section 2.2.2 above and Section 4.3.2.3.2 below, at the time of the submission of the Final Form RM and the replies to RFI I-3 and I-4, iCap ranked high among Sigma-Aldrich's R&D projects and was qualified as a "*strategic*" *and* "*lighthouse project*", which was "*too high profile, too important*".[705] Contemporaneous internal documents also reveal that iCap was expected to have a strong impact on Sigma-Aldrich's future sales[706] and market shares in solvents and inorganics (as illustrated in Table 1).

Table 1

Sigma-Aldrich's sales in the affected markets (2014)	[…]€ *(EEA)* / […]€ *(global)*
Incremental sales brought by iCap	[…] […]

Sigma-Aldrich's market shares in…	[…]	[…]
… KF titration *(affected market)*	[…]%	[…]%
… Other titration *(affected market)*	[…]%	[…]%

Sources: ID29-2985 and ID28-123

(c) As explained in Section 4.1.2.1, iCap was clearly related to Sigma-Aldrich's solvents and inorganics business in the EEA and, thus, should have been disclosed to the Commission. The claim that Sigma-Aldrich reached the opposite conclusion on the ground that iCap was not R&D on products but on packaging is not supported by contemporaneous evidence. For instance, in the modified list that Mr [NAME OF INDIVIDUAL] circulated after the 5 June 2015 call, he did not classify iCap as packaging R&D. Rather, he included iCap under "*New Technology*", while he created a separate category for "*RediDry packaging technology*".[707]

(360) In any event, even if Sigma-Aldrich did genuinely consider that iCap was not "*solely or predominantly*" related to the Divestment Business at the time of non-disclosure;

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702 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

703 In fact, the email of [NAME OF INDIVIDUAL] quoted by Sigma-Aldrich did not exclude concerns: "[…] *we need to understand if this gives us any concerns*" [Doc Id: 329-40603].

704 Email chain between [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

705 See recital 478(c).

706 In December 2015, Merck awarded a prize to iCap in the category "*sales potential*" (ID29-3368).

707 Email chain between [NAMES OF INDIVIDUALS], Sigma-Aldrich, re "R n d", dated 5 June 2015 [Doc Id: 329-40603].

that it was packaging – not product – R&D; and that it was not important, the Commission considers that it still breached Article 14(1) of the Merger Regulation.[708] Indeed, Section 5.3 of the Form RM and the questions in RFI I-3 and I-4 – asked in the context of Sections 5.12 and 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated) – did not inquire only about "*solely and predominantly related*" pipeline projects, innovation, R&D agreements nor did they exclude packaging R&D or emphasise important projects.[709] For instance, Sigma-Aldrich was required to provide information on (i) "*any innovations or new products*" (Section 5.3 of the Form RM); (ii) "*any R&D agreements with third parties related to solvents and inorganics in the EEA*" (question 12 of RFI I-4); (iii) "*any personnel specialised in R&D for solvents and inorganics or the Fluka branded products in general*" (question 16 of RFI I-4); and (iv) "*all differences between the Divestment Business and Sigma's business for solvents and inorganics in the EEA*" (question 6 of RFI I-3) (emphasis added). Sigma-Aldrich was aware (or could not have been unaware) that its obligation to make a full and honest disclosure to the Commission of the relevant facts and circumstances was not limited to projects, innovation or agreements solely or predominantly related to the Divestment Business; even if they concerned only packaging; and even if they were "*not important*".[710] This is exactly why, during the 5 June 2015 call, [NAME OF INDIVIDUAL] told Sigma-Aldrich's [NAME AND JOB TITLE OF INDIVIDUAL], that the *"R&D question"* was *"a bit sticky*".[711]

(361) *Second*, the Reply to the SSO stressed that Sigma-Aldrich's [LEGAL ADVICE RECEIVED BY SIGMA].[712] In this respect, the Commission notes that, according to well-established case-law, "*an undertaking may not escape imposition of a fine where the infringement of the competition rules has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer*".[713]

4.2.2.3. The incorrect and/or misleading information was provided by Sigma-Aldrich as part of a strategy to avoid disclosing iCap to the Commission

(362) The Commission considers that the elements in Sections 4.2.2.1 and 4.2.2.2 above are sufficient to demonstrate that Sigma-Aldrich "*[could] not be unaware of the […] nature of its conduct"* and thus committed an infringement intentionally or at least negligently.[714]

(363) For the reasons set out in this Section 4.2.2.3, the Commission finds that Sigma-Aldrich's supply of incorrect and/or misleading information was part of a strategy to avoid the transfer of iCap to the Purchaser of the Divestment Business. More specifically, the evidence in the file reveals that Sigma-Aldrich deliberately provided incorrect and/or misleading to avoid the disclosure of iCap to the Commission (Section 4.2.2.3.1) and to make its exclusion from the scope of the Divestment

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708 Similarly, Sigma-Aldrich's alleged doubts regarding the transferability of iCap are irrelevant to assess whether the latter should have been disclosed in response to RFIs I-3 and I-4 and to the Form RM.

709 See Section 4.1.

710 See recital (378).

711 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Status", dated 5 June 2015 [Doc Id: 329-43509].

712 Reply to SSO, paras.218-222 and 272.

713 Case T-704/14, *Marine Harvest*, para. 238 and the case law cited.

714 Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

Business go unnoticed by suggesting that the Commission's guidance on IP and R&D had been addressed (Section 4.2.2.3.2).

(364) That suggests the existence of a strategy to deceive the Commission. Although Article 14(1) of the Merger Regulation does not require the existence of such a strategy, which is not a *constitutive* element of an infringement, its existence is relevant to further illustrate the fact that Sigma-Aldrich acted intentionally, or at the very least negligently, and hence the gravity of the infringements.[715]

4.2.2.3.1. Sigma-Aldrich deliberately provided incorrect and/or misleading information to avoid the disclosure of iCap to the Commission and its transfer to the Purchaser of the Divestment Business.

(365) As already mentioned, Sigma-Aldrich expressly acknowledged the fact, that, at the time of the submission of the Final Form RM and the responses to RFIs I-3 and I-4, it knew the existence of iCap and deliberately "*made the decision not to disclose iCap*" to the Commission.[716] This is corroborated by several internal documents, in particular:

(a) On 31 July 2015, {NAME OF INDIVIDUAL] explained that: "*In the process of negotiation with the commission we always tried to keep R&D out and were successful doing so by always referring to product R&D. With this we tried to keep iCap, iBarrel, filtration etc. out of scope.*"[717] Mr [NAME OF INDIVIDUAL] added that "*packaging innovation*" was the "*biggest exposure*" in the negotiation of *the* sale of the Divestment Business to Honeywell and that Sigma-Aldrich needed "*to find another way to attack/present this*";[718]

(b) On 28 August 2015, a Sigma-Aldrich employee proposed to specifically mention iCap among the *excluded* assets that would not be *transferred* to Honeywell. Mr [NAME OF INDIVIDUAL] replied: *"in the discussions with the EC as it related to R&D we always referred to product R&D this to specifically exclude packaging or production technology to be transferred to the buyer. Does calling out intellectual property in this sense (iCap, a packaging format) bring this in question?*";[719]

(c) On the same day, [NAME OF INDIVIDUAL] indicated that "*what we should discuss before Seelze are the technologies in the pipe that concern at least partially Solvents and Inorganics. We kept this deliberately out of the D*[ivestment] *B*[usiness] *as agreed with [NAMES OF INDIVIDUALS]. But I am not sure, whether this is a potential High-risk, if we withhold it from Seelze completely. This concerns our bigger projects like iCap, iBarrel, [SIGMA'S R&D AND BUSINESS STRATEGIES]* […] *For this there are no products yet, but just, there are to be some – even if under the Merck brand. We should look*

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715 Case IV/29.895 *Telos*, 25 November 1981, para. 29. See also Case M.1610 *Deutsche Post/trans-o-flex*, 14 December 1999, paras. 176 and 178.

716 See notably Reply to SSO, Section 4.3.1, and the Second Oral Hearing recording.

717 Email from [NAME OF INDIVIDUAL] to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), copying [NAME OF INDIVIDUAL], "Divested products list, Arnaud's request plus add-remove", 30 July 2015 [Doc Id: 304-1179].

718 Email from [NAME OF INDIVIDUAL] to [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich), copying [NAME OF INDIVIDUAL], "Divested products list, Arnaud's request plus add-remove", 31 July 2015 [Doc Id: 304-1178].

719 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 304-1164].

*at this tête-à-tête [*unter vier Augen*]"*.[720] [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) responded: "*[SIGMA'S R&D AND BUSINESS STRATEGIES]*";[721]

(d) On 29 August 2015, following a suggestion of [NAME OF INDIVIDUAL] that "*the agreements with Metrohm, Helbling, Biolab and other technology, licensing & marketing contracts could be relevant*" for the divestment business,[722] [NAME OF INDIVIDUAL] explained that "*iCap is not part of the D*[ivestment] *B*[usiness], *[NAME OF INDIVIDUAL] confirmed we keep out our pipe with packaging technology*";[723]

(e) On 28 August 2015, in a "*Failure mode and effects analysis (FMEA)*" report for iCap, Sigma-Aldrich also set out mitigating measures to avoid the Purchaser of the Divestment Business claiming rights on iCap. The strategy proposed was to "*emphasise iCap as innovative packaging instead of a titration feature*";[724]

(f) On 17 December 2015, [NAME OF INDIVIDUAL] advised employees of the combined entity that they "*may want to make sure* [they do not] *do anything visible on this* [iCap applied to Karl Fischer titration solutions] *for at least six months if not a year.* [Honeywell] *can ask to add things to the DB for the next six months and for the next year we will be their service provider*".[725]

(366) In other words, those details from Sigma-Aldrich's internal documents, including internal exchanges of employees directly involved in the negotiation with the Commission, reveal that Sigma-Aldrich "*deliberately*" provided the Commission with incorrect and/or misleading information "*to keep* [iCap] *out*" of the scope of the Divestment Business. In order to do so, in reply to RFI I-3 and I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM, Sigma-Aldrich omitted to mention iCap, even though it knew that iCap was responsive, and consistently referred to "*product R&D"* to "*specifically exclude … iCap, a packaging format"*, without ever raising or discussing the distinction between product R&D and packaging R&D with the Commission.[726] Internal documents produced in the context of the negotiation with Honeywell reveal that such a distinction was artificial and required the implementation of "*mitigating measures*" to prevent the purchaser of the Divestment Business from "*claiming rights on iCaps*", including "[not] *do*[ing] *anything visible*" on iCap "*for at least six months if not a year*".

(367) In view of the foregoing, the Commission concludes that Sigma-Aldrich deliberately provided incorrect and/or misleading information in reply to RFI I-3 and I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of

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720 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804].

721 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804].

722 Email from [NAME OF INDIVIDUAL], 28 August 2015, 23:39 [*original in German*] [Doc Id: 28-1937].

723 Email from [NAME OF INDIVIDUAL], 29 August 2015, 09:27 [Doc Id: 28-1937].

724 FMEA Analyse iCap, risks no. 10.1 and 11.1 [*original in German*] [Doc Id: 30-799].

725 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595].

726 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

the Final Form RM in order to avoid the disclosure of iCap to the Commission and its transfer to the Purchaser of the Divestment Business.

(368) In the Reply to the SSO, Sigma-Aldrich submitted that the above internal documents are not sufficient to support the allegation that Sigma-Aldrich intended to mislead the Commission since they all post-date the relevant facts.[727] In addition, the Reply to the SSO claims that neither Sigma-Aldrich nor its employees had an incentive or motive to hide iCap (and, thus, no intention to mislead the Commission) on the grounds that (i) iCap was not worth the risks and (ii) its employees were focusing on closing the Transaction to secure their bonuses and did not even know whether they would remain with the new entity.[728] Those arguments do not change the Commission's conclusion for several reasons.

(a) The above internal exchanges referring to the negotiation process with the Commission were all drafted between June and December 2015, that is to say (i) shortly after the alleged infringements and (ii) before the opening of the infringement proceedings (that is, *in tempore non suspecto*), which makes them particularly credible.[729] Conversely, the Parties did not provide any contemporaneous evidence supporting their claims, relying quasi-exclusively on witness statements drafted after the opening of the infringement proceedings (that is, *in tempore suspecto*);[730]

(b) The elements in the file contradict the claims that Sigma-Aldrich and its employees had no motive to mislead the Commission by hiding iCap. Indeed, as already explained, contemporaneous evidence shows that at the time of the merger review, Sigma-Aldrich expected iCap to have a material impact on the sales in solvents and inorganics;[731] which is also corroborated by the fact that, after the clearance, Merck showed a strong interest in iCap, awarding it notably a prize in the sales potential category.[732] Moreover, some of Sigma-Aldrich's employees involved in the preparation and submission of the remedy discussions considered that retaining iCap in the combined entity as a "*trump card*" that could be played to keep their jobs;[733]

(c) The allegation that Sigma-Aldrich did not intend to mislead the Commission by "*hid*[ing] *iCap*" to avoid its transfer to the Purchaser of the Divestment Business is expressly contradicted by contemporaneous internal documents, including in particular [NAME OF INDIVIDUAL] email advising employees of the combined entity "[not to] *do anything visible on [iCap] for at least six*

727 Reply to SSO, paras. 196 and 232.

728 Reply to SSO, paras. 244ff.

729 See notably the conclusions of Advocate General Vesterdorf in Case T-1/89 - *Rhône Poulenc* stating that "*emails drafted shortly after the meetings and clearly without any thought for the fact that they might fall into the hands of third parties must be regarded as having great significance*."

730 As explained in Section 4.3.1 above, the Parties have provided witness statements from 63 witnesses. None of these witnesses has provided any contemporaneous document to support his/her statements, with the exception of [NAME OF INDIVIDUAL] (an employee of Merck – not Sigma-Aldrich) (Reply to SO, Annexes 3-5), who provided 3 emails referring to the commercial potential of iCap which is irrelevant to the Commission's investigation.

731 See Section 2.2.2 and Section 4.3.2.3.2.

732 See also recital 478(c).

733 "*For [NAME OF INDIVIDUAL] it does not look great either […]. But he still has a trump card up his sleeve – which includes iCap / 3S among other things. Let's see how that works. […] I hope for him that he can still play his trump card at Merck*" (email from [NAME OF INDIVIDUAL], Sigma-Aldrich to [NAME OF INDIVIDUAL], Metrohm, re "Re: Auf zu neuen Ufern!", dated 12 December 2015 [*original in German*] [ID: 29-3418]).

months if not a year" because Honeywell *"can ask to add things to the* [Divestment Business] *for the next six months and for the next year we will be their service provider*";[734]

(d) In any event, as already explained, the elements in Sections 4.2.2.1 and 4.2.2.2 above are sufficient to demonstrate that Sigma-Aldrich acted intentionally or at least negligently, showing that the latter was aware (or could not have been unaware) of the fact that: (i) the information required was necessary and material for the Commission's assessment and that (ii) the information supplied was incorrect and/or misleading. The 6 email exchanges referred to in the present Section go beyond the above and reveal the motive of Sigma-Aldrich, showing that the supply of incorrect and/or misleading information was part of a strategy to deceive the Commission to avoid the disclosure of iCap and its transfer to the Purchaser. Such a strategy further illustrates the fact that Sigma-Aldrich acted intentionally, or at the very least negligently, even if the existence of such a strategy to deceive is not an element required under Article 14(1) of the Merger Regulation.[735]

4.2.2.3.2. Sigma-Aldrich provided incorrect and/or misleading information to make the exclusion of iCap from the scope of the Divestment Business go unnoticed, by suggesting that the Commission's guidance on IP and R&D had been addressed

(369) As detailed below, on several occasions, in the context of the remedy discussions, the Commission stressed the importance of packaging and R&D and the need to include them in the scope of the remedies.

(370) *On 19 May 2015*, the Commission held a meeting with the Parties to discuss the Draft Commitments (submitted the previous day). In light of the results from the Phase I market investigation, the Commission informed the Parties that packaging should be included in the scope of the Divestment Business. Later on that date, the Commission sent comments to the Parties specifying that for "[p]*ackaging* […] *any IP and know how should be included*" in the Divestment Business.[736]

(371) *On 2 June 2015*, the Commission held another meeting with the Parties to communicate the results of the market test. In this meeting, the Commission informed the Parties that all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments.[737]

(372) *On 5 June 2015*, the Commission received a new version of the Initial Commitments, with no explicit mention of pipeline projects and R&D agreements, ignoring thus the guidance provided to the Parties on 2 June 2015. Consequently, a few hours later, the Commission suggested that the following language be included in the Commitments: "*To the extent it concerns products included in the Divestment Business, the Parties shall transfer all R&D and pipeline projects and related information to the Purchaser. To the extent any such agreement exist and concern the products*

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734 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595] (emphasis added).

735 Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

736 Comments on Commitments [Doc Id: 787], emphasis added.

737 Email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948]. On 2 June 2015, the Commission sent RFI I-4 to the Parties asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA (RFI I-4, questions 12, 13 and 16 [Doc Id: 829]).

included in the Divestment Business, the Parties will transfer to the Purchaser all R&D agreements with third parties".[738] There was no distinction between product and packaging R&D.[739]

(373) *In August 2015*, in the context of the remedy implementation, the Commission became aware that the Divestment Business included standard versions of certain products but not the Redi-Dri version (which involved alternative packaging under a different SKU). In September 2015, the Monitoring Trustee (instructed by the Commission) told the Parties that there should be no distinction between products and packaging under the Final Commitments. As he put it, "[w]*e are writing with some further guidance from the case team concerning the scope of products to be included in the Divestment Business*. […] *There is no differentiation with regard to packaging under the* [Final] *Commitments, for example, standard and redi-dry versions of a product should be included in the Divestment Business. If particular packaging is required and is considered part of Sigma's patents, IP or know-how, Sigma should grant a license to the Purchaser under paragraph 18 of the* [Final] *Commitments' Schedule*".[740]

(374) After receiving the above repeated and express guidance, Sigma-Aldrich did not take any action to inform the Commission about the existence of iCap, an R&D project specifically developed for products included in the Divestment Business.[741] In view of the above guidance, Sigma-Aldrich could not be unaware that iCap was responsive to Section 5.3 of the Form RM, to question 6 of RFI I-3 – asked in the context of Section 5.12 of the Form RM (into which Sigma-Aldrich's reply was integrated) – and to questions 12, 13 and 16 of RFI I-4 – asked in the context of Section 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated). And yet, iCap is mentioned nowhere in the Final Form RM or in the replies to RFI I-3 and RFI I-4.

(375) Sigma-Aldrich did not bring to the Commission's attention the fact that it did not follow the above guidance and intended to exclude iCap from the scope of the Divestment Business. Instead, Sigma-Aldrich used incorrect and/or misleading language in its responses and submissions (including the Final Form RM and the replies to RFI I-3 and RFI I-4) suggesting that it had followed the said guidance.[742]

(376) In response to the guidance provided by the Commission on 19 May 2015 to include in the remedies *"any IP and know how* [on packaging]*",* the Parties submitted a new version of the Draft Commitments on 21 May 2015, assuring the Commission that the revised draft was "*incorporating your comments*".[743] The above suggested that the Parties had followed the guidance provided by the Commission on 19 May 2015, which was not the case. Indeed, both the Initial and the Final Commitments referred to IP and know-how "*owned by or licensed to Sigma that are used in the Divestment*

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738 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Commitments was proposed [Doc Id: 954 and Doc Id: 956].

739 In other words, the suggestion made by the Commission on 5 June 2015 did not exclude what is referred by Sigma-Aldrich as "packaging R&D", *i.e.* R&D related to the development of new packaging for (existing or new) products included in the Divestment Business .

740 Email from Thomas Höhn (Monitoring Trustee) to [NAME OF INDIVIDUAL] and Sigma-Aldrich and Merck's external counsels "M.7435 – Scope of DB and SKU list", 9 September 2015 [Doc Id: 304-1124].

