



EUROPEAN COMMISSION  
DG Competition

***Case M.10792 - PHILIP MORRIS INTERNATIONAL /  
SWEDISH MATCH***

Only the English text is available and authentic.

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

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Article 6(1)(b) in conjunction with Art 6(2)  
Date: 25/10/2022

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## EUROPEAN COMMISSION

Brussels, 25.10.2022  
C(2022) 7868 final

### **PUBLIC VERSION**

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Philip Morris International Inc.  
Avenue de Rhodanie 50  
1007 Lausanne  
Switzerland

**Subject: Case M.10792 – PHILIP MORRIS INTERNATIONAL / SWEDISH MATCH**  
**Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>**

Dear Sir or Madam,

- (1) On 6 September 2022, the European Commission received the notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Philip Morris International Inc. ('PMI', United States) will acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Swedish Match AB 'SM', Sweden) (the 'Transaction')<sup>3</sup> (PMI is designated hereinafter as the 'Notifying Party'. PMI and SM are hereinafter collectively referred to as the 'Parties'.)

<sup>1</sup> 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.