741 See Section 4.1.2.1.1.

742 See also Case T-430/18 *American Airlines*, 16 December 2020, paras. 174-177.

743 [Doc Id: 996]

Business."[744] The Final Form RM included the same wording,[745] as did the Excluded Assets Schedule, which was negotiated as part of the SPA with Honeywell. This Schedule excluded "*any research and development related to packaging and closures for packaging not used in connection with any of the Product*".[746]

(377) In this respect, it should be noted that: (i) the Commission never made a distinction depending on whether packaging IP, know-how and R&D was "*used*" or "*not used*" in the Divestment Business at the time of the Clearance Decision – and had no reasons to do so in light of the results of the market investigation and the market test communicated to the Parties during the Phase I investigation[747] – and (ii) the Parties did not make clear to the Commission that they intended to make such a distinction.[748] The Parties could not have been unaware that making such a distinction without explicitly raising it, in spite of the Commission's express guidance, could result in a misleading interpretation of the facts and prevent the Commission from discussing and investigating this distinction within the tight timeframe of Union merger control.

(378) If Sigma-Aldrich intended to ignore the Commission's guidance on IP and to exclude some of the packaging IP from the Divestment Business because it was not "*used*" in solvents and inorganics in the EEA, it should have clearly disclosed it to the Commission by formulating it in its responses and submissions (in particular in reply to question 6 of RFI I-3 as incorporated in Section 5.12 of the Final Form RM). Sigma-Aldrich's omission to do so (while ignoring the Commission's explicit guidance – and indeed positively indicating that it had followed the Commission's guidance (see recital (379))) suggests that Sigma-Aldrich acted intentionally, or at the very least negligently.

(379) In response to the guidance provided by the Commission on 2 June 2015 to include in the remedies all pipeline projects and R&D agreements, the Parties provided a new version of the Initial Commitments on 5 June 2015 (01:51 AM), "*incorporating the changes you requested following the market test*".[749] Yet, that revised version did not include any explicit mention of pipeline projects and R&D agreements.

(380) In response to the language suggested by the Commission on 5 June 2015 to include *"all R&D and pipeline projects"* and *"all R&D agreements with third parties"*, Sigma-Aldrich implicitly introduced a distinction between product and packaging R&D, without explaining the significance of this distinction.[750] The Final Commitments included R&D to the extent it concerns "*solely or predominantly new products or products under development within the scope of the Divestment Business*".[751] In the same vein, Section 5.3 of the Final Form RM stated that "*there are no new products or innovations imminently planned with regard to the Fluka Business or the Sigma-Aldrich Business*".[752] The reply to question 12 of RFI I-4 as incorporated in Section

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744 Initial Commitments [Doc Id: 789] and Final Commitments [Doc Id: 840], emphasis added.

745 Final Form RM, para. 38 [Doc Id: 849].

746 Products referred to solvents and inorganics included in the sale to Honeywell (under the Fluka and Sigma-Aldrich brands), see definition of "Products", point 1.1 of the SPA [Doc Id: 890].

747 See Section 2.1.2.2.

748 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

749 Cover email from Merck's external lawyer to the Commission with Sigma-Aldrich's external lawyer in copy of 03/06/2015 and 05/06/2015 "RE: M.7435 Merck/Sigma-Aldrich" [Doc Id: 911].

750 In other words, the suggestion made by the Commission on 5 June 2015 did not exclude what is referred by Sigma-Aldrich as "packaging R&D", *i.e.* R&D related to the development of new packaging for (existing or new) products included in the Divestment Business .

751 Final Commitments, para. 24 [Doc Id: 840].

752 Final Form RM, para. 107 [Doc Id: 849], emphasis added.

5.4 of the Final Form RM also stated that "*Sigma does not have any formal R&D agreements with respect to its current solvents and inorganics products in the EEA*"[753] which refers only to existing and commercialised SKUs[754] and thus exclude packaging R&D which would be commercialised as a new SKU.

(381) Taking into account those circumstances, in particular the Commission's previous guidance provided to the Parties and the absence of waiver requests, as well as the overall context of this matter,[755] Sigma-Aldrich could not have been unaware that the language used in the Final Commitments and the Final Form RM reasonably suggested to the Commission that *all* R&D projects related to the Divestment Business had been included.[756]

(382) Not only did Sigma-Aldrich ignore the Commission's guidance on R&D and excluded packaging R&D projects from the Divestment Business but it also failed to disclose it to the Commission and formulated its responses and submissions, including in particular in Section 5.3 of the Final Form RM and/or in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) or question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM), in a way suggesting that it had followed the Commission's guidance. Sigma-Aldrich's omission to do so (while ignoring the Commission's explicit guidance) suggests that Sigma-Aldrich acted intentionally, or at the very least negligently.

(383) In response to the guidance provided by the Commission in August 2015 to make "*no differentiation with regard to packaging under the* [Final] *Commitments*", Sigma-Aldrich did not take any action to inform the Commission about the exclusion of packaging R&D from the scope of the Divestment Business, before or even after receiving this email. Instead, email exchanges within Sigma-Aldrich show that there were concerns about avoiding disclosure of iCap:

(a) Mr [NAME OF INDIVIDUAL] forwarded the Monitoring Trustee's email to Mr [NAME OF INDIVIDUAL] copying also Mr [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich). Mr [NAME OF INDIVIDUAL] commented: "[t]*his is very concerning. In the way it is written it opens the door to areas we have been able to single out such as Anhydrous and NMR solvents. Possibly the iCap could come in play*";[757]

(b) Mr [NAME OF INDIVIDUAL] replied: *"anhydrous and NMR are not at risk at all - they are explicitly carved out from the* [Final] *Commitments* […] *We can give a license to Redi Dri and hopefully be done* […] *we have to be cautious arguing too much over concepts on some of these questions because we could argue ourselves into a broader interpretation which does bring into play other issues which are today out"* .[758]

(384) In the Commission's view, all of the above shows that, throughout the process, Sigma-Aldrich could not have been unaware that the language used in the Final Commitments, in the Final Form RM (incorporating the replies to RFI I-3 and RFI I-

753 Final Form RM, para. 120 [Doc Id: 849], emphasis added.
754 Reply to SO, para. 349.
755 Cases T-145/06 *Omya*, 4 February 2009, para. 33; and T-151/05 – *NVV and Others*, 7 May 2009, para. 184.
756 On the difference between product and packaging R&D, see notably [Doc Id: 304-1179, 28-1937].
757 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: M.7435 – Scope of DB and SKU list", 9 September 2015 [Doc Id: 304-1124] (emphasis added).
758 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re:M.7435 – Scope of DB and SKU List" [Doc Id: 304-1125] (emphasis added).

4) was incorrect and/or at the very least misleading as it as it did not give a true picture of reality, reasonably suggested that the Commission's guidance had been addressed and did not allow the Commission to understand that Sigma-Aldrich intended to exclude iCap from the scope of the Divestment Business. The foregoing, together with the elements in Section 4.2.2.3.1, shows that the supply of incorrect and/or misleading information in Section 5.3 of the Final Form RM and in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) was part of a strategy to deceive the Commission to make the exclusion of iCap from the scope of the Final Commitments go unnoticed, which further demonstrates that Sigma-Aldrich acted intentionally (or at least negligently) in making such incorrect and/or misleading statements. If Sigma-Aldrich intended to ignore the Commission's guidance on R&D and exclude packaging R&D projects, such as iCap, from the Divestment Business, it could and should have clearly disclosed it to the Commission by formulating it in its responses and submissions, including in particular in Section 5.3 of the Final Form RM and/or in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) or question 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).[759]

(385) Sigma-Aldrich contested this conclusion by arguing that the changes made to the language of the Commitments do not reveal any intention to mislead the Commission but aimed at clarifying the scope of the remedy. According to Sigma-Aldrich, the initial language proposed by the Commission was excessively broad and difficult to analyse within the limited available time, which could have resulted in the transfer of assets that were not relevant for the Divestment Business. In this regard, Sigma-Aldrich submitted that it did not have iCap in mind when proposing the changes to the Commission's language in the Commitments.[760] The above claims do not affect the Commission's conclusion for the following reasons:

(a) Contemporaneous evidence, and in particular the emails exchanged in the context of the call of 5 June 2015[761], expressly refer to iCap, showing that, contrary to the Parties' allegation, Sigma-Aldrich had iCap in mind when proposing the amendments to the language of the Commitments and using the same incorrect and/or misleading wording in Section 5.3 of the Final Form RM and in reply to RFI I-3 and RFI-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM);[762]

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759 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

760 Reply to SSO, paras. 236-243.

761 See Section 4.2.2.2.1.

762 For instance, both the Final Commitments and the Final Form RM (including the reply to RFI I-3 and RFI I-4) make an implicit and non-obvious distinction depending on whether packaging IP, know how and R&D was "*used*" or "*not used*" in the Divestment Business at the time of the Clearance Decision by referring to IP and know-how "*owned by or licensed to Sigma that are <u>used</u> in the Divestment Business*" (see Final Commitments [Doc Id: 840] and Final Form RM, para. 38 [Doc Id: 849], emphasis added). Similarly, both the Final Commitments and the Final Form RM (including the reply to RFI I-3 and RFI I-4) consistently refer to "*product R&D*" to make an implicit and non-obvious distinction between product R&D and packaging R&D. For example, the reply to question 12 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) states that "*Sigma does not have any formal R&D agreements with respect to its <u>current</u> solvents and inorganics <u>products</u> in the EEA*" ([Doc Id: 849], emphasis added) which, according to the Parties, implicitly refers only to existing and commercialised SKUs (see Reply to SO, para. 349) and thus excludes packaging R&D, such as iCap which would be commercialised as a new SKU. In line with the above interpretation, Section 5.3 of the Final Form RM stated that "*there are*

(b) The claim according to which Sigma-Aldrich simply sought to clarify the scope of the Commitments, to avoid the transfer of assets that were not relevant for the Divestment Business, such as packaging R&D, is not consistent with the fact that Sigma-Aldrich did not raise the above issue in response to RFI I-3 and I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM, for which packaging R&D (such as iCap) was responsive. In particular, it is not consistent with the fact that the exclusion of packaging R&D (such as iCap) is mentioned neither in Section 5.12 of the Final Form RM (which incorporated the reply to question 6 of RFI I-3), nor in the text of the Final Commitments;[763] whereas Sigma-Aldrich was not willing to take the same risk later on when selling the Divestment Business to the Purchaser and felt the need to expressly exclude the project;

(c) If Sigma-Aldrich was genuinely "*concerned*" by the fact that the "*broad*" language proposed by the Commission "*could render the undertakings in relation to R&D not easily definable and possibly unachievable*"[764], it should have raised this issue with the Commission. The fact that Sigma-Aldrich implemented changes to the Commitments (using the same wording in the Final Form RM, incorporating the reply to RFI I-3 and I-4) without informing the Commission of their significance suggests that it acted intentionally (or, at the very least negligently).

(386) In this respect, in the Reply to the SSO, Sigma-Aldrich claimed that it was not negligent but rather thorough, following a *"diligent process"*. In particular, it submitted that: (i) when the Commission started to consider R&D as relevant (on 5 June 2015), Sigma-Aldrich reacted immediately (for example, identifying relevant individuals, organising calls, consulting with external legal counsel); and (ii) Sigma-Aldrich included a catch-all clause in the Commitments and the SPA to ensure that any additional assets necessary for the competitiveness and viability of the Divestment Business could be provided to the Purchaser.[765] In this respect, the Commission notes the following:

(a) Whether or not Sigma-Aldrich reacted quickly to the guidance on R&D and packaging formulated by the Commission is irrelevant for assessing whether the incorrect and/or misleading information was provided intentionally or negligently. What matters is the substantive nature of that reaction. In this respect, as previously explained, in response to the above guidance, Sigma-Aldrich deliberately supplied incorrect and/or misleading information to avoid the disclosure of iCap to the Commission and to make its exclusion from the scope of the Divestment Business go unnoticed by suggesting that the Commission's guidance on IP and R&D had been addressed. The above, and in particular the fact that Sigma-Aldrich implemented changes to the Commitments, using the same incorrect and/misleading wording in the Final Form RM (incorporating the replies to RFIs I-3 and I-4) without informing the Commission of their significance suggest that, far from being diligent, Sigma-

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no <u>new products</u> or innovations imminently planned with regard to the Fluka Business or the Sigma-Aldrich Business" ([Doc Id: 849], emphasis added).

763 See model commitments text, Schedule, para. 3, available at https://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf (last accessed on 11 March 2021): "*The Divestment Business shall <u>not</u> include:(a)...;(b)[<u>It is the responsibility of the Parties to indicate clearly what the Divestment Business will not encompass</u>]*" (emphasis added).

764 Reply to SO, Annex 1.18 (witness statement of [NAME OF INDIVIDUAL]), para. 12

765 Reply to SSO, paras. 261-268.

Aldrich implemented a strategy to deceive the Commission, which further demonstrates the intentional, or at the very list negligent, nature of its behaviour;

(b) Similarly, the fact Sigma-Aldrich included a catch-all clause in the Final Commitments, in accordance with the Commission's model commitment text,[766] is irrelevant for assessing whether the supply of incorrect and/or misleading information in Section 3 of the Final Form RM and in reply to RFI I-3 and RFI I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) was intentional or negligent. In any event, it should be noted that Sigma-Aldrich implemented measures to withhold iCap from the Commission, Honeywell and the Monitoring Trustee in order to neutralise the above catch-all clause and, thus, prevent the transfer of iCap, such as Mr [NAME OF INDIVIDUAL] recommendation "[not to] *do anything visible on* [iCap] *for at least the next six months*" (corresponding to the term of the SPA catch-all clause)[767] or the inclusion of iCap in the Excluded Assets Schedule.[768]

4.2.2.4. Conclusion

(387) Sigma-Aldrich was aware (or could not have been unaware) of the fact that the information required in Section 5.3 of the Form RM, in question 6 of RFI I-3 – asked in the context of Section 5.12 of the Form RM (into which Sigma-Aldrich's reply was integrated) – and in question 12, 13 and 16 of RFI I-4 – asked in the context of Section 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated) – was necessary and material for the Commission's assessment of the compatibility of the Transaction (see Section 4.2.2.1). Sigma-Aldrich was also aware (or could not have been unaware) that the information supplied was incorrect and/or misleading because it was aware (or could not have been unaware) that iCap was an innovation project; that iCap together with the solvents and inorganics it was offered with constituted new products planned; that several of its employees were working on the iCap project, including personnel specialised in R&D; and that there was an R&D agreement related to the Divestment Business which was therefore responsive to Section 5.3 of the Form RM and to question 6 of RFI I-3 and question 12, 13 and 16 of RFI I-4 – asked in the context of Sections 5.12 and 5.4 of the Form RM (into which Sigma-Aldrich's replies were integrated) (see Section 4.2.2.2). The foregoing is sufficient to demonstrate that Sigma-Aldrich "[could] *not be unaware of the* […] *nature of its conduct"* and thus committed an infringement intentionally or at least negligently.[769]

(388) Furthermore, the evidence in the Commission's file reveals that the supply of incorrect and/or misleading information was part of a strategy implemented by Sigma-Aldrich to avoid the transfer of iCap to the Purchaser of the Divestment Business. More specifically, the evidence in the file reveals that Sigma-Aldrich deliberately provided incorrect and/or misleading information to avoid the disclosure of iCap to the Commission and to make its exclusion from the scope of the Divestment Business go unnoticed by suggesting the Commission's guidance on IP and R&D had been addressed (Section 4.2.2.3). That suggests the existence of a

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766 Model commitments text, para. 6.

767 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595].

768 See Section 4.3.2.1.2.

769 Case T-704/14 *Marine Harvest*, 26 October 2017, para. 237, upheld in Case C-10/18 P *Mowi ASA*. See also C-681/11 *Schenker & Co. and Others*, 18 June 2013, para. 37 and the case-law cited.

strategy to deceive the Commission, which although not a *constitutive* element of the infringement, further illustrates the fact that Sigma-Aldrich acted intentionally, or at the very least negligently, and hence the gravity of the infringements.[770]

(389) In view of the above, the Commission concludes that Sigma-Aldrich intentionally or at least negligently provided incorrect and/or misleading information in Section 5.3 of the Final Form RM and in replies to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM).

4.3. Other arguments presented by the Parties do not affect the Commission's conclusions

4.3.1. Preliminary remark on the probative value of witness statements

(390) As a preliminary remark, the Commission notes that the claims formulated by Merck and Sigma-Aldrich in the Reply to the SO and the Reply to the SSO rely quasi-exclusively on witness statements (i) made at the request of the Parties by their employees, (ii) in the context of the infringement proceeding and (iii) under the supervision of external counsel. In total, the Parties provided no less than 63 witness statements.[771]

(391) The Commission recalls that, according to established case law, such statements have, by their nature, "*little probative value*"[772] and "*cannot establish the reality of the circumstances set out therein without other evidence to corroborate it*".[773]

(392) In this case, the credibility of the above-mentioned witness statements is particularly low since they are:

(a) not supported by contemporaneous evidence. None of the witnesses was able to provide contemporaneous documents supporting their statements, with the exception of [NAME OF INDIVIDUAL], i.e. an employee of Merck – not Sigma, who provided three emails, but which all concern the commercial potential of iCap as a project which is irrelevant for assessing whether Sigma-Aldrich intentionally or at least negligently provided incorrect and/or misleading information;[774] and

(b) contradicted by contemporaneous evidence, including statements made by the same individuals *in tempore non suspecto* (as illustrated in the table below).

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770 Case IV/29.895 *Telos*, 25 November 1981, para. 29. See also Case M.1610 *Deutsche Post/trans-o-flex*, 14 December 1999, paras 176 and 178.

771 Reply to SO, Annexes 1.1 to 1.57; and Reply to SSO, Annexes 1.1 to 1.6.

772 See notably Case T-14 and 87/14 - *IRISL*, 17 February 2017, where the General Court ruled that "*statements* […] *made by individuals employed by* [the applicant]" and "*at the request of* [the applicant] *in connection with the present action*" have "*little probative value*" (paras. 123-124).

773 Case T-380/17 - *HeidelbergCement*, 5 October 2020, paras. 171 and 173.

774 Reply to SO, Annexes 3 to 5.

Table 2

Sigma-Aldrich Employees	Contemporaneous statements (2015)	*ex-post* witness statements (2018)
[NAME AND JOB TITLE OF INDIVIDUAL]	*"Next Generation Packaging", "unique selling points"* [ID28-1881] *"too high profile, too important"* [ID28-2031]	"*definitely not a game changer*", "*not important for the [Divestment Business]*" [RSO, Annex 1.6]
[NAME AND JOB TITLE OF INDIVIDUAL]	iCap's transfer was a *"serious concern"* [ID304-1124], *a "sticky question"* [ID329-43509]	"*not important for the Divestment Business*" [RSO, Annex 1.18]
[NAME AND JOB TITLE OF INDIVIDUAL]	One of "*our bigger projects*" [ID29-2804]	"*one of a number of project under development*", "*not something that [he would] single out*" [RSO, Annex 1.2]
[NAME AND JOB TITLE OF INDIVIDUAL]	*"We will make Apura [Merck's KF Titration solutions brand] the number one brand! Or will find any other creative solution to leverage iCap"* [ID29-2552]	"*definitely not a game changer*", "*not important for the [Divestment Business]*" [RSO, Annex 1.6]
[NAME AND JOB TITLE OF INDIVIDUAL]	The inclusion of packaging in the scope of the Divestment Business is "*very concerning" as "possibly the iCap could come in play*" [ID330-29323]	"*never thought that [iCap] was required for the viability and competitiveness of the Divestment Business*" [RSO, Annex 1.16]
[NAME AND JOB TITLE OF INDIVIDUAL]	Since iCap "*could be seen as related [to the Divestment Business]*", she was "*concerned that if this isn't addressed now, H[oneywell] will come back later and say that it should have included*" [ID304-691]	"*the Divestment was perfectly viable and competitive without iCap*" [RSO, Annex 1.2]

4.3.2. Overview of the other arguments presented by the Parties

(393) Section 4.1 above addressed the Parties' arguments regarding the incorrect/misleading nature of the information supplied in Section 5.3 of the Final Form RM and in reply to RFIs I-3 and I-4 (such replies having been integrated into Sections 5.12 and 5.4 of the Final Form RM). Section 4.2 above addressed the Parties' arguments regarding Sigma-Aldrich's intention (or negligence) for the purposes of Article 14(1) of the Merger Regulation. Section 5 below addresses the Parties' arguments regarding fines.

(394) The remainder of this Section deals with three broader arguments of the Parties which do not relate to any of the other Sections of this Decision but rather constitute recurring themes in the Reply to the SO, the Reply to the SSO and in the Parties' prior submissions.

(395) *First*, the Parties argued that iCap was in fact fully disclosed to the Commission in the course of the Commission's Phase I investigation and in the remedy implementation phase following the approval of the Transaction.[775] According to the Parties:

(a) during the Phase I investigation, Sigma-Aldrich submitted two presentations in response to the Commission's question 2(a) of RFI I-1, which included specific references to iCap;[776] and

775 "iCap Position Paper", 14 July 2016, para. 2 [Doc Id: 132].
776 "iCap Position Paper", 14 July 2016, para 2 (a) [Doc Id: 132].

(b) during the remedy implementation phase, iCap was specifically mentioned in the SPA concluded with Honeywell as part of the "Excluded Assets" list. This list was agreed with Honeywell, reviewed and approved by the Monitoring Trustee and the Commission had the opportunity to review and sign off on this one-page document.[777]

(396) *Second*, the Parties claimed that there was "*no request for information by services of the Directorate-General for Competition to provide information about packaging R&D at any time during the merger investigation*".[778] The Parties argued that "*ZERO of* [the 296 questions sent in pre-notification] *concerned R&D*" and "*only one* [of the 67 questions in Phase I investigation] *addressed R&D*".[779] The Parties also noted that iCap was included in the documents provided at the beginning of the Phase I investigation and yet *"the Commission did not raise any questions about it in the three subsequent RFIs* […] *during the Phase I review*".[780] According to the Reply to the SSO, the Commission raised R&D for the first time on 5 June 2015 "*approximately seven months into the merger review process*" and *"3 weeks after the submission of the 1st draft Form RM*". It also argued that Sigma-Aldrich received this request "*at extremely short notice*", with "*only* […] *a few hours to come up with workable language*".[781] More generally, the Parties repeatedly stressed the tight legal deadlines they were subject to in the context of the remedy discussion.[782]

(397) *Third*, the Parties stated that iCap was "*not material to Sigma's business at the time of the Transaction*" nor was it "*solely or predominantly related to the Divestment Business*".[783] According to the Parties, excluding iCap from the scope of the Divestment Business would not affect its viability and competitiveness.[784] The Parties concluded that *"*[g]*iven that the importance of iCap forms the cornerstone of the Commission's case* […] *and given the lack of importance of iCap, when objectively examined, the case against the Parties can only collapse*".[785]

4.3.3. Commission's assessment

(398) The Commission considers that these three arguments presented by the Parties do not change the findings in this Decision.

4.3.3.1. The Parties' argument that Sigma-Aldrich fully disclosed iCap

(399) The Parties' claim that Sigma-Aldrich fully disclosed iCap in the course of the Commission's Phase I investigation and in the remedy implementation phase is incorrect.

4.3.3.1.1. Presentations provided during the Phase I investigation

(400) On 23 April 2015, during the Phase I investigation, the Commission asked Sigma-Aldrich to *"submit any internal document, including but not limited to, reports, presentations, surveys, concerning the assessment, description or analysis of competitive situation/dynamics (including existing or potential competitors) on the following markets: a. for laboratory chemicals in Europe or any of its sub-segments;* […]" (RFI I-1).

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777 "iCap Position Paper", 14 July 2016, para 2 (b)-(g) [Doc Id: 132].
778 "iCap Position Paper", 14 July 2016, para 3 [Doc Id: 132].
779 Merck's First Oral Hearing Presentation, p. 167 [Doc Id: 1986].
780 Reply to SO, para. 234 [Doc Id: 1187].
781 Reply to SSO, Section 4.3.1.1 and para. 330.
782 See notably Reply to SSO, paras. 186-188 and 191-192.
783 Reply to SO, Sections 2.1 and 2.2 [Doc Id: 1187].
784 Reply to SO, paras. 127-134. See also Supplementary reply to SO, paras. 42-50 [Doc Id: 1939].
785 Reply to SO, para. 6 [Doc Id: 1187] and Reply to SSO, paras.226-229.

(401) On 29 April 2015, Sigma-Aldrich submitted documents responsive to RFI I-1. These documents have been gathered from 35 individuals from Sigma-Aldrich's Research, Applied and SAFC business units as well as the marketing department.[786] In total, Sigma-Aldrich provided 66 documents in response to RFI I-1.[787] Out of these documents, two documents submitted in response to question 2a merely cursorily mentioned iCap.

(402) The first document is a presentation called "*Sigma-Aldrich, Solvents- Global Overview*" dated 4 June 2014. It consists of 32 pages. On page 14, iCap is mentioned once cursorily in a slide of 20 rows. There, the slide includes "*Development of iCap*" as second of 5 bullets under "*Product and Packaging –Innovation*". No further explanation of "iCap" is provided. iCap is not mentioned again in this document.[788]

(403) The second document mentioning iCap is also called "*Sigma-Aldrich, Solvents- Global Overview"* and dated 4 June 2014. This document consists of 43 pages.[789] It is likely an earlier draft of the previous document as it contains additional pages at the end that seem to be template slides that had not been edited at that point (named, for example, *"Images for Slides Containing Text", "Sample Full-Screen Table" or "Sample text slide"*). Also in this document, "*Development of iCap*" is mentioned as one out of 5 bullets under "*Product and Packaging – Innovation*" in slide 14 called "*Global Solvent Strategy, Next Steps*". No further description of iCap is included in the document.

(404) According to the Parties, by way of submission of those two presentations, iCap was "*disclosed as a packaging innovation*" and that therefore, "*there can be no doubt that the Commission was informed about iCap during (and in fact in the early stage of) the EU merger review process*".[790]

(405) However, the Commission takes the view that these two presentations cannot remedy the incorrect and/or misleading statements that Sigma-Aldrich provided in reply to RFIs I-3 and I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM in the specific context of the merger review in this case.

(406) Sigma-Aldrich failed to disclose iCap on several instances when specifically inquired about:

(a) innovation and products planned (Section 5.3 of the Form RM);

(b) R&D functions, R&D agreements and R&D personnel (questions 12, 13, and 16 of RFI I-4 relating to Section 5.4 of the Form RM); and

(c) the assets of the currently operated solvents and inorganics business of Sigma-Aldrich in the EEA that would not be part of the Divestment Business (question 6 of RFI I-3 relating to Section 5.12 of the Form RM).

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786 Response to RFI I 1 by [NAME OF LAW FIRM], dated 29 April 2015 [Doc. Id: 156].

787 Using the counting of Sigma-Aldrich. Each document had been assigned a start number and an end number. The documents submitted in response to question 2a of RFI I-1 range from 0001 to 0712, a total of 712 pages, the documents submitted in response to question 2b of RFI I-1 range from 1000 to 1316, a total of 317 pages, the documents submitted in response to question 2c of RFI I-1 range from 2000 to 2086, a total of 87 pages, and the documents submitted in response to question 3 of RFI I-1 range from 2500 to 2568, a total of 69 pages.

788 See Doc Id:130.

789 See Doc Id: 131.

790 "iCap Position Paper", 14 July 2016, para. 2(a) [Doc Id: 132].

(407) In each of those instances, the questions of the RFIs I-3 and I-4 (asked in the context of Sections 5.4 and 5.12 of the Form RM) and Section 5.3 of the Form RM called *specifically* for an answer that would have required the disclosure of the iCap project.[791] It is the obligation of the Parties (including Sigma-Aldrich) to provide correct and non-misleading information in response to the RFIs and in the Form RM.[792]

(408) iCap was only cursorily mentioned in two multipage documents provided as part of a submission of 66 documents amounting to 1 185 pages.[793] This was a "*veritable needle in a haystack*",[794] which in the specific context of the tight deadlines characterising Union merger control, cannot remedy the incorrect and misleading statements that Sigma-Aldrich provided in reply to RFI I-3, RFI I-4 and the Final Form RM. In this respect, the Court has expressly ruled that, in light of the requirement of speed which characterises the merger control procedure, "*the Commission cannot be required, in the absence of evidence indicating that information provided to it is inaccurate, to verify all the information it receives.*"[795] Similarly, the General Court has recalled that the Commission's obligation to display the utmost diligence in performing its supervisory duties in the field of concentrations "*is not intended to relieve the* [concerned] *undertakings of their obligation to provide complete and accurate information in the Form RM*".[796] It follows that a passing reference to iCap in two presentations provided in a different context, in response to a general RFI from the early-stage of the Phase I investigation,[797] is insufficient to discharge Sigma-Aldrich's obligation regarding the specific questions in RFIs I-3 and I-4 (asked in the context of Sections 5.12 and 5.4 of the Form RM) and Section 5.3 of the Form RM.

(409) This is in line with the Commission's decisional practice. In *KLM/Martinair*, the Commission stated that discussions during a meeting or information supplied in an annex are not sufficient to rectify incorrect information supplied in the Form CO: "[t]*his* [discussion during a meeting] *does not, however, remove the obligation of KLM to include full information on those activities, at least in response to Question 6.2 of Form CO*" and "*the information provided in the appendix to the SH&E study cannot serve to rectify the incorrect information given in the appropriate Section of Form CO of the notification*".[798]

(410) Moreover, RFIs I-3 and I-4 (asked in the context of Sections 5.12 and 5.4 of the Form RM) and Section 5.3 of the Form RM had a narrow scope and required specific information that the Commission needed to assess whether the Commitments proposed by the Parties were sufficient to eliminate the serious doubts raised by the proposed Transaction in relation to solvents and inorganics in the EEA. This specific information was thus necessary in the context of the remedy discussion following the Phase I market investigation and the SOP meeting held on 13 May 2020 during which the Commission raised serious doubts regarding the compatibility of the Transaction with the internal market. The cursory disclosure of iCap in response to a general RFI sent at the early

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791 For the reasons explained in Sections 4.1.2.1, 4.1.3.1, and 4.1.4.1.

792 Case T-151/05 – *NVV and Others*, 7 May 2009, para. 185.

793 See footnote 788 above.

794 Reply to SO, para. 229 [Doc Id: 1187].

795 Case T-151/05 – *NVV and Others*, 7 May 2009, para. 184 (emphasis added).

796 Case T-430/18 *American Airlines*, 16 December 2020, paras. 191-192.

797 RFI I-1 dated 23 April 2015 (i.e. two days after the formal notification of the Transaction) requesting Sigma-Aldrich to provide internal documents on the competitive dynamics/situations in the relevant markets [Doc Id: 774].

798 COMP/M.1608 – KLM/Martinair III, 14. December 1999, paras. 53 and 29

stages of the Phase I investigation is unable to remedy the need to disclose specific information required to assess the Commitments offered by the Parties.

(411) In view of the above, the Commission considers that the submission of two versions of an internal presentation where iCap appears in one line of a multipage document in response to a general RFI sent at the early stages of the Phase I investigation cannot remedy the incorrect and/or misleading information supplied in Section 5.3 of the Final Form RM and in the replies to RFI I-3 and RFI I-4 (as integrated into Sections 5.4 and 5.12 of the Final Form RM), requiring specific and targeted information to assess the Commitments offered by the Parties.

4.3.3.1.2. Excluded Assets Schedule

(412) The Parties also argued that iCap was disclosed to the Commission after the Clearance Decision was adopted. As part of the formal purchaser approval proceedings, Merck claims that the Commission "*had the opportunity to review and sign off on the package of proposed agreements*",[799] including the Excluded Assets Schedule of the SPA where the patent number application of iCap is listed. Merck adds that "*both the MT* [Monitoring Trustee] *and the EC* [Commission] *received drafts of the transaction agreements, including of the excluded assets schedule, on 2 October 2015 (i.e. 18 days before the signing of the SPA and about 5 weeks before the EC purchaser approval decision), and they provided detailed joint comments on the transaction agreements on 8 October 2015. There were no comments about the excluded assets schedule.*"[800] Similarly, the Reply to the SSO submits that (i) listing iCap in the Excluded Assets Schedule proves that Sigma-Aldrich had no intention to hide it and (ii) the Commission, Honeywell and the Monitoring Trustee had the chance to review this one-page document long before the execution of the agreement with Honeywell.[801]

(413) However, the Commission takes the view that the Excluded Assets Schedule cannot remedy the incorrect and misleading statements that Sigma-Aldrich provided in reply to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM.

(414) *First*, question 6 of RFI I-3 (relating to Section 5.12 of the Form RM), questions 12, 13 and 16 of RFI I-4 (relating to Section 5.4 of the Form RM), and Section 5.3 of the Form RM require information that the Commission needs to assess whether the Commitments proposed by the Parties were sufficient to eliminate the serious doubts raised by the proposed Transaction. This information was thus necessary *before* the adoption of the Clearance Decision at the moment of the submission of the responses to RFIs I-3 and I-4 and of the Form RM Submissions. The disclosure of iCap in the Excluded Assets Schedule three months *after* the adoption of the Clearance Decision is unable to remedy the submission of incorrect and/or misleading information in reply to RFIs I-3 and I-4 (as incorporated in Sections 5.12 and 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM. On the contrary, the inclusion of iCap on this list shows that Sigma-Aldrich was aware of the links between iCap and the Divestment Business and that, while Sigma-Aldrich "*decided*" not to disclose iCap to the Commission[802] in the context of the remedy discussions, it was not willing to take

799 "iCap Position Paper", 14 July 2016, para. 2(e) [Doc Id: 132].

800 "iCap Position Paper", 14 July 2016, para. 2(f) [Doc Id: 132].

801 Reply to SSO, paras. 226-229.

802 See notably Reply to SSO, Section 4.3.1, and the Second Oral Hearing recording.

the same risk later on when selling the business to a third party and felt the need to expressly exclude the project.

(415) *Second*, and in any event, the information in the Excluded Assets Schedule can by no means qualify as proper disclosure of the iCap project. This schedule mentions "*PCT Patent Appl. No. PCT/EP2014/056491 entitled "CLOSURE FOR A CONTAINER" filed April 1, 2014 and all related applications and any patents that pay issue thereform.*" Under this obscure reference, the Commission could not have reasonably appreciated that the 2014 patent refers to a key R&D project on a packaging technology developed for Sigma-Aldrich's volumetric and Karl Fischer titration solutions and HPLC solvents included in the Divestment Business. Rather, the remainder of the schedule states that what is excluded is "*any research and development related to packaging and closures for packaging not used in connection with any of the Products*[803]", which suggests that the 2014 patent relates to packaging of products not included in the Divestment Business.[804]

(416) *Finally*, the elements in the Commission's file reveal that, in the context of the remedy implementation, Sigma-Aldrich was aware of the fact that the obscure mention of iCap's patent in the Excluded Assets Schedule would not allow Honeywell, the Monitoring Trustee or the Commission to realise that Sigma-Aldrich intended to exclude from the scope of the remedy an asset closely related to the Divestment Business. This is corroborated by the fact that Sigma-Aldrich implemented measures after the signature of the SPA (and its Excluded Assets Schedule) to further ensure that iCap was withheld from Honeywell, the Monitoring Trustee and the Commission. For instance, on 17 December 2015, [NAME OF INDIVIDUAL] advised employees of the combined entity that they "*may want to make sure* [they do not] *do anything visible on this* [iCap applied to Karl Fischer titration solutions] *for at least six months if not a year.* [Honeywell] *can ask to add things to the DB* [Divestment Business] *for the next six months and for the next year we will be their service provider*".[805]

(417) In view of recitals (413) to (416), the Commission concludes that the references to the iCap patent in the Excluded Assets Schedule cannot remedy the incorrect and/or misleading information supplied in Section 5.3 of the Final Form RM and in the replies to RFI I-3 and RFI I-4 (as integrated into Sections 5.12 and 5.4 of the Final Form RM).

4.3.3.2. The Parties' argument that Sigma-Aldrich was first asked to discuss R&D and packaging late in the merger process and under time pressure

(418) *First*, the Parties' claim that there was no request for information by the Commission regarding packaging R&D before 5 June 2015[806] is factually incorrect and, in any event, irrelevant.

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803 "Products" being all products (chemical substances) transferred as part of the Divestment Business.

804 Sigma-Aldrich IP counsel also proposed a note to Honeywell which suggests that this patent was not related to products included in the Divestment Business, and stated that "*if true*" it should be mentioned that "[*the foregoing is IP directed to packaging currently under research and development and not in use as packaging for any Products. To avoid all doubt, however, we are including it on the schedule of Excluded Assets]*." (Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL], "Re:Updated schedules", 26 September 2015 [Doc Id: 304-691]).

805 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595].

806 Reply to SSO, Section 4.3.1.1.

(419) During pre-notification, the Commission sent to both Parties 8 questions on packaging, its development and the possible know-how and IP rights in relation to the Parties' solvents and inorganics businesses, which are summarised in Table 3.

Table 3

Overview of RFI Questions in Pre-Notification concerning R&D and Packaging			
Date	**RFI #, Question #**	**Products Concerned**	**Question**
12 December 2014	RFI 2, question 13	Laboratory Chemicals (which include solvents and inorganics)	"*Please elaborate in detail on the services such as quality assurance and control, purification and packaging of those products* [laboratory chemicals] *provided by the Parties and competitors. Please indicate the time, the equipment and the cost needed to develop those services*".[807]
12 December 2014	RFI 2, question 25	Laboratory Chemicals (which include solvents and inorganics)	"*The Parties indicate that catalogue and bulk solvents address different customers (paragraph 248) and differ in terms of volume, packaging and delivery (paragraph 249). Please elaborate on the capacities for suppliers of bulk solvents to enter into the market for catalogue solvents quickly* [...]".[808]
12 December 2014	RFI 2, question 38	Laboratory Chemicals (which include solvents and inorganics)	"*Please elaborate on the facilities, distribution, logistic, investments and know-how needed to refill, mix, blend and package inorganics*".[809]
12 December 2014	RFI 2, question 28	Laboratory Chemicals (which include solvents and inorganics)	"*Please confirm that the Parties do not hold any IP right in the solvents sector*".[810]
25 February 2015	RFI 4, question 30	Laboratory Chemicals (which include solvents and inorganics)	"*Could you please indicate which activities (i.e. production, distillation/purification, filling/packaging, quality control) drive the product* [laboratory chemical]*'s quality? At which level of the process is the know-how and/or possible IP rights?*".[811]
25 February 2015	RFI 4, question 39	Laboratory Chemicals (which include solvents and inorganics)	"*Please explain in detail the process of purchasing bulk raw material from third parties and the value added by the Parties in the final product* [laboratory chemical]".[812]
20 March 2015	RFI 6, questions 9(c) and 9(f)	Inorganics	"*Regarding Inorganics for Instrumental Analysis:* […] *c. Please indicate at which steps of the process is the know-how to supply Karl Fischer titration products.* […] f. *Please explain what was protected by the IP rights owned by Sigma-Aldrich regarding the Karl Fischer titration products. Please also indicate when the corresponding IP rights expired*".[813]
20 March 2015	RFI 6, question 10	Inorganics	"*Could you please confirm that the Parties do not own IP rights in the fields of inorganics? If not, please list the IP and provide a brief explanation on what is protected and indicate to which category of products they belong.*"[814]

807 RFI2, question 13 [Doc Id: 595].
808 RFI2, question 25 [Doc Id: 595].
809 RFI2, question 38 [Doc Id: 595].
810 RFI 2, question 28 [Doc Id: 595].
811 RFI 4, question 30 [Doc Id: 665]
812 RFI 4, question 39 [Doc Id: 665].
813 RFI 6, questions 9(c) and 9(f) [Doc Id: 695].
814 RFI 6, question 10 [Doc Id: 695].

(420) Therefore, contrary to the their claim, already at the time of notification, the Parties were aware of the importance of disclosing information on their packaging activities, as well as the development of packaging and possible know-how and IP rights in their solvents and inorganics business.

(421) Moreover, during the Phase I investigation, on several occasions, and as early as possible in the merger review process, the Commission stressed the importance of R&D and packaging, and specifically asked the Parties to include in the scope of the remedy all R&D and packaging project related to Sigma-Aldrich's solvents and inorganics business in the EEA:

(a) On 5 May 2015, the Commission participated in a call with Merck's and Sigma-Aldrich's external counsel to inform them about the necessity of scheduling an SoP meeting.[815] During the call, the possibility of a remedy, at least in relation to HPLC and other solvents, was also discussed. The Parties explained that "*Sigma* […] *doesn't actually produce HPLC or any solvents* [...] [a] *lot of what Sigma does is only downfilling/packaging*". The Commission indicated that "*the repackaging steps may seem banal, but* [based on the results of the Phase I market investigation] *they don't seem to be – they seem to be important*".[816]

(b) On 19 May 2015, the Commission participated in a meeting with the Parties. Commenting on the first Draft Commitments (submitted the previous day), and echoing the results of the Phase I market investigation, the Commission noted that packaging should be included in the Divestment Business. Later that day, the Commission sent comments to the Parties specifying that for "[p]*ackaging* […] *any IP and know how should be included*" in the Divestment Business.[817]

(c) On 2 June 2015, the Commission participated in another meeting with the Parties to communicate the results of the market test. In this meeting, the Commission informed the Parties that, in light of the results of the market test, all pipeline projects and R&D agreements related to the Divestment Business should be part of the Commitments.[818] On the same day, the Commission sent RFI I-4 to the Parties asking specific questions on R&D agreements and personnel related to Sigma-Aldrich's solvents and inorganics business in the EEA.[819]

(d) On 5 June 2015, a few hours after receiving a new version of the Initial Commitments ignoring the guidance provided on 2 June 2015, the Commission suggested that the following language be included in the Commitments: "*To the extent it concerns products included in the Divestment Business, the Parties shall transfer all R&D and pipeline projects and related information to the Purchaser. To the extent any such agreement exist and concern the products included in the Divestment Business, the Parties will transfer to the Purchaser*

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815 See footnote 30.

816 See email from [NAME OF INDIVIDUAL AND LAW FIRM] to [NAME OF INDIVIDUAL] (Sigma-Aldrich), 5 May 2015, "Fwd: Important Update – telephone conference with EC", [Doc Id: 2002] and email from [NAME OF INDIVIDUAL AND LAW FIRM] to [NAME OF INDIVIDUAL] (Sigma-Aldrich), 5 May 2015, "Call with EC today – key points", [Doc Id: 2003].

817 Comments on the Draft Commitments [Doc Id: 787], emphasis added.

818 Email from Merck's legal counsel to the Commission case team including a list of attendees to the meeting, 1 June 2015, [Doc Id: 948].

819 RFI I-4, questions 12, 13 and 16 [Doc Id: 829].

all R&D agreements with third parties".[820] There was no distinction between product and packaging R&D.

(422) Therefore, Sigma-Aldrich was aware at the time of submission of the Final Form RM and the replies to RFI I-3 and RFI I-4, of the importance of disclosing information on its possible know-how and IP rights as well as R&D's activities in their solvents and inorganics business, including on packaging. By omitting such information, especially after the Commission's repeated guidance, Sigma-Aldrich did not satisfy its obligation to make full and honest disclosure of its relevant activities to the Commission. In addition, nothing in the Commission's questions would suggest that only R&D activities outside of packaging was relevant.

(423) In any event, even if the Commission had never asked any questions to the Parties on packaging, IP rights and/or R&D activities for solvents and inorganics in pre-notification and in the Phase I investigation (*quod non*), Sigma-Aldrich would not have been exonerated from its obligation to provide complete, correct and non-misleading information in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM.[821]

(424) *Second*, the tight legal deadlines applying to the merger review process do not relax the obligation of care on the undertakings concerned. On the contrary, the need for speed in merger control speaks for supplying complete, correct, and non-misleading information on time and in *all* the relevant submissions.[822] In any event, in this case, regardless of the tight legal deadlines, Sigma-Aldrich was able to identify iCap as an R&D project related the Divestment Business within a couple of hours[823] and deliberately decided not to disclose it to the Commission. This decision was taken on 5 June 2015, namely (i) 3 days before the submission of the reply to RFI I-4 (on 8 June 2015), (ii) 6 days before the submission of the Final Commitments (on 11 June 2015), and (iii) 7 days before the submission of the Final Form RM (on 12 June 2015). In this context, nothing indicates that Sigma-Aldrich would have acted differently had it had more time.

(425) In view of recitals (418) to (424), the Commission concludes that the alleged lack of questioning from the Commission on packaging R&D is: (i) factually incorrect and (ii) in any event and regardless of the legal deadlines, irrelevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and of the Form RM (including in particular Section 5.3).

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820 See in particular email from the Commission dated 5 June 2015 "strictly confidential M7435 Commitments 4 June (2).docx" where a wording for the R&D section of the Initial Commitments was proposed [Doc Id: 954 and Doc Id: 956].

821 In this respect, the Court ruled that "*the requirement that information must be necessary is to be interpreted by reference to the decision on the compatibility of the concentration with the common market implies that the need for the information covered by a request under Article 11 of Regulation No 139/2004 must be assessed by reference to the view that the Commission could reasonably have held, at the time the request in question was made, of the extent of the information necessary to examine the concentration. Accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*." (see Case T-145/06 *Omya*, 4 February 2009, para. 30 (emphasis added)).

822 See also Case T-430/18, *American Airlines*, 16 December 2020, para. 133.

823 See recitals (101) to (102).

4.3.3.3. The Parties' argument that iCap and R&D are unimportant for laboratory chemicals and for the Divestment Business

(426) The Parties' claim that iCap and R&D in general (including on packaging) were not "*important*" for the laboratory chemicals' business in general and for the Divestment Business in particular.

(427) As a preliminary remark, the Commission considers that the Parties' claims do not change the findings in Sections 4.1 and 4.2. The alleged "*unimportance*" of iCap and R&D is irrelevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and the Form RM, including in particular Section 5.3 (and, in any event, factually incorrect).

(428) The "*importance*" or lack thereof of iCap and R&D for the laboratory chemicals' business in general, and for the Divestment Business in particular, is not the relevant standard to qualify the existence of an infringement. The disclosure requirements in RFIs I-3 and I-4, as well as the Form RM (including in particular Section 5.3), were not limited to "*important*" projects, innovation or agreements related to the Divestment Business. It follows that even if the information on iCap and R&D was not "*important*" in the Parties' (subjective) view, it had to be disclosed to the Commission.[824]

(429) As explained in recitals (195) and (334), pursuant to the case-law, the Commission must be provided with all the information that it deems "*necessary*" for the assessment of the compatibility of the concentration concerned with the common market and enjoys "*discretion*" when deciding on the need for the information, which cannot be interpreted "*strictly*" given the requirement for speed characterising the Union merger control.[825]

(430) In any event, as set out in recitals (431) to (464), the elements in the Commission's file and the results of the investigation conducted in case in M.7435 contradict the Parties' claim that iCap and R&D were not "*important*" for the laboratory chemicals' business in general, and for the Divestment Business in particular. In other words, the alleged "unimportance" of iCap is factually incorrect and, thus, cannot excuse Sigma-Aldrich's intentional or negligent omission of that project.

4.3.3.3.1. Importance of R&D in laboratory chemicals

(431) The Parties consider that the lack of importance of R&D and specifically R&D on packaging for the laboratory chemicals business was confirmed by the market investigation in M.7435 because R&D or packaging was mentioned as a possible concern arising from the Transaction "*only in a couple of instances*" while the case team carried out 23 conference calls with market participants and received more than 100 replies to the market investigation questionnaires.[826]

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824 See recital (378).

825 Case T-145/06 *Omya*, 4 February 2009, paras. 28, 30, 32 and 33. In this case, the Court also held that the "*need for the information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*" (see para. 30).

826 The results of the Phase I market investigation in Case M.7435 – *Merck/Sigma-Aldrich* have been made available to the Parties following the company's request for further access to file. See Section 1. See also Supplementary reply to SO, paras. 18-20 [Doc Id: 1939] and Reply to SSO, para. 30.

(432) The Commission first notes that it is not a prerogative of Sigma-Aldrich to subjectively decide whether the information – expressly required by the Commission[827] – is necessary or not for the Commission's assessment of the Transaction. The Commission is entitled to request "*all the information necessary to enable it to decide on the compatibility of the concentration*".[828] If Sigma-Aldrich intended to exclude "*unimportant*" elements from the scope of the information supplied in Section 5.3 of the Final Form RM and in reply to the relevant questions of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and RFI I-4 (as incorporated in Section 5.4 of the Final Form RM), it could and should have informed the Commission accordingly by clearly indicated it, which it did not. Since Sigma-Aldrich failed to bring this exclusion to the attention of the Commission, in breach of the requirements under RFI I-3, RFI I-4 and of the Form RM (including in particular Section 5.3), it is not entitled to rely on it to support its narrow interpretation of the statements made in response to RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM.[829]

(433) Even if the alleged "*unimportance*" of R&D in laboratory chemicals was relevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and of the Form RM (including in particular Section 5.3) (*quod non*), the elements in the Commission's file reveal that this allegation is factually incorrect for the following reasons.

(434) Contrary to the Parties' claim, the market investigation in M.7435 did raise the importance of packaging (and thus R&D on packaging) in the laboratory chemicals' business.

(435) Based on the evidence available to the Commission,[830] activities in the laboratory chemicals' markets essentially consist of performing purification, quality control, filling and packaging of chemicals, with the objective of limiting as much as possible any risk of contamination from impurities to allow customers' standardised testing.

(436) By way of example, during the conference calls and in the replies to the market investigation questionnaires, the Commission received the following feedback on the importance of packaging (among other elements) for laboratory chemicals:

(a) "*The superior quality can stem from various elements such as the level of documentation, the source of raw materials, whether the products are filtered or unfiltered, whether they are redistilled, whether there is water or hydrosolvents, and the condition of packaging. All these factors can reduce the presence of impurities. This is crucial for the pharmaceutical industry in order to improve the reliability of clinical trial results*";[831]

(b) "*Merck and Sigma show to be particularly strong since they both have a sufficient reach-out to customers through a sales force (direct or indirect), a developed packaging and other logistical infrastructure, a wide product portfolio range which can reach almost 100% of products coverage when*

827 See notably question 12 of RFI I-4 [Doc Id: 829]: "*Does Sigma have any R&D agreements with third parties related to solvents and inorganics in the EEA?*" (emphasis added).

828 Case T-145/06 *Omya*, 4 February 2009, para. 28.

829 Case T-430/18 *American Airlines*, 16 December 2020, paras. 149-150, 160-161 and 198-199.

830 See recitals (12) to (13) and (17) to (20).

831 Minutes of a conference call dated 10 February 2015 (emphasis added) [Doc Id:1665-14].

combined between the two companies, IP in forms of well recognized brands, proper delivery timing, and overall high quality standards";[832]

(c) "*Both Merck and Sigma are offering high quality product, with availability of documentation, quick delivery time. Both two companies are offering reliability, flexible range of packaging and both are having serious representatives in our local Market*";[833]

(d) "*Laboratory chemicals: both Merck and Sigma are strong suppliers in relation to all the areas indicated above* [including packaging]. *Merck is stronger on the manufacturing side (supplying Sigma for some products), while Sigma is particularly strong in portfolio and packaging*".[834]

(437) On 19 May 2015, the Commission held a meeting with the Parties to discuss the Draft Commitments and informed the Parties that, in light of the above feedback received from respondents to the market investigation,[835] packaging should be included in the scope of the Divestment Business. Later that day, the Commission sent comments to the Parties specifying that for "[p]*ackaging* […] *any IP and know how should be included*" in the Divestment Business.[836]

(438) Merck itself in the final Form CO specified that packaging was important in particular in relation to the market for volumetric titration solutions "*the products are highly standardized and the main differentiating factor between competitors' products is merely the packaging, which is important to protect the solutions from impurities and contamination*".[837]

(439) In view of recitals (434) to (438), including market participants' views provided in the course of its investigation in M.7435, packaging was an important and relevant feature of competition for the markets for solvents and inorganics. R&D on packaging was therefore also important in the same markets. Indeed, in the course of the Phase I investigation, the Commission mentioned explicitly and repeatedly to the Parties that it considered packaging in solvents and inorganics in the EEA to be important[838] and highlighted the need to include R&D assets in the Divestment Business.[839]

(440) In any event, the scope of the information requirements of Section 5.3 of the Form RM and RFIs I-3 and RFI I-4 – asked in the context of Sections 5.12 and 5.4 of the Form RM (into which Sigma-Aldrich's replies were incorporated) – are defined by the Commission, which is entitled to request "*all the information necessary to enable it to decide on the compatibility of the concentration*" and enjoys "*discretion*" when assessing it.[840]

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832 Minutes of a conference call with a competitor dated 6 May 2015 (emphasis added) [Doc Id: 1302].

833 Q1 Competitors, question 52 (emphasis added) [Doc Id: 1250].

834 Q3 Customers, question 40 (emphasis added) [Doc Id: 1258].

835 See footnote 827.

836 Comments on Commitments [Doc Id: 787], emphasis added.

837 Final Form CO, para. 644 (emphasis added). In the Reply to the SO, the Parties also noted that the iCap project is currently not a unique innovation and mentioned several initiatives of companies in that field, including the fact that "*Merck and other manufacturers are involved in a confidential project with Mettler Toledo, one of Metrohm's competitors, to develop a technology allowing data transfer from bottles to instruments*" (Reply to SO, paras. 44-45).

838 See notably recitals (25) and (419) to (422).

839 See notably recitals (31) to (32) and (421) to (422).

840 Case T-145/06 *Omya*, 4 February 2009, para. 28. In this case, the Court also held that (i) the Commission enjoys "*discretion*" when assessing the necessity of the information required for the

(441) Moreover, to allow the Commission to carry out its investigation by necessarily relying, to a great extent, on the Parties' response to RFIs and submissions,[841] the information that the Parties provide needs to be correct and non-misleading, in line with Article 14(1), irrespective of an *ex post* evaluation of market participants' comments. This is especially the case for pipeline products or R&D and innovation efforts, which are often not publically known. In this context, the Remedies Notice stresses the importance of a full disclosure: "*Only the parties have all the relevant information necessary for such an assessment, in particular as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed for divestiture. It is therefore the responsibility of the parties to provide all such information available that is necessary for the Commission's assessment of the remedies proposal*".[842]

(442) In view of the above, the Commission concludes that the Parties' argument about the lack of importance of packaging and R&D in laboratory chemicals is irrelevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and the Form RM (including in particular Section 5.3) and, in any event, is factually incorrect.

4.3.3.3.2. Importance of R&D – and more specifically, iCap – for the Divestment Business

(443) As an initial matter, it should be noted that the actual commercial success or failure of iCap is immaterial to the evaluation of Sigma-Aldrich's conduct in this case as it post-dates the conduct at issue. As this Section will show, what matters is that while the submission of the respective information was clearly required both by Section 5.3 of the Form RM and RFIs I-3 and I-4, the Parties (including Sigma-Aldrich) did *not* mention an R&D project to the Commission nor did they explain why excluding R&D activities on packaging would (clearly) not affect the Divestment Business' viability and competitiveness.[843]

(444) In support of their position that iCap was not important for the viability and competitiveness of the Divestment Business, Merck and Sigma-Aldrich claimed that:

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assessment of the compatibility of the Transaction, which involves complex economic assessment and which shall not be interpreted "*strictly*" given the requirement for speed characterising the Union merger control (see paras.32-33). The Court also ruled that the "*need for the information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*" (see para. 30).

841 Case T-151/05 – *NVV and Others*, 7 May 2009, paras. 184 and 185: "*in view of the need for speed and the very tight deadlines to which the Commission is subject in the procedure for the control of concentrations", "the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust*", with the Parties having "*an express obligation to make a full and honest disclosure to it of the facts and circumstances which are relevant for the decision*" (emphasis added).

842 Remedies Notice, para. 7.

843 In view of the evidence available to the Commission in relation to the role of packaging activities in those markets, the Commission would certainly not have considered that carving out R&D activities in that space would (clearly) not affect the Divestment Business' viability and competitiveness within the legal standard of divestment offered during the Phase I investigation. Should the existence of iCap had been disclosed to the Commission, its transfer as part of the Divestment Business would have been required for the clearance of the Transaction.

(a) The market test of the Initial Commitments suggested that R&D was not key for the Divestment Business. According to the Parties, (i) only few market participants considered that additional assets including IP were needed in the Divestment Business, (ii) some of the respondents who mentioned R&D in their replies still considered that overall the Divestment Business would be viable and competitive, (iii) some market respondents made unreasonable suggestions in relation to the scope of the Divestment Business (in particular Honeywell which wanted to request as much assets as possible since it was "*the only realistic purchaser of the Divestment Business*") and (iv) many respondents did not list R&D or innovation among the key functions and assets to be included in the Divestment Business;[844]

(b) Honeywell's submissions to the Commission confirmed that the Divestment Business was viable and competitive without iCap;[845]

(c) the Commission misinterpreted the evidence in the file because iCap was not solely or predominantly related to the Divestment Business, as it was envisaged to work with different applications and was not initially developed (or even marketed so far) for Karl Fischer or HPLC;[846]

(d) the Divestment Business was viable and competitive without iCap since the products included in the Divestment Business were high margin products, the addressable market for iCap is small and the projections on which the Commission based its assessment were flawed and unrealistic.[847]

(445) As explained in recitals (446) to (458), the elements in the Commission's file, including the market participants' views provided to the Commission in the course of its investigation in M.7435, suggest that Merck and Sigma-Aldrich's claim as to the "*unimportance*" of iCap and R&D for the Divestment Business is not only irrelevant[848] but also factually incorrect.

(446) *First*, at least 6 respondents to the market test identified R&D assets and/or personnel as potentially missing from the Divestment Business.[849] On that basis, the Commission sent to the Parties RFI I-4 and invited them to update the Initial Form RM to reflect the input from the market test. It is the obligation of the Parties to do so supplying correct and non-misleading information.[850]

(447) As the General Court has noted, commitments entered into following the Phase I investigation require the Commission to be "*entitled, without making a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts*" as to whether the concentration would significantly impede effective competition.[851] As a result, it is irrelevant that some respondents did not identify R&D as an important asset missing from the Divestment Business and affecting its viability or competitiveness or that some respondents who did mention R&D were allegedly not familiar with the

844 Supplementary reply to SO, paras. 21-41 [Doc Id: 1939].
845 Supplementary reply to SO, paras. 43-45 [Doc Id: 1939].
846 Reply to SO, paras. 100-126 [Doc Id: 1187].
847 Reply to SO, paras. 127-134 [Doc Id: 1187].
848 See recitals (426)ff.
849 See footnote (52).
850 Case T-151/05 – *NVV and Others*, 7 May 2009, para. 185.
851 Cases T-162/10 – *Niki Luftfahrt GmbH*, 13 May 2015, para. 297; T-430/18 – *American Airlines*, 16 December 2020, para. 120.

specificities of the solvents and inorganics markets. The Commission was bound to take the fact that some respondents did raise concerns into consideration in its Clearance Decision.

(448) *Second*, it is irrelevant that, on 30 September 2015, as a potential purchaser of the Divestment Business, Honeywell expressed its belief in the viability and growth of the business without iCap.[852] In May and June 2015, Honeywell did raise the importance of including R&D activities in the Divestment Business during the market test of the Initial Commitments.[853] In September 2015, Honeywell had not been made specifically aware of the existence of iCap and its relation to the Divestment Business. Honeywell had no reason to include a reference to this project or other R&D projects on packaging in its presentation.

(449) The views of market participants are relevant for assessing the importance of R&D activities in the Divestment Business, the viability of the Divestment Business, and the context surrounding the commitments. In contrast, the obligation of the Parties to provide correct and non-misleading information in response to RFIs and in the Final Form RM is not subject to the views of market participants regarding the information. As explained in recital (447), Honeywell's view, like those of respondents to the market test is not relevant for assessing whether Sigma-Aldrich provided incorrect and/or misleading information to the Commission. The same applies to the alleged misconceptions of Honeywell on iCap.[854]

(450) *Third*, contrary to the Parties' claims, iCap was developed specifically for volumetric titration, Karl Fischer titration, and HPLC solvents applications.[855] But even if iCap was only related to volumetric titration solutions (that is, part of the Divestment Business), it would still have to be disclosed to the Commission in response to question 6 of RFI I-3 (as incorporated in Section 5.12 of the Final Form RM) and questions 12, 13 and 16 of RFI I-4 (as incorporated in Section 5.4 of the Final Form RM) and in Section 5.3 of the Final Form RM.[856]

(451) *Fourth*, contrary to the Parties' claims, iCap appeared to have the potential to impact Sigma-Aldrich's sales and market shares for volumetric titrations, Karl Fischer titrations and HPLC solvents.[857]

(452) Since project launch in 2011 and up until 2015, it was foreseen that iCap would increase Sigma-Aldrich's future sales and market shares in the affected markets, and more specifically in the markets for titration solutions (including volumetric titration and Karl Fischer titration)[858] and HPLC solvents.[859]

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852 [Doc Id: 3181]; notes of the conference call by the Monitoring Trustee [Doc Id: 1215] and minutes of the conference call based on the case team handwritten notes [Doc Id: 1801].

853 [Doc Id: 1358].

854 Supplementary reply to SO, para. 49. In that respect, contrary to the Parties' allegations, Honeywell was right to consider that iCap is a "closed system" since at least the single version of iCap is and that iCap was developed for Hydranal and Karl Fischer titration products (see Section 4.1.2.1.1).

855 See recitals (229) to (235).

856 See recital (231).

857 See also Section 2.2.2 . Sigma-Aldrich itself identified iCap as the R&D project with the highest expected incremental sales, according to an "*Innovation Pipeline Planner*" document dated October 2015 and focusing on innovation in the Union (see recital (102)).

858 See notably in 2011, *"[iCap] gives us a competitive advantage providing reagents to Metrohm's next generation of titration instruments. Our development of intelligent cap to interface with Metrohm's instrument family is the advantage and it will drive future titration sales. […] The successful reagent partner of Metrohm will gain share in all titration markets including Karl Fisher. Today we have […] in titration reagent business. […]"* (Email by [NAME OF INDIVIDUAL] (Sigma-Aldrich) to [NAME

(453) In 2011, Sigma-Aldrich prepared specific projections for the impact of iCap on Sigma-Aldrich's market shares in volumetric titration and Karl Fischer titration solutions[860] from its envisaged commercialisation in 2015 up until 2020.[861]

(454) In a worldwide market for reagents with Karl-Fischer titration applications, Sigma-Aldrich was estimated to have a market share of [60-70]% in 2014 (i.e., one year before the expected commercialisation of iCap). In the 5 years following the commercialisation of iCap in 2015, Sigma-Aldrich expected its share to increase to [60-70]% in this market. Without iCap, Sigma-Aldrich expected its share to decrease to [40-50]% by 2020.

Figure 4

Karl-Fischer Titration Reagents (Worldwide)

Sigma-Aldrich's Market Share Projections

(Value of Sales)

[non-confidential summary table replacing the original graph figure]

	2014	2015	2016	2017	2018	2019	2020
iCap	[60-70]%	[60-70]%	[60-70]%	[60-70]%	[60-70]%	[60-70]%	[60-70]%
w/o iCap	[60-70]%	[60-70]%	[60-70]%	[50-60]%	[50-60]%	[40-50]%	[40-50]%

Source: Graph based on data in the 2011 DCF [Doc Id: 28-123]

(455) In a worldwide market for reagents for "other" titration applications (or volumetric titration applications),[862] Sigma-Aldrich had lower shares but expected that iCap would allow it to strengthen its market position. In 2014 (namely one year before the expected commercialisation of iCap), Sigma-Aldrich expected to have a market share of [15-20]%. In the 5 years following the commercialisation of iCap in 2015, Sigma-Aldrich expected its share to increase to [25-30]% in this market (namely, an increase of [65-70]%). Without iCap, Sigma-Aldrich expected its share to decrease to [10-15]% by 2020.

OF INDIVIDUAL] (Sigma-Aldrich) re "DCF Metrohm iCAP" dated 29 March 2011 [Doc Id: 28-53]); 2011 DCF [Doc Id: 28-123]; in 2012, "*exclusive ww* [worldwide] *rights to sell Hydranal* [Sigma-Aldrich brand for Karl Fischer titration solutions] *and all volumetric solutions for titration with this convenience […] opportunity*" ("Analytical Standards & Reagents, Business Review and Planning", 9 March 2012, slide 17 [Doc Id: 29-334], see also "Analytical Standards & Reagents, Overview Innovation Pipe Mid Term Strategy", 24 February 2014, slide 15 [Doc Id: 29-1488]); in 2013, *"[…]"* sales for titration within 5 years (Draft presentation "Analytical Fuel for Growth – Expansion Recommendations Buchs and Bellefonte" dated 23 July 2013, slide 17 [Doc Id: 28-1130]); in 2014, 2014 DCF [Doc Id: 29-1483].

859 In 2013, "*[…]*" for its HPLC application (Draft presentation "Analytical Fuel for Growth – Expansion Recommendations Buchs and Bellefonte" dated 23 July 2013, slide 17 [Doc Id: 28-1130]); 2013 DCFs ([Doc Id: 28-1018], [Doc Id: 29-1131]; [Doc Id: 29-1212]; [Doc Id: 29-1228]).

860 HPLC solvents were also mentioned, but the calculation of sales and market shares evolution on this market was still to be determined ("*tbd*").

861 Excel file with [Doc Id: 28-123], sheet "scenario with and without iCAP".

862 This is the term used in the Clearance Decision, para. 173, Table 6.

Figure 5

Other Titration Reagents (Worldwide)

Sigma-Aldrich's Market Share Projections

(Value of Sales)

[non-confidential summary table replacing the original graph figure]

	2014	2015	2016	2017	2018	2019	2020
iCap	[15-20]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[25-30]%
w/o iCap	[15-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-15]%

Source: Graph based on data in the 2011 DCF [Doc Id: 28-123]

(456) At the time of the submission of replies to RFIs I-3 and I-4 and of the Final Form RM, the most recent forecast of iCap's impact on titration reagents sales was in the 2014 DCF, dated 5 March 2014. The 2014 DCF made incremental sales projections only for volumetric titration reagents for 10 years following iCap's commercialisation.[863] In Y10 after the commercialisation of iCap, the 2014 DCF expected that iCap would bring Sigma-Aldrich USD […] of incremental sales in volumetric titration reagents. Those projections were in line with the projections in the 2011 DCF[864] and they have been reiterated 6 days after the notification in a DCF dated 27 April 2017 concerning Buchs expansion.[865]

(457) At the time of the submission of the replies to RFIs I-3 and I-4 and of the Final Form RM, the most recent forecast of iCap's impact on HPLC solvents sales was in a DCF on Buchs expansion dated 23 January 2014. This DCF made incremental sales projections for HPLC solvents for 9 years following iCap's commercialisation.[866] In Y9 after the commercialisation of iCap, this DCF expected that iCap would bring Sigma-Aldrich USD […] of incremental sales in HPLC solvents. Those projections were in line with a 23 July 2013 presentation regarding Buchs expansion[867] and were reiterated 6 days after the notification in a DCF dated 27 April 2015 also prepared for Buchs expansion.[868]

(458) In addition, the agreement with Metrohm regarding iCap suggests that Sigma-Aldrich did not perceive the product as unimportant. On 10 April 2013, [NAME OF INDIVIDUAL], Director Business Development (Sigma-Aldrich) sent an email to [NAME OF INDIVIDUAL] and other Sigma-Aldrich employees sharing with them a spreadsheet summarizing the company's collaborations and "*other external contracts*". [NAME OF INDIVIDUAL] requested [NAME OF INDIVIDUAL] and the other

863 [Doc Id: 29-1483]

864 Excel file with [Doc Id: 28-123], sheet "DCF". Note, however, that the 2011 DCF included only incremental sales projections for 7 years after launch.

865 Excel file with [Doc Id: 29-2361], sheets "base DCF" and "DCF realistic". Note, however, that this DCF included only incremental sales projections for 9 years after launch.

866 Excel file with [Doc Id: 28-1384], sheet "business".

867 Draft presentation" Analytical Fuel for Growth – Expansion Recommendations Buchs and Bellefonte" dated 23 July 2013, slides 16-17 [Doc Id: 28-1118].

868 Excel file with [Doc Id: 29-2361], sheets "base DCF" and "DCF realistic".

addressees to update the collaboration lists on a monthly basis.[869] The most recent version of this list (likely prepared in or after December 2013) included […] collaborations, one of which is "*iCap titration w/Metrohm*". The iCap titration collaboration had the [SIGMA'S R&D AND BUSINESS STRATEGIES].[870]

(459) In the Reply to the SO and during the First Oral Hearing, Merck and Sigma-Aldrich claimed that Sigma-Aldrich's projections were not realistic and that the impact of iCap on Sigma-Aldrich's sales and market shares had been overestimated by Sigma-Aldrich.[871] This claim is made based on (i) a number of witness statements collected in 2017 to 2018,[872] (ii) one email from a Merck employee *after* closing of the Transaction which raises questions on the potential of iCap[873] and (iii) the actual sales of Metrohm Omnis titration instruments since launch in 2016.[874]

(460) The Commission notes that all of these sources were made after (and, in some cases, several years after) the submission of the RFI replies, the Final Form RM, and the adoption of the Clearance Decision, once the Commission had commenced these proceedings, and with the benefit of hindsight; none of them can show that the projections that Sigma-Aldrich had prepared at that time were unrealistic or overly optimistic.

(461) Merck and Sigma-Aldrich added that there is also "*contemporaneous evidence*" showing that the Parties considered iCap as a minor project that was unimportant to Sigma-Aldrich's business.[875] Yet, neither Merck nor Sigma-Aldrich cited any such evidence in the relevant section of the Reply to the SO or the Reply to the SSO. The Parties did not provide any contemporaneous evidence to show that the cooperative agreement with Metrohm regarding iCap was minor, unimportant or peripheral. They simply compare the Y1-Y10 NPV of iCap (USD […])[876] with the EEA-wide and worldwide turnover of Sigma-Aldrich (respectively, EUR […] and more than EUR

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869 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], re "Collaborations update", 12 April 2013 [Doc Id: 28-932].

870 SIAL Collaborations Spreadsheet [Doc Id: 29-1360].

871 Reply to SO, paras. 48ff. See also Merck's First Oral Hearing Presentation, pp. 44-48 [Doc Id: 1986].

872 Reply to SO, paras 52, 54, 56-57, 61-63, 65 [Doc Id: 1187] and Merck's First Oral Hearing Presentation, pp. 35-42 [Doc Id: 1986].

873 See Reply to SO, para. 66 and email from [NAME OF INDIVIDUAL], Merck to [NAMES OF INDIVIDUALS], Merck, re "AW: Titrations Lösungen", dated 6 January 2016, [*original in German*], available as Annex 4 to the Reply to SO, [Doc Id:1179-71]. In this email, Ms [NAME OF INDIVIDUAL] expressed doubts about the Sigma-Aldrich sales forecasts; the technical advantages; and the cost of iCap. She questioned whether the Merck sales team will allow the project to go forward based on the information available. Yet, in the same email Ms [NAME OF INDIVIDUAL] added that *"I would like to have the project presented to me again* [...] *we should approach the project carefully and should also look at the contract with Metrohm in detail* [...] *in principle I am not against the project, the idea is good, but <u>just not adapted to the new situation yet</u>"* (emphasis added). This shows that Ms [NAME OF INDIVIDUAL] was not opposed to the project nor did she consider that it was not worth pursuing. She simply flagged a number of questions that had to be answered before the project goes forward under Merck's internal procedures. This cannot be considered as evidence that iCap was not important overall or specifically for the Divestment Business. No reply to this email or subsequent exchanges between Ms [NAME OF INDIVIDUAL] and [NAME OF INDIVIDUAL] or [NAME OF INDIVIDUAL] (Ms. [NAME OF INDIVIDUAL] supervisors) were provided by Merck. In any event, notwithstanding the initial doubts of Ms [NAME OF INDIVIDUAL], Merck went ahead with the project launching the multi-use version of iCap in May 2016 and the single-use version of iCap in April 2018 (both for volumetric applications) (see Reply to SO, paras 29-30 [Doc Id: 1178] and witness statement of [NAME OF INDIVIDUAL], Metrohm, Reply to SO, Annex 1.13 [Doc Id: 1179-5]).

874 Reply to SO, paras. 31ff. [Doc Id: 1187].

875 Reply to SO, paras. 92-96 [Doc Id: 1187].

876 Without taking into account the residual NPV of the project.

[…]). This comparison is not relevant to understand the importance of a cooperative agreement specifically for the affected markets. By way of example, Sigma-Aldrich's sales in the market for volumetric titration solutions in the EEA were approximately EUR […] in 2014.[877] The Y1-Y10 NPV of iCap (USD […]), therefore, constitutes approximately one-third of Sigma-Aldrich's sales in this market, and cannot, therefore, be considered as minor, unimportant or peripheral.

(462) In the Reply to the SSO, Sigma-Aldrich reiterates that iCap had no relevance for the viability and competitiveness of the Divestment Business and that it was immaterial to the Transaction or Merck and Sigma-Aldrich's business post-Transaction.[878] In this respect, Sigma-Aldrich argues that the Commission (i) failed to review comprehensively and objectively the input received from market participants during the market investigation and the market test of the draft Commitments,[879] (ii) selectively quotes and misinterprets parts of internal documents and emails,[880] and (iii) relies on incorrect and outdated financial data.[881]

(463) Those claims do not change the Commission's conclusion in this Section, for the following reasons:

(a) As already elaborated in detail in recitals (426) to (429), the alleged "*unimportance*" of iCap for the Divestment Business is irrelevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFIs I-3 and I-4 and Section 5.3 of the Form RM. Moreover, the contemporaneous evidence in the Commission's file reveals that this allegation is factually incorrect. In this respect, the Commission notes that Sigma-Aldrich did not support its arguments challenging the importance of iCap with contemporaneous evidence,[882] but relies on witness statements whose probative value is very limited;[883]

(b) Sigma-Aldrich has claimed that the Commission failed to mention an email exchange from March 2011, parts of which appear to call into doubt iCap's financial prospects.[884] In fact, the Commission both mentioned and quoted the very passage Sigma-Aldrich claims the Commission did not consider, placing it into a larger context which does not support the contention that iCap was not seen as important at the time;[885]

(c) Sigma-Aldrich argues that a 2011 report by Helbling, which is referred to above, is unreliable because the company was hired by Sigma-Aldrich to develop iCap and therefore could not have objectively evaluated its prospects.[886] The mere involvement of Helbling in the development of iCap cannot by itself lead to the conclusion that its views of the project were not objective. Moreover, Sigma-

877 Reply to question 4, RFI iCap-2 [Doc Id: 91].
878 Reply to SSO, para. 79.
879 Reply to SSO, paras. 25-33.
880 Reply to SSO, paras. 34-41.
881 Reply to SSO, paras. 42-58.
882 As explained in Section 4.3.1 above, the Parties have provided witness statements from 63 witnesses. None of these witnesses has provided any contemporaneous document to support his/her statements, with the exception of [NAME OF INDIVIDUAL] (Reply to SO, Annexes 3-5). All 3 emails of [NAME OF INDIVIDUAL] (an employee of Merck – not Sigma-Aldrich) speak to the commercial potential of iCap as a project which is irrelevant to the Commission's investigation.
883 See Section 4.3.1.
884 Reply to SSO, para. 35.
885 See recital (60).
886 Reply to SSO, para. 35.

Aldrich did not provide any support as to why Helbling's particular views on this point were inaccurate. At any rate, Helbling's view are not determinative of the Commission's assessment on this point;

(d) Sigma-Aldrich argues that the Commission relies on conclusions of the dated and allegedly inaccurate 2011 DCF analysis, including email exchanges relating to it and the 31 March 2011 presentation.[887] As an initial matter, the Commission was transparent about the relationship between the cited email exchange, the 2011 DCF, and the 2011 presentation.[888] However, Sigma-Aldrich has not provided any contemporaneous evidence to suggest that the 2011 DCF analysis was inaccurate. In any event, the Commission cites many DCFs and other internal documents post-dating the 2011 DCF, which also consider iCap as a promising R&D project[889];

(e) Sigma-Aldrich argued that the Commission artificially inflates the importance of isolated references to iCap in various internal documents, citing the Commission's reference of a May 2013 presentation in particular.[890] However, the Commission refers to this presentation as part of its discussion of iCap's development; as such the reference supports the view that iCap was not considered as unimportant at the relevant time.[891] In any event, while the Commission does refer to documents that list iCap as one of several projects, some of these documents describe it as the project with the highest probability of completion[892] or as the project with the highest expected incremental sales[893];

(f) Sigma-Aldrich points to certain inconsistencies and errors in documents quoted by the Commission to argue that the latter's case rests on unreliable references. The example Sigma-Aldrich uses in support of its claim[894] consists of a document with one clerical error (wrongly indicating that iCap would be launched in 2014). The error in this particular document does not render the document unreliable as a whole. Moreover, the Commission does not draw on the incorrect part of the document to support any factual assessment concerning the importance of iCap[895];

(g) Sigma-Aldrich further faults the Commission for taking overly optimistic assumptions expressed during the iCap project development stage at face value, rather than questioning them and putting them into the broader context, including the organizational context, in which they were made.[896] Sigma-Aldrich also reiterates that the Commission's reliance on the 2011 and 2014 DCF analyses is misplaced, arguing that the forecasts in these documents are based on unrealistic and incorrect assumptions[897] and disputing the Commission's "*static analysis*" concerning the importance of iCap.[898] In this

887 Reply to SSO, para. 36.
888 See Section 4.3.3.3.
889 See Section 4.3.3.3.
890 Reply to SSO, para. 37.
891 See recital (74).
892 See recital (119).
893 See recital (95).
894 Reply to SSO, para. 39.
895 See recital (228).
896 Reply to SSO, paras. 40-41.
897 Reply to SSO, paras. 42-58.
898 Reply to SSO, para. 54. In particular, Sigma-Aldrich refers to the standard set out in Case T-399/16 - *CK Telecoms UK Investments Ltd*, 28 May 2020, paras. 117-118. In this regard, the Commission notes

respect, it should be recalled that the importance of the commercial prospects of iCap is irrelevant for assessing whether Sigma-Aldrich breached Article 14(1) of the Merger Regulation.[899] Moreover, Sigma-Aldrich acknowledges that at the time of the merger review proceedings, iCap was considered to be an important project within its laboratory chemicals business. In any event, Sigma-Aldrich presents no contemporaneous evidence suggesting that the assumptions of the internal documents cited by the Commission were overly optimistic, which would at any rate be irrelevant. Moreover, the contextual factors Sigma-Aldrich argues the Commission has ignored are irrelevant. For example, whether iCap was discussed on one or more pages as a "*Top R&D Project*" in the October 2015 document referred to by Sigma-Aldrich is not relevant for answering the question of whether iCap would have been responsive to RFI I-3, RFI I-4 and Section 5.3 of the Form RM[900];

(h) Sigma-Aldrich emphasises that the Divestment Business would have been viable and competitive without iCap.[901] However, whether the Divestment Business would have been viable or competitive without iCap is immaterial to the question of whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and Section 5.3 of the Form RM.[902] In any event, according to contemporaneous evidence, at the time of the alleged infringements, iCap was expected to have a strong impact on the Divestment Business's competitiveness[903];

(i) Sigma-Aldrich argues that the development of iCap post-Transaction confirms that the product was "*a flop since its launch*".[904] However, the actual commercial success or failure of iCap is immaterial to the evaluation of Sigma-Aldrich's conduct in this case as it post-dates the conduct at issue in this case. The fact that the R&D project has not yet performed to expectations is irrelevant: (i) R&D project are by nature uncertain, such lack of certainty cannot have the effect to limit the disclosure requirements for the parties; and (ii) the fact that iCap was not divested together with the Divestment Business, as a result of the alleged infringements, may have adversely affected its commercial potential. In addition to the above, Sigma-Aldrich claims that iCap had "*inherent disadvantages*"[905] and suggests an inevitable evolution of iCap towards eventual commercial failure.[906] This claim is not consistent with the contemporaneous evidence in this

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that the standard set out in that case relates to the demonstration of a "*significant impediment to effective competition*" following a Phase II investigation. This is not relevant in the present case, which relates to the supply of incorrect and/or misleading information in the context of a Phase I merger investigation where the standard is the demonstration of "*serious doubts*" (which is a lower standard given the time constraints characterising the Phase I investigation).

899 See recital (443).

900 Reply to SSO, para. 41(g).

901 Reply to SSO, paras. 59-63.

902 Case T-145/06 *Omya*, 4 February 2009, para. 28. In this case, the Court also held that the "*need for the information*" must be assessed by reference to the view that the Commission could reasonably have held of the extent of the information necessary to examine the concentration at the relevant time when the supply of the information is required and that "*accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made*" (see para. 30).

903 See recitals (60), (392) and (445).

904 Reply to SSO, para. 64.

905 Reply to SSO, para. 23.

906 Reply to SSO, para. 79.

case, which confirms that Sigma-Aldrich perceived iCap to be an important project for its laboratory chemicals business as it was being run at the time, and thus for determining that the scope of the Divestment Business was sufficient to ensure its viability and overcome the Commission's serious doubts.[907] In particular, this allegation is not consistent with the fact that, after the clearance, Merck showed a strong interest in iCap, awarding it a price in the *sales potential* category[908] and continued its development.

(464) In view of the above, the Commission concludes that Sigma-Aldrich's argument about the lack of importance of iCap in the Divestment Business is irrelevant to conclude whether Sigma-Aldrich complied with the disclosure requirements of RFI I-3 and RFI I-4 and the Form RM (including in particular Section 5.3) and, in any event, is factually incorrect.

4.3.3.4. Conclusion of the Commission's assessment

(465) In view of recitals (399) to (464), the Commission concludes that the Parties' arguments summarised in recitals (393) to (397) do not alter the Commission's findings in Sections 4.1 and 4.2.

4.4. Conclusion

(466) Based on the findings in Sections 4.1, 4.2 and 4.3, the Commission concludes that Sigma-Aldrich has committed the following infringements intentionally or at least negligently:

(a) an infringement of Article 14(1)(b) of the Merger Regulation by supplying incorrect and/or misleading information to the Commission in response to question 6 of RFI I-3 on 2 June 2015 (as incorporated in Section 5.12 of the Final Form RM);

(b) an infringement of Article 14(1)(b) of the Merger Regulation by supplying incorrect and/or misleading information to the Commission in response to questions 12, 13 and 16 of RFI I-4 on 8 June 2015 (as incorporated in Section 5.4 of the Final Form RM); and

(c) an infringement of Article 14(1)(a) of the Merger Regulation by supplying incorrect and/or misleading information in Section 5.3 of the Final Form RM on 12 June 2015.

(467) For the avoidance of doubt, since the information requirements of Sections 5.4 and 5.12 of the Form RM overlap to some extent with the information requirements of question 6 of RFI I-3 and questions 12, 13 and 16 of RFI I-4, the Commission does not hold Sigma-Aldrich liable for an additional and distinct infringement of Article 14(1)(a) of the Merger Regulation on the basis of the supply of incorrect and/or misleading information in Sections 5.4 and 5.12 of the Final Form RM .

(468) In the Reply to the SSO, Sigma-Aldrich took the view that "*the responses to the RFIs cannot constitute separate infringements from the submission of the Form RM*".[909] According to Sigma-Aldrich, the Commission itself acknowledged that the responses were provided in a single context which means that there was "*at most, one*

907 See recitals (60), (392) and (445).
908 See also recital 478(c).
909 Reply to SO, paras. 177-181 and 319.

infringement".[910] Those claims do not change the Commission's conclusion that Sigma-Aldrich committed three separate infringements for the following reasons:

(a) The supply of incorrect and/or misleading information in an RFI can constitute a separate infringement from the supply of incorrect and/or misleading information in the Form RM. This is confirmed by the existence of separate provisions in the Merger Regulation, one referring to incorrect and/or misleading information in RFIs (Article 14(1)(b)) and one referring to incorrect and/or misleading information in other submissions (Article 14(1)(a));

(b) Each of the infringements in recital (466) concerns a different question or set of questions posed by the Commission. The first infringement (mentioned in recital (466)(a) above) concerns question 6 of RFI I-3.[911] The second infringement (mentioned in recital (466)(b) above) concerns questions 12, 13, and 16 of RFI I-4.[912] The third infringement (mentioned in recital (466)(c) above) concerns Section 5.3 of the Form RM and not an RFI question. The Commission considers that incorrect and/or misleading information supplied in response to different RFIs and/or submissions (within the meaning of Article 14(1)(a) of the Merger Regulation) can give rise to separate infringements, even if all these questions were asked in the "*single context*" of assessing the proposed commitments; and

(c) Each of the infringements in recital (466) above concerns different information requested by the Commission. The first infringement (mentioned in recital (466)(a) above) concerns incorrect and/or misleading information about assets that were excluded from the business to be divested. The second infringement (mentioned in recital (466)(b) above) concerns incorrect and/or misleading information about Sigma-Aldrich's R&D functions, including R&D personnel and R&D agreements with third parties. The third infringement (mentioned in recital (466)(c) above) concerns incorrect and/or misleading information about the existence of the iCap project itself and its relationship to the Divestment Business. The Commission considers that even if asked in the "*single context*" of assessing the proposed commitments, incorrect and/or misleading information on different issues, provided in response to separate RFIs or in response to the information required in the Form RM can give rise to separate infringements. The single context of the requests is taken into account in the Commission's decision to impose one fine for all three infringements.

5. DECISION TO IMPOSE A FINE

(469) Article 14(1) of the Merger Regulation states that in the case of intentional or negligent conduct as described in points (a) to (f) of that Article: "[t]*he Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings, fines not exceeding 1% of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5"*.

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910 Reply to SO, para. 319.

911 The fact that this information was integrated in the Final Form RM is taken into account for the gravity of this infringement (see Section 5.1) but does not give rise to a separate infringement.

912 The fact that this information was integrated in the Final Form RM is taken into account for the gravity of this infringement (see Section 5.1) but does not give rise to a separate infringement.

(470) As described in recital (466), the Commission considers that Sigma-Aldrich's conduct constitutes three separate infringements:

(a) an infringement of Article 14(1)(b) of the Merger Regulation by supplying incorrect and/or misleading information to the Commission in response to RFI I-3. Sigma-Aldrich provided the same incorrect and/or misleading information in a separate document responding to RFI I-3 (on 2 June 2015) which was subsequently incorporated into the Final Form RM (on 12 June 2015);

(b) an infringement of Article 14(1)(b) of the Merger Regulation by supplying incorrect and/or misleading information to the Commission in response to RFI I-4. Sigma-Aldrich provided the same incorrect and/or misleading information in response to RFI I-4 which was incorporated into the Second updated version of the Initial Form RM (on 8 June 2015) and in the Final Form RM (on 12 June 2015); and

(c) an infringement of Article 14(1)(a) of the Merger Regulation by supplying incorrect and/or misleading information in Section 5.3 of the Final Form RM on 12 June 2015.[913]

(471) As explained in recital (468), each of these infringements concerns a different question or set of questions posed by the Commission, or a distinct section of the Form RM, and different information supplied by Sigma-Aldrich at different points in time. However, all the incorrect and/or misleading information was supplied in response to questions that the Commission asked in the context of the assessment of the proposed commitments or that were required by the Form RM. All the incorrect and/or misleading information supplied by Sigma-Aldrich related to the business to be divested under the proposed commitments and was necessary for the Commission to determine whether this business would be viable and competitive. Ultimately, the information was consolidated in the Final Form RM submitted on 12 June 2015.[914] Therefore, the Commission concludes that, for the purposes of this case, one fine should be imposed for those three infringements.[915]

(472) As regards the appropriate level of the fine to be imposed on Sigma-Aldrich, Article 14(3) of the Merger Regulation provides that in fixing the amount of the fine, *"regard shall be had to the nature, gravity and duration of the infringement*". Section 5.1 outlines the nature and gravity of Sigma-Aldrich's infringements. Section 5.2 concerns the duration of the infringements. Section 5.3 outlines mitigating and aggravating circumstances.

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913 Sigma-Aldrich provided the same incorrect and/or misleading information in the Initial Form RM, the First updated version of the Initial Form RM, the Second updated version of the Initial Form RM, and in the Final Form RM.

914 For RFI I-3, this was explicitly requested by the Commission (Doc Id: 812) while for the RFI I-4, the Parties submitted their responses only as part of the Form RM Submissions and the Commission did not ask for a separate document with the replies (see recital (221)).

915 This is in line with the relevant case law and Commission decisional practice under the procedural framework for the application of Article 101 and Article 102 TFEU. See Case T-83/91 - *Tetra Pak*, 6 October 1994, para. 236, where the General Court held that the Commission is entitled to impose a single fine for a multiplicity of infringements, without being required to state specifically how it took into account each of the components objected to for the purposes of setting the fine. See also Case IV/31.143 – *Peugeot*, 25 September 1986.

5.1. The nature and gravity of the infringements

(473) The Commission considers that the three infringements committed by Sigma-Aldrich are of a serious nature and particularly grave for the following reasons.

5.1.1. The obligation to provide correct and non-misleading information in merger investigations is crucial for the Commission's assessment of the compatibility of a concentration with the internal market

(474) The obligation to provide information that is correct and not misleading in a merger investigation is essential for the Commission to be able to review mergers effectively. RFIs pursuant to Article 11(2) of the Merger Regulation are an essential source of information for the Commission. Such RFIs are an indispensable tool for the Commission to gather the necessary facts and information for the accurate assessment of the impact of a notified concentration.[916] Similarly, the information to be provided in the Form RM is essential for the Commission to assess the commitments submitted by the parties to a concentration, including the viability, effectiveness and overall suitability of the commitments to dispel competition concerns.[917]

(475) Therefore, the supply of incorrect and/or misleading information in replies to RFIs or in a Form RM is in itself a serious infringement because it prevents the Commission from accessing information necessary to assess a concentration (and its modifications in case of commitments). Under the tight deadlines of a merger investigation, it is particularly important that the Commission can rely on the accuracy of the information supplied. This principle is set out also in the preamble to the Implementing Regulation, which states at recital (5): "[i]*t is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration."*

5.1.2. Sigma-Aldrich acted intentionally or at least negligently

(476) In Section 4.2.2, the Commission found that:

(a) Sigma-Aldrich was aware (or could not have been unaware) of the fact that the information required pursuant to RFI I-3 and RFI I-4 and Section 5.3 of the Form RM was necessary and material for the Commission's assessment of the compatibility of the Transaction;[918]

(b) Sigma-Aldrich was also aware (or could not have been unaware) that the information supplied was incorrect and/or misleading because it was aware (or could not have been unaware) that iCap was an innovation project; that iCap together with the solvents and inorganics it was offered with constituted new products; that several of its employees were working on the iCap project, including personnel specialised in R&D; that there was an R&D agreement related to Sigma-Aldrich's solvents and inorganics business in the EEA; and that the above information was responsive to RFI I-3 and RFI I-4 (the answers to which were incorporated in Sections 5.12 and 5.4 of the Final Form RM) and to Section 5.3 of the Form RM;[919]

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916 See also Case M.8228 - *Facebook/Whatsapp*, 17 May 2017, para. 97.

917 See also Case T-430/18, *American Airlines*, 16 December 2020, para. 133.

918 See Section 4.2.2.1.

919 See Section 4.2.2.2.

(c) The incorrect and/or misleading statements formed part of a deliberate attempt by Sigma-Aldrich to avoid disclosing iCap to the Commission.[920]

(477) The Commission therefore concludes that Sigma-Aldrich's infringements were intentional, and thus particularly grave. Moreover, Sigma-Aldrich's infringements concerning the replies to RFIs I-3 and I-4 were also repeated on a number of occasions. For the infringement of Article 14(1)(b) concerning RFI I-3, the information was first submitted on 2 June 2015 in reply to the RFI. The same information was submitted again on 8 June 2015 (in the Second updated version of the Initial Form RM submitted on 8 June 2015) and on 12 June 2015 (in the Final Form RM).[921] For the second infringement of Article 14(1)(b) concerning RFI I-4, the information was first submitted on 8 June 2015 and again on 12 June 2016 (in the Final Form RM).[922] Regarding each of those infringements, Sigma-Aldrich could have verified the information originally provided to the Commission's RFIs (given that the original replies were provided under "*time pressure*" according to Sigma-Aldrich),[923] but it did not do so.

(478) Even if the Commission were to conclude that Sigma-Aldrich infringed Articles 14(1)(a) and 14(1)(b) of the Merger Regulation by negligence, the gravity of the infringements would not change significantly for the reasons explained in detail in recital (480)(b).

(479) In the Reply to the SSO, Sigma-Aldrich submitted the following:

(a) Sigma-Aldrich's conduct was not intentional. Sigma-Aldrich had no intention (or motive) to hide iCap from the Commission. Rather, Sigma-Aldrich's decision-makers concluded in good faith that iCap did not need to be disclosed to the Commission or divested;[924]

(b) "*There is no room for negligence on the part of Sigma*" because Sigma-Aldrich followed an appropriate process to obtain relevant information in a short period of time and in the context of negotiating the Commitments, which include a build-in remedy for potential omissions (that is, the "catch all" clause).[925] Moreover, Sigma-Aldrich's infringement cannot be considered as "*repetitive*", simply because a number of drafts were submitted when the allegedly incorrect or misleading information was identical in all drafts.[926]

(480) However, those arguments do not change the Commission's conclusion that Sigma-Aldrich's infringements were particularly grave. Contrary to Sigma-Aldrich's claims, the Commission notes the following:[927]

(a) Sigma-Aldrich argues that its conduct was not intentional. The Commission explained why it considers Sigma-Aldrich's supply of incorrect and/or misleading information was intentional in Section 4.2.2 (as summarised in recital (476) above);

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920 See Section 4.2.2.3.
921 See recitals (219) to (220).
922 See recitals (221) to (221).
923 Reply to SSO, para. 122.
924 Reply to SSO, para. 305.
925 Reply to SSO, para. 312.
926 Reply to SSO, para. 320.
927 Each of the items (a) to (c) below address the corresponding item (a) to (d) in the previous recital.

(b) Sigma-Aldrich argues that its conduct was not negligent, however, the Commission considers Sigma-Aldrich's supply of incorrect and/or misleading information is at least negligent for the following reasons. iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents included in the Divestment Business[928]; Sigma-Aldrich was aware or could not have been unaware of this. Moreover, it was not difficult or time-consuming for Sigma-Aldrich to identify iCap among the R&D projects that concerned the Divestment Business. When asked for the R&D projects and third-party R&D agreements that concerned the Divestment Business, Sigma-Aldrich's Vice President of Marketing, R&D and Business Development immediately identified iCap.[929] This was shared with several key decision-makers within Sigma-Aldrich (namely, [NAMES OF INDIVIDUALS]) and Sigma-Aldrich's external counsel.[930]

Sigma-Aldrich's behaviour cannot be justified because "*it decided, in good faith, not to disclose a minor packaging project*".[931] It is not a prerogative of Sigma-Aldrich to subjectively decide whether the information – expressly required by the Commission[932] – is necessary or not for the Commission's assessment of the Transaction. The Commission is entitled to request "*all the information necessary to enable it to decide on the compatibility of the concentration*"[933] and is responsible for assessing the feasibility of the commitments offered by the parties and the viability and competitiveness of the assets proposed for divestiture.[934] The Commission can make this assessment only if it has received all the information required from the parties (and in particular, the party operating the Divestment Business). Sigma-Aldrich was thus obliged to provide correct and complete information in its submissions and in replies to RFIs, as explained in Section 3.1. Sigma-Aldrich should be aware of this obligation, given that (i) it had repeatedly received guidance from the Commission on R&D and IP related to the Divestment Business, including on packaging;[935] and (ii) it involved external legal counsel when preparing its submissions and replies to RFIs.

The Commission acknowledges that tight legal deadlines apply to the merger review process as from the date of notification, which is chosen by the parties. Far from relaxing the obligation of care on the undertakings, typically large multinational businesses benefiting from internal and external professional advice, supplying complete, correct, and non-misleading information in a timely manner and in *all* the relevant submissions is a necessity of merger control.[936] In any event, regardless of the tight legal deadlines, Sigma-Aldrich has been able to identify iCap quickly among the R&D projects related the Divestment Business.[937]

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928 See recital (336).
929 See recital (345).
930 See recitals to (349).
931 Reply to SSO, para. 312.
932 See notably question 12 of RFI I-4 [Doc Id: 829]: "*Does Sigma have <u>any R&D agreements with third parties related to solvents and inorganics in the EEA</u>?*" (emphasis added).
933 Case T-145/06 *Omya*, 4 February 2009, para. 28.
934 Remedies Notice, para. 7.
935 See Comments on the Draft Commitments and Draft Form RM [Doc Id: 787] and Section 4.2.2.3 above.
936 See also Case T-430/18, *American Airlines*, 16 December 2020, para. 133.
937 See recitals (101) to (102).

Regarding the first and second infringements in recital (466), Sigma-Aldrich had several days to review and verify the information supplied from the date of the submission of the RFI responses (2 and 8 June 2015) until the date of the Final Form RM (12 June 2015), but it failed to do so. The Commission considers that such failure constitutes negligence on the part of Sigma-Aldrich.

5.1.3. The incorrect and/or misleading information related to an R&D project of Sigma-Aldrich

(481) It is the parties' responsibility to provide full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.[938] This obligation applies, in particular, to the supply of accurate and complete information with regard to development projects, given that, due to the secret nature and sensitivity of pipeline products, the only way for the Commission to obtain this information is normally from the parties themselves.[939]

5.1.4. iCap was relevant to the scope of the Divestment Business

(482) The supply of incorrect and/or misleading information by Sigma-Aldrich affected the scope of the Divestment Business in Case M.7435 – *Merck/Sigma-Aldrich*. Had the Parties provided information regarding iCap, this project would have been included in the Divestment Business. When commitments are offered during the Phase I investigation, the Commission accepts asset carve outs from the Divestment Business only in exceptional circumstances, when the Parties can show that this does not affect the viability and competitiveness of the business.[940] Such circumstances did not apply in Case M.7435 – *Merck/Sigma-Aldrich*. Rather, iCap was specifically developed for Sigma-Aldrich's Karl Fisher titration, other volumetric titration solutions and HPLC solvents included in the Divestment Business.[941] The project had the potential to impact Sigma-Aldrich future sales[942] and ranked among the top R&D projects of Sigma-Aldrich for this business.[943] Moreover, participants to the market test of the Initial Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business.[944] For all these reasons, if iCap had been disclosed correctly, the Commission would have required its inclusion in the scope of the Divestment Business.

(483) In the Reply to the SO and in the Reply to the SSO, Merck and Sigma-Aldrich consider that the gravity of any infringements should be low since iCap was not material to Sigma-Aldrich's business or to the Divestment Business.[945] More specifically, the Parties consider that:

(a) iCap was a minor project that was unimportant to Sigma-Aldrich's business. This is why Sigma-Aldrich did not disclose it in the Barolo virtual data room

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938 Implementing Regulation, Preamble, recital 5. See also Case T-430/18, *American Airlines*, 16 December 2020, paras. 191-192.

939 Case M.8436 - *General Electric Company/LM Wind Power Holding*, 8 April 2019, para. 184.

940 Remedies Notice, para. 29. See also paras. 81 and 83 which indicate that the remedies proposed in the course of the Phase I investigation should be so "clear-cut" that it is not necessary to enter into an in depth investigation and should "clearly" rule out the 'serious doubts' identified.

941 See Section 4.1.2.1.1.

942 See recital (359)(b). See also Section 4.3.2.3.2.

943 See recitals (359)(b) and 478(c).

944 See recitals (446).

945 Reply to SO, para. 460 and Reply to SSO, paras. 322-323.

when Merck asked on patents/patent applications for the top 20 Sigma-Aldrich products;[946]

(b) iCap was not solely or predominantly related to the Divestment Business and the latter was viable and competitive without iCap;[947]

(c) as currently launched, iCap addresses a limited part of the market and would not get much traction so that less than […] of the volumetric titration market would potentially be impacted by iCap.[948] Sigma-Aldrich added that there needs to be some link between the fine and the value of the technology which was, allegedly, concealed in this case. According to Sigma-Aldrich, iCap had a 10-year NPV of EUR […] which is negligible compared to the EUR […] value of the Transaction. Any punishment for allegedly concealing the iCap technology should reflect its negligible value.[949]

(484) Those arguments do not change the Commission's conclusion regarding the high gravity of Sigma-Aldrich's infringements:[950]

(a) The iCap R&D project was important for Sigma-Aldrich's laboratory chemicals business for all the reasons explained in Section 4.3.3.3.1. The fact that the project was not included in the Barolo VDR does not suffice to show that it was unimportant to Sigma-Aldrich's business. The Parties acknowledged that the purpose of data rooms, such as the Barolo virtual data room, is very different from the collection of information needed for the merger review process by the Commission.[951] Virtual data room are set up in the context of due diligence process of the Transaction to support, for example, valuation calculations concerning the entire transaction. On the contrary, the Commission's merger review process focuses only on the affected markets, where the sales of the parties can be minimal (especially, if markets are defined at regional or national level) compared to their total sales and/or the value of the transaction.[952]

(b) As explained in Section 4.1.2.1.1 that iCap was developed specifically for volumetric titration solutions, Karl Fischer titration solutions, and HPLC solvents which all belonged to the Divestment Business.

(c) To conclude that iCap would impact less than […] of the the volumetric titration market, Merck and Sigma-Aldrich used (i) actual sales of Metrohm's

946 Reply to SO, paras 92-96.

947 Reply to SO, paras. 127-134.

948 Reply to SO, paras. 31-41, 130.

949 Reply to SSO, para. 323.

950 Each of the points (a) to (c) address the corresponding points (a) to (c) in the recital (483).

951 Reply to SO, paras. 221-223, 225. See also [NAME AND JOB TITLE OF INDIVIDUAL] (Merck), Annex 1.15 ("*the purpose of the due diligence was to identify material risks and potential synergies for Sigma's price valuation* […] *packaging was seen as a "device add-on", which was immaterial for the Transaction. It was the last thing one would look at during the due diligence*") and [NAME AND JOB TITLE OF INDIVIDUAL], Annex 1.19 (" *The purpose of the due diligence was to determine Sigma's value and identify the synergies of the Transaction. Advisors were instructed not to flag issues that did not have a material impact, i.e. below a […] dollar value. This is a normal threshold given the size of the Transaction*.") [Doc Id: 1179-11].

952 In the case at hand, the sales of Sigma-Aldrich were low in the markets affected by the Transaction and in particular in solvents and inorganics in the EEA. [SIGMA'S R&D AND BUSINESS STRATEGIES].

Omnis instruments in 2016 to 2018 and (ii) sales projections for Omnis instruments and iCap products that Merck employees prepared in 2018.[953]

However, figures that post-date the Commission's merger review procedure by several years cannot be used reliably to assess the importance (or the potential) of iCap at the time when the Parties offered Commitments in Case M.7435 – *Merck/Sigma-Aldrich*.[954]

At that time, Sigma-Aldrich expected iCap to impact meaningfully its sales in solvents and inorganics.[955] The project ranked high among the company's R&D projects.[956] In 2014 to 2015, iCap was referred to as a "*strategic project"* in internal documents[957] (September 2014), a "*top priority*"[958] (April 2015), among the "*bigger projects*"[959] (August 2015), among the "*major projects*"[960] (September 2015), a "*major R&D project*",[961] "*too high profile, too important*"[962], a "*Top R&D project*"[963] (October 2015) and a "*key R&D investment*" and "*lighthouse project*"[964] (December 2015).

In any event, after the Clearance Decision demonstrate the significance of iCap. For example, after the Transaction was cleared, Merck showed a strong interest in the iCap project. iCap was presented in Merck's R&D summit in Boston on 1 to 3 December 2015,[965] less than two weeks after the closing of the Transaction,[966] and won a prize in the sales potential category.[967] iCap was also presented to Merck's Executive Board on 7 December 2015[968] and appears to have captured their interest.[969]

Following the closing of the Transaction, Merck decided to continue investing in the iCap project.[970] In 2021, Merck markets the single-use iCap[971] as a "*safe,*

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953 Merck's First Oral Hearing Presentation, pp. 45, 19-42, and 22 [Doc Id: 1986].

954 See by analogy, Case C-466/19, *Qualcomm*, 28 January 2021, paragraph 82.

955 See recital (359)(b).

956 See recital (85) and footnote 503.

957 Email from [NAME OF INDIVIDUAL] (Helbling) to [NAME AND JOB TITLE OF INDIVIDUAL], "Sigma-Aldrich @ Merck", 23 September 2014 [*original in German*] [Doc Id: 29-1813].

958 Document "Re: Analytica Booth" by [NAME OF INDIVIDUAL] dated 20/04/2015 [Doc Id: 29-2319 - Ref: 2016/050430].

959 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Re: was wir noch besprechen sollten vor Seelze" dated 28 August 2015 [*original in German*] [Doc Id: 29-2804 - Ref: 2016/050430]

960 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAME OF INDIVIDUAL], Sigma-Aldrich, re "Notes from our call today" dated 25 September 2015 [Doc Id 28-1991].

961 Email from [NAME OF INDIVIDUAL] (Sigma-Aldrich) to [NAMES OF INDIVIDUALS] (Sigma-Aldrich), "R&D Request", 9 October 2015 [Doc Id: 29-2897 - Ref: 2016/050430]:

962 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS] "iCap implementation", 26 October 2015 [Doc Id 28-2031].

963 Sigma-Aldrich "R&D Details – Purchase Accounting request from Merck – Summary" [Doc. Id: 303-4]

964 Merck's presentation "OP 2016 – Applied Solutions", 17 November 2015 [ID 29-3419]

965 See recital (132).

966 The closing took place on 18 November 2015.

967 Email by [NAME OF INDIVIDUAL], ex-Sigma-Aldrich, to, among others, [NAMES OF INDIVIDUALS], Metrohm, re "ein wichtiger Meilenstein" dated 3 December 2015 [Doc Id 29-3368].

968 [Doc ID 28-2082].

969 Email by [NAME OF INDIVIDUAL], Sigma-Aldrich, to [NAMES OF INDIVIDUALS], both ex-Sigma-Aldrich, re "Confidential – [NAME OF INDIVIDUAL]" dated 17 December 2015 [Doc Id 29-3468].

970 Contrary to Merck's claim during the First Oral Hearing that it had no choice but to continue cooperating with Metrohm because of its contractual obligations (First Oral Hearing Recording, [Doc Id: 1982-1985]), [SIGMA'S BUSINESS STRATEGIES AND OTHER AGREEMENTS] [Doc Id: 60].

smart and secure" ('3S') device. In April 2018, Merck launched several of its reagents for volumetric titration featuring iCap (or 3S).[972] In June 2020, Merck announced that it expanded the selection of volumetric titration reagents available with 3S.[973] On top of volumetric titration and Karl Fischer titration (in both its single and multi-use formats), Merck [SIGMA'S R&D AND BUSINESS STRATEGIES].[974] Merck also presented the single-use iCap (3S) as the number 1 innovation showcased at the World of Technology & Science conference in Utrecht, the Netherlands, which took place on 2 to 5 October 2018.[975]

Furthermore, the fact that iCap was not divested together with the Divestment Business directly impacted the project's potential. Complications and delays arose due to the fact that: (i) the chemicals and chemicals' bottles with which iCap was intended to be used were no longer Sigma-Aldrich's but Merck's;[976] and (ii) Merck's chemicals' production had to be transferred to Buchs.[977] Merck initially did not have the incentive to develop the project because of the risk of Honeywell asking for the project to be divested.[978] In an email to the Commission, Metrohm confirmed that the current proceedings directly impacted the date of iCap's launch.[979]

As regards Sigma-Aldrich's argument that the value of the iCap project was negligible, the Commission notes that the total NPV of the iCap project was estimated at EUR […] in March 2014, namely, shortly before the Transaction was announced.[980] This value is not negligible when considered in its proper context, namely, the price that Honeywell paid to acquire the Divestment Business (EUR […]);[981] the total value of sales of the Divestment Business in 2014 (EUR […]);[982] the value of sales of Sigma-Aldrich in 2014 in the market

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971 Merck's First Oral Hearing Presentation, pp. 18 and 21 [Doc Id: 1986].

972 Reply to SO. para. 29 [Doc Id: 1187].

973 Merck, "Connected Titration: 3S Reagents for safer and more reliable Volumetric Titrations", June 2020, p. 2, available at https://learning.sepscience.com/hubfs/Webinars/Merck_300620/32190-3S_Titration_flyer_Web_MRK.pdf?hsCtaTracking=b20dd67e-8650-48e8-910e-9f5b807759ae%7C5e41e5f0-41bf-47c7-99ce-143815a101dc (last accessed on 5 January 2021).

974 Reply to SO, para. 108 [Doc Id: 1187].

975 See http://www.merckmillipore.com/LU/fr/20180917_153515 (last accessed on 18 June 2020) and also https://fhi.nl/wots/3s-safe-smart-and-secure-connect-your-lab-merck/ (last accessed on 18 June 2020).

976 See notably Excel sheet, "Project Cockpit / Monthly Report", 5 November 2015 [Doc Id: 29-3223] and Reply to SO, Annex 5, Email from [NAME OF INDIVIDUAL] (Merck) to [NAME OF INDIVIDUAL] (Merck), dated 18 January 2016 [Doc Id: 1179-72].

977 See for example "*Prior to the Transaction, iCap's installation process on the reagents was designed to be manual and take place at Buchs. Post-Transaction, Merck's reagents had to be transferred from Darmstadt to Buchs. This was a complicated exercise* […] *An added complication is that Karl Fischer reagents are too aggressive to be transported in bulk to Sigma's site, Buchs, where the iCap manufacturing process is already in place. Merck will therefore need to implement the filling and handling procedures in Darmstadt where currently there are no relevant facilities*" [Doc Id: 1179-14].

978 The risk that Honeywell would request a licence for iCap gave incentives to slow down the project (see for example "*[We] May want to make sure we don't do anything visible on this [iCap] for at least six months if not a year. They [Honeywell] can ask to add things to the DB [Divestment Business] for the next six months and for the next year we will be their service provider. A launch in a year is the safest if we want to avoid possible concerns from them.*" [Doc Id: 310-311]. On the risk of the purchaser claiming iCap, see also [Doc Id: 30-799].

979 Email from Metrohm to the case team dated 2 September 2016 [Doc Id: 3].

980 See Figure 3.

981 Reply to SO, footnote 7.

982 Final Form RM, Doc Id: 849, para. 134.

for volumetric titration solutions in the EEA (around EUR […]);[983] the value of sales of Sigma-Aldrich in 2014 in the market for Karl-Fischer titration solutions in the EEA (approximately EUR […]);[984] or the value of sales of Sigma-Aldrich in 2014 in the market for HPLC solvents in the EEA (around EUR […]).[985]

5.1.5. The gravity of Sigma-Aldrich's infringement compared with the infringements in Facebook/WhatsApp and GE/LM Wind

(485) In the Reply to the SSO, Sigma-Aldrich noted that "[t]*o be consistent in its fining practice, and not discriminate between companies, the Commission should, if it imposes a fine in the present case, apply a gravity factor significantly lower than the 0.22% factor applied in the recent Facebook/WhatsApp decision,*[986] *and lower than the 0.05% factor applied in GE/LM Wind*[987]".[988] According to Sigma-Aldrich, this should be the case for the following reasons:

(a) unlike Facebook (whose conduct was at least negligent), Sigma-Aldrich acted in good faith and its conduct was at most negligent;[989]

(b) Facebook provided incorrect and/or misleading information in relation to one of the key features of WhatsApp's business. On the contrary, iCap was not a key feature of Sigma-Aldrich's business or of the Transaction;[990]

(c) Facebook failed to provide information on the technology in question in that case, not only in the Form CO but also in response to a subsequent RFI.[991] Moreover, in *GE/LM Wind*, the incorrect information was provided in the Form CO, in a context in which GE had ample time to provide complete information, unlike the circumstances in this case.[992]

(486) Those claims do not change the Commission's conclusions regarding the gravity of Sigma-Aldrich's infringements set out in recital (466). The Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters.[993] The Commission assesses each case based on its own factual circumstances, including the specificities of the conduct of each undertaking; their negligence or intention; and their cooperation with the Commission.

(487) The Commission recalls the following elements which confirm the gravity of Sigma-Aldrich's infringements:

(a) Sigma-Aldrich provided incorrect and/or misleading information to the Commission intentionally or at least negligently for the reasons explained in Sections 4.2.2 and 5.1.2;

(b) Sigma-Aldrich provided incorrect and/or misleading information on a pipeline project (as was the case in *GE/LM Wind*).[994] As explained in recital (481), due

983 Merck's reply to RFI iCap-2, 30 May 2016, Doc Id: 117, question 4.
984 Merck's reply to RFI iCap-2, 30 May 2016, Doc Id: 117, question 4.
985 Merck's reply to RFI iCap-2, 30 May 2016, Doc Id: 117, question 4.
986 Commission decision of 17 May 2017, *Facebook/Whatsapp*, M.8228.
987 Commission decision of 8 April 2019, *General Electric Company/LM Wind Power Holding*, M.8436.
988 Reply to SSO, para. 313.
989 Reply to SSO, para. 314.
990 Reply to SSO, para. 315.
991 Reply to SSO, para. 316.
992 Reply to SSO, para. 317.
993 Case C-76/06 *Britannia Alloys and Chemicals*, para. 60.
994 Case M.8436 - *General Electric Company/LM Wind Power Holding*, 8 April 2019, para. 184.

to the secret nature and sensitivity of pipeline products, the only way for the Commission to obtain this information is normally from the parties themselves. This means that it is the parties' responsibility to provide full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration - including with regard to development projects.[995] Moreover, participants to the market test of the Initial Commitments raised the need to include all pipeline products and R&D agreements in the Divestment Business. This feedback was passed on by the Commission to (Merck and) Sigma-Aldrich[996] and it was clear that all pipeline products and R&D agreements should be included in response to the Commission's questions specifically on these points;[997]

(c) the iCap R&D project was closely related to the Divestment Business for the reasons explained in Sections 4.1.2.1 and 4.1.3.1. Contrary to Sigma-Aldrich's claims, it considered iCap important for its laboratory chemicals business for all the reasons explained in Section 4.3.3.3;

(d) Sigma-Aldrich failed to provide information on not one, but on several topics regarding the Divestment Business: the existence of the iCap project, Sigma-Aldrich's R&D functions, including R&D personnel and R&D agreements with third parties, and the assets excluded from the Divestment Business; and

(e) Merck (and Sigma-Aldrich) had started preparations for a possible remedy several months before June 2015, when the infringements set out in recital (466) took place. Merck's external counsel identified the risk for potential remedies in this case at least as early as September 2014. In March 2015, a virtual data room was set up and populated by Sigma-Aldrich with information and documents regarding a possible divestiture of its business in solvents and inorganics.[998]

5.2. The duration of the infringements

(488) The Commission considers that all the infringements are instantaneous, since they were committed by supplying incorrect and/or misleading information on three specific occasions, namely on the date of reply to RFI I-3 (2 June 2015), the date of reply to RFI I-4 (8 June 2015), and the date of the submission of the Final Form RM (12 June 2015).

5.3. Mitigating and aggravating circumstances

(489) The Commission takes the view that there are no mitigating or aggravating factors to be taken into account in this case.

(490) However, in the Reply to the SO and in the Reply to the SSO, Merck and Sigma-Aldrich argued that there were "*important factors that support a significant downward adjustment of the fine*",[999] namely:

(a) the circumstances in which the information should have been provided (the tight deadlines that the Parties were subject to and the number of substantive issues open in relation to the Divestment Business);[1000]

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995 Preamble, recital (5) of Regulation (EC) No 802/2004. See also Case T-430/18 *American Airlines*, para. 192.

996 See recital (32).

997 See recital (446).

998 Letter from Merck's external counsel to the Commission, 27 November 2017, paras. 1-5, Doc Id: 1129.

999 Reply to SO, para. 463.

(b) in June 2015, the Parties alerted the Commission of an error in the SKUs included in the remedy package, which (if uncorrected) would have substantially reduced the size of the remedy; the Parties claim that illustrates the Parties' good faith;[1001]

(c) the potential inadvertent omission could have been resolved without consequences by resorting to the "*catch-all*" clause in the Commitments or in the SPA between the Parties and Honeywell. The Monitoring Trustee had the possibility to include iCap into the Divestment Business but it did not do so;[1002]

(d) Sigma-Aldrich disclosed iCap in the Excluded Assets Schedule and the Commission, the Monitoring Trustee, and Honeywell did not react to this disclosure;[1003]

(e) the alleged omission had no impact on the divestiture process in Case M.7435 – *Merck/Sigma-Aldrich*. According to Sigma-Aldrich, "[w]*ith or without iCap being included, the process would have been exactly the same and the outcome, namely, Honeywell's acquisition of the business* [...] *would have occurred*";[1004]

(f) Sigma-Aldrich granted Honeywell a royalty-free licence before iCap was launched;[1005] and

(g) the effective cooperation of Merck throughout the investigation once the alleged omissions were discovered.[1006]

(491) Those arguments do not change the Commission's conclusion that there are no mitigating circumstances in this case.[1007]

(492) *First*, the Commission acknowledges that tight legal deadlines apply to the merger review process as from the date of notification (which is chosen by parties). However, as explained in recital (424), the speed in merger control makes the need for complete, correct, and non-misleading information on time and in all the relevant submissions even more critical.[1008]

(493) Despite the tight legal deadlines, Sigma-Aldrich quickly identified iCap (within less than two hours) as being among the R&D projects related the Divestment Business.[1009] According to the Reply to the SSO, Sigma-Aldrich then decided in good faith that it did not need to disclose iCap to the Commission or include it in the remedy package.[1010] It is this decision that led to the supply of incorrect and/or misleading information, not the tight deadlines as such. In any event, as already stated, it is not a prerogative of Sigma-Aldrich to subjectively decide what information[1011] is necessary. This is even less so when the Commission has already

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1000 Reply to SO, para. 463(a) and Reply to SSO, paras. 330ff.
1001 Reply to SO, para. 463(b) and Reply to SSO, paras. 342ff.
1002 Reply to SO, para. 463(c) and Reply to SSO, paras. 333ff.
1003 Reply to SSO, paras. 346ff.
1004 Reply to SSO, para. 328.
1005 Reply to SO, para. 463(d) and Reply to SSO, paras. 336ff.
1006 Reply to SO, para. 463(e) and Reply to SSO, paras. 349ff.
1007 The items identified "*first*" to "*seventh*" in recitals (492) to (516) address the corresponding items (a) to (g) in recital (490).
1008 See also Case T-430/18, *American Airlines*, 16 December 2020, paragraph 133.
1009 See recitals (101) and (102).
1010 Reply to SSO, para. 331.
1011 See notably Question 12 of RFI I-4 [Doc Id: 829]: "*Does Sigma have <u>any R&D agreements with third parties related to solvents and inorganics in the EEA</u>?*" (emphasis added).

emphasised the importance that it placed on receiving complete information on R&D – including for packaging.[1012] The Commission is responsible for assessing the feasibility of the commitments proposed by the parties and the viability and competitiveness of the assets proposed for divestiture.[1013] The Commission can make this assessment only if it has received all the information required by the parties (and in particular, the party operating the Divestment Business).[1014]

(494) During a call that took place on 5 June 2015, Sigma-Aldrich took the decision to not disclose iCap to the Commission.[1015] The infringements identified in recitals (466)(b) and (c) relate to the supply of incorrect and/or misleading information in the response to RFI I-4 (8 June 2015) and in the Final Form RM (12 June 2015). Sigma-Aldrich did not provide any evidence suggesting that it would reconsider its decision or decide differently if it had more time to prepare the answers to RFI I-4 or the Form RM Submissions.[1016]

(495) *Second*, Merck and Sigma-Aldrich alerted the Commission of an error in the SKUs included in the remedy package. This error does not relate to iCap and is therefore unrelated to the supply of incorrect and/or misleading information by Sigma-Aldrich subject to this Decision. Thus, the Parties' initiative to contact the Commission on the SKU error cannot be taken into account as a mitigating circumstance regarding the infringements in recital (466). Moreover, given that Sigma-Aldrich's infringements concerning the replies to RFIs I-3 and I-4 were also repetitive, that initiative to contact the Commission cannot be deemed as a mitigating circumstance.[1017] Sigma-Aldrich could have verified the information originally provided to the Commission's RFIs (in particular given that the original replies were provided under "*time pressure*" according to Sigma-Aldrich),[1018] but it did not do so.

(496) In the Reply to the SSO, Sigma-Aldrich claimed that the error in the SKU lists would be "*worth*" more than USD […] while a potential omission related to iCap most optimistically represented a value of USD […] (based on the project's 10-year NPV). According to Sigma-Aldrich, it is highly unlikely that a company would remedy an error "*worth*" more than USD […] but intentionally omit iCap which represented a much lower value.

(497) However, those additional claims do not change the Commission's conclusion. This case concerns the supply of incorrect and/or misleading information on iCap. The fact that the Parties complied with their obligation to supply correct and complete information on *other* items related to the Divestment Business cannot be considered as a mitigating circumstance regarding supplying incorrect and/or misleading information on iCap.[1019] The alleged difference in value between iCap (for which

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1012 See recitals (17) to (20) and footnote 38.

1013 Remedies Notice, para. 7.

1014 See recital 474(b).

1015 Reply to SSO, para. 220.

1016 In the Reply to SSO, para. 342, Sigma-Aldrich contested this by referring to its decision to correct and alert the Commission about an issue with the SKUs included in the remedy package. However, as further outlined in recital (495), Sigma-Aldrich's correction of the SKU did not concern iCap.

1017 See recital (477).

1018 Reply to SSO, para. 122.

1019 An error regarding SKUs of marketed products is fundamentally different from the non-disclosure of a pipeline project. Unlike pipeline projects, SKUs are publicly available information which customers use to order products from Sigma-Aldrich. Errors in the SKU list of marketed products that should fall within the scope of the Divestment Business could be easily identified by Honeywell, the Monitoring Trustee or customers and other players in the market.

Sigma-Aldrich provided incorrect and/or misleading information) and the other items (for which Sigma-Aldrich complied with its obligation to provide correct and complete information) is immaterial.[1020]

(498) *Third*, the Parties claimed that the catch-all clause in the Commitments or in the SPA between the Parties and Honeywell could remedy the non-disclosure of iCap to the Commission. However, the Commission recalls that the catch-all clause in the Commitments (which was reflected in the SPA between the Parties and Honeywell) is copied from the model commitments text.[1021] The fact that Sigma-Aldrich followed the Commission's model commitments text cannot be taken into account as a mitigating circumstance for Sigma-Aldrich's infringements.

(499) Merck and Sigma-Aldrich also argued that the Monitoring Trustee failed to invoke the catch-all clause in the Commitments or in the SPA between the Parties and Honeywell in order to request the transfer of iCap. However, the Commission considers that the Monitoring Trustee's actions cannot be taken into account as a mitigating circumstance for Sigma-Aldrich's infringements. The infringements set out in recital (466) concern intentional (or at least negligent) conduct of Sigma-Aldrich during the Commission's merger review. The appointment of the Monitoring Trustee and the Monitoring Trustee's actions *post*-dates the infringements.

(500) In any event, Sigma-Aldrich itself could have invoked the catch-all clause and could have requested the transfer of iCap or could have alerted the Monitoring Trustee, but it did not do so. Instead, Sigma-Aldrich considered measures to ensure that iCap would not be disclosed to Honeywell or the Monitoring Trustee to avoid its transfer to the Purchaser of the Divestment Business. For instance, on 17 December 2015 (approximately two months after the Parties signed the SPA with Honeywell concerning the divestment business), [NAME OF INDIVIDUAL] (Sigma-Aldrich) wrote to other Sigma-Aldrich employees: "[Merck] *may want to make sure we don't do anything visible on this* [iCap] *for at least six months if not a year. They* [Honeywell] *can ask to add things to the DB for the next six months and for the next year we will be their service provider*."[1022]

(501) *Fourth*, according to the Reply to the SSO, the inclusion of iCap in the Excluded Assets Schedule means that Sigma-Aldrich did not intend to hide the project from the Commission. Sigma-Aldrich added that the Commission, Honeywell, and the Monitoring Trustee failed to spot iCap in the Excluded Assets Schedule but this does not mean that Sigma-Aldrich did not have good faith during the merger review process.

(502) However, the Commission considers that the Excluded Assets Schedule cannot remedy the incorrect and/or misleading statements that Sigma-Aldrich made in reply to RFIs I-3 and I-4 and in Section 5.3 of the Final Form RM (for the reasons explained in recitals (413)ff. above). The Excluded Assets Schedule *post*-dates the Clearance Decision and the infringements set out in recital (466) above.

1020 The Commission notes that Sigma-Aldrich (i) understates the NPV of iCap using a 2011 estimate while in a 2015 estimate, the total NPV of the project was EUR […] (see Figure 3 above) and (ii) does not provide any contemporaneous evidence for the impact of the SKU list error. Instead, the estimate provided above ([…]) seems to be based only on a "*recollection*" of [NAME OF INDIVIDUAL] taking into account the present cash value of the assets (See Reply to SSO, footnote 416 and witness statement of [NAME OF INDIVIDUAL] (Annex 1.18 to the Reply to SO, para. 18).

1021 See Model commitments text, para. 6.

1022 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id:330-11595].

(503) Nor does the inclusion of iCap in the Excluded Assets Schedule suffice to show Sigma-Aldrich's "*good faith in the process*". The inclusion of iCap in the Excluded Assets Schedule was aimed at pre-empting a future request by Honeywell concerning the project. On 26 September 2015, [NAME OF INDIVIDUAL], asked [NAMES AND JOB TITLES OF INDIVIDUALS](Sigma-Aldrich) whether the "*solvent cap IP (iCap and iBarrel)*" should be included in the SPA's Excluded Assets Schedule, since "*while not solely or predominantly related, these could be seen as related*" and she was "*still concerned that if this isn't addressed now, HON will come back later and say that it should have* [been] *included. There is already one published patent application, and a second product ready to go into testing"*.[1023] Moreover, on 17 December 2015 (approximately two months after the SPA between the Parties and Honeywell), [NAME OF INDIVIDUAL] advised employees of the combined entity that they "*may want to make sure* [they do not] *do anything visible on this* [iCap] *for at least six months if not a year"*.[1024]

(504) If anything, the inclusion of iCap in the Excluded Assets Schedule confirms that the project was related to the Divestment Business. Working on the Excluded Assets Schedule, on 28 August 2015, [NAME AND JOB TITLE OF INDIVIDUAL] (Sigma-Aldrich) replied that she "*look[ed] through the patent docket"* and found that *"probably the closest patent, as it relates to solvent generally, that must be excluded relates to "iCap""*.[1025]

(505) *Fifth*, Sigma-Aldrich argues that with or without iCap being included, the process would have been exactly the same and the outcome, namely, Honeywell's acquisition of Sigma-Aldrich's solvents and inorganics business would have occurred.

(506) The Commission considers Sigma-Aldrich's argument to be legally and factually incorrect. As explained in recital (482) above, had the Parties provided information regarding iCap, this project would have been included in the Divestment Business, which was not the case following the incorrect and/or misleading information supplied by Sigma-Aldrich. In other words, the business that Honeywell would acquire would be different if iCap had been included.

(507) In any event, the obligation to provide correct and complete information (which Articles 14(1)(a) and 14(1)(b) of the Merger Regulation serve to enforce) cannot be differentiated according to the outcome of the competitive assessment or the divestiture process. Regardless of the impact of incorrect/misleading information on the outcome of the Commission's assessment, this assessment is jeopardised when it is based on incorrect and/or misleading information.[1026]

(508) *Sixth*, the Parties argue that Sigma-Aldrich ultimately licensed iCap to Honeywell and thus the alleged infringements did not have any impact on competition.

(509) However, Sigma-Aldrich did not grant this licence swiftly nor spontaneously. Rather, it only decided to grant such a licence (together with Metrohm) on 24 October 2016.[1027] This was three months *after* the Commission informed the Parties

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1023 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS]"Fwd: Updated schedules", 26 September 2015 [Doc Id: 304-691].

1024 Email from [NAME OF INDIVIDUAL] to [NAMES OF INDIVIDUALS], copying [NAME OF INDIVIDUAL] "Re: Metrohm & iCap", 17 December 2015 [Doc Id: 330-11595].

1025 Email from [NAME OF INDIVIDUAL] to [NAME OF INDIVIDUAL] "Re: List of Assets Excluded from Sale – Port", 28 August 2015 [Doc Id: 303-1241] (emphasis added).

1026 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 187.

1027 See recital (141).

that an investigation was ongoing pursuant to Articles 6(3)(a) and 14(1) of the Merger Regulation.[1028] The Commission cannot exclude that the decision to grant the licence took into account the then ongoing investigation.[1029]

(510) Nor did the 24 October 2016 licence address adequately the requirements of Honeywell, as a purchaser of the Divestment Business. The terms of this licence were not discussed or approved by the Commission or Honeywell – it had been granted unilaterally.[1030] At the Commission's request, the terms of the licence were discussed with Honeywell and subsequently modified on 5 December 2016.[1031]

(511) For all these reasons, the Commission considers that the licence granted by Sigma-Aldrich to Honeywell cannot be considered as a mitigating circumstance for Sigma-Aldrich's infringements.

(512) In the Reply to the SSO, Sigma-Aldrich repeated that its decision to provide a royalty-free licence to Honeywell for iCap was "*voluntary*"[1032] and "*proactive*".[1033] In any event, Sigma-Aldrich added, this licence resolved any impact that might have been caused by the alleged infringement, because it was granted before iCap was launched in the market.[1034]

(513) These additional claims do not change the Commission's conclusion for the following reasons:

(a) Sigma-Aldrich's decision to grant a licence to Honeywell concerning iCap was neither voluntary nor proactive (see recital (509)); and

(b) As explained in recital (482), had the Parties provided information regarding iCap, this project would have been included in the Divestment Business. This could mean that Merck would no longer be able to use iCap. On the contrary, the licence that Merck granted to Honeywell does not give to Honeywell exclusive rights on the project. Thus, Sigma-Aldrich incorrectly argues that the license "*resolve*[s] *any impact that might have been caused by the alleged infringement*".[1035]

(514) *Seventh*, the Parties argued that they cooperated effectively with the Commission throughout the investigation once the alleged omission was discovered. Sigma-Aldrich recalled that in response to the Commission's Article 11(3) Decisions of 14 October 2016 and Article 11(3) Decisions of 1 December 2016, Merck (and Sigma-Aldrich) submitted several documents along with detailed privilege logs. Sigma-Aldrich added that "in the spirit of cooperation", Merck (and Sigma-Aldrich) reduced the number of documents considered fully or partially privileged from 43,000 to 25,000 to 9,635 and ultimately to 7,980.[1036] As regards these 7,980 documents, according to Sigma-Aldrich, Merck (and Sigma-Aldrich) agreed to provide full access to the case team and to select for further review and discussion the documents that the case team might wish to rely on in an infringement decision.

1028 Letter from the Commission to the Party dated 29 July 2016 [Doc Id: 2].
1029 M.8436 – *General Electric Company/LM Wind Power Holding*, 8 April 2009, para. 206.
1030 See recital (141).
1031 See recitals (144) and (146).
1032 Reply to SSO, paras. 337 and 341.
1033 Reply to SSO, para. 340.
1034 Reply to SSO, para. 340.
1035 Reply to SSO, para. 340.
1036 Reply to SSO, para. 353.

Agreeing to such a procedure clearly went beyond what is normal in cases under Article 14 of the Merger Regulation, Sigma-Aldrich noted.[1037]

(515) These claims do not change the Commission's conclusion for the following reasons. Merck (and Sigma-Aldrich) replied to requests for information addressed to them by the Commission and exercised their rights of defence, by submitting Replies to the SO, the SSO, and explaining their position in two oral hearings. But Merck (and Sigma-Aldrich) did not actively assist the Commission in establishing the infringement. Therefore, the Commission does not consider Merck's (and Sigma-Aldrich's) alleged cooperation as a mitigating circumstance in the present case regarding the infringements set out in recital (466) above.

(516) Moreover, the Commission considers that the position that Merck (and Sigma-Aldrich) took regarding internal documents and LPP[1038] does not constitute an example of "*effective cooperation*" nor goes beyond their legal obligations for the following reasons:

(a) Merck (and Sigma-Aldrich) did not reply in a timely or complete manner to the Commission's Article 11(3) Decisions of 14 October 2016;[1039]

(b) Merck (and Sigma-Aldrich) initially submitted extremely broad LPP claims on the internal documents requested, which were subsequently limited only following the requests of the case team;[1040]

(c) Merck (and Sigma-Aldrich) submitted several LPP claims which were not plausible, according to the Hearing Officer (who was involved following Merck counsel's request);[1041] and

(d) The data room procedure was proposed by the Commission in response to Merck counsel's letter requesting a "*mutually acceptable solution*" to the LPP issue from the Hearing Officer. [INFORMATION ON LEGAL PRIVILEGE CLAIMS].[1042]

5.4. Conclusion

(517) The Commission therefore considers that in the context of Case M.7435 - *Merck/Sigma-Aldrich*, Sigma-Aldrich has committed the three infringements mentioned in recital (466) above, by intentionally or at least negligently supplying incorrect and/or misleading information in reply to two requests made pursuant to Article 11(2) of the Merger Regulation and in the Final Form RM set out at Annex IV to the Implementing Regulation.

(518) These infringements are serious in nature and particularly grave because the obligation to provide correct and non-misleading information is crucial in merger investigations, in particular regarding R&D; because Sigma-Aldrich acted intentionally or at least negligently; and because iCap was relevant to the Divestment Business.

(519) The three infringements mentioned in recital (466) above were all instantaneous.

(520) Finally, the Commission considers that there are no aggravating or mitigating circumstances in this case and that the overall fine amount imposed in this case for

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1037 Reply to SSO, paras. 354-355.
1038 See in detail Section 2.3.2.
1039 See recital(159).
1040 See recitals (160)ff.
1041 See recital (163).
1042 See recital (165).

the infringements is proportionate to the nature, gravity, and duration of the three infringements.

6. AMOUNT OF THE FINES

(521) When imposing penalties under Article 14 of the Merger Regulation, the Commission takes into account the need to ensure that fines have a sufficiently punishing and deterrent effect.

(522) Therefore, taking account of the elements set out in Section 5 above, in order to impose a sufficient penalty for the infringements mentioned in in recital (466) and deter any recurrence of them and given the specific circumstances of this case, the Commission considers it appropriate to impose a fine of EUR 7 500 000 on Sigma-Aldrich pursuant to Articles 14(1)(a) and (b) of the Merger Regulation.

(523) As the final amount of the fine set is below 1% of Sigma-Aldrich's turnover in the last financial year prior to the adoption of the decision ([SIGMA'S TURNOVER]), no adaptation is necessary.[1043]

HAS ADOPTED THIS DECISION:

Article 1

Sigma-Aldrich Corporation intentionally or at least negligently supplied incorrect and/or misleading information in reply to the 29 May 2015 request for information adopted pursuant to Article 11(2) of the Merger Regulation in Case M.7435 – *Merck/Sigma-Aldrich*, in violation of Article 14(1)(b) of the Merger Regulation.

Article 2

Sigma-Aldrich Corporation intentionally or at least negligently supplied incorrect and/or misleading information in reply to the 2 June 2015 request for information adopted pursuant to Article 11(2) of the Merger Regulation in Case M.7435 – *Merck/Sigma-Aldrich*, in violation of Article 14(1)(b) of the Merger Regulation.

Article 3

Sigma-Aldrich Corporation intentionally or at least negligently supplied incorrect and/or misleading information in Section 5.3 of the Final Form RM submitted on 12 June 2015 pursuant to Article 20(1a) of the Implementing Regulation in Case M.7435 – *Merck/Sigma-Aldrich*, in violation of Article 14(1)(a) of the Merger Regulation.

Article 4

A fine of EUR 7 500 000 is imposed on Sigma-Aldrich Corporation pursuant to Articles 14(1)(a) and 14(1)(b) of the Merger Regulation for the infringements referred to in Articles 1 to 3 above.

[1043] Sigma-Aldrich's reply of 14 April 2021 to the RFI of 6 April 2021. In its reply of 14 April 2021, Sigma-Aldrich also submitted that it would be reasonable and appropriate for the Commission to use Sigma-Aldrich's FY2014 as a reference period for compliance with the 1% threshold in Article 14(1) of the Merger Regulation, as this was the last financial year when Sigma-Aldrich reported separate turnover figures before the completion of the Transaction in 2015. The Commission notes that, in any event, the final amount of the fine is also set below 1% of Sigma-Aldrich's FY2014 turnover (i.e., EUR 2,096 million).

The fine shall be credited, in euro, within 6 months of the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: EC/ BUFI/M.8181

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where Sigma-Aldrich Corporation lodges an appeal, it shall cover the fine by the due date either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.[1044]

Article 5

This Decision is addressed to:

Sigma-Aldrich Corporation,
3050 Spruce Street, Saint Louis,
Missouri 63103,
United States of America

This Decision shall be enforceable pursuant to Article 299 TFEU.

Done at Brussels, 3.5.2021

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

[1044] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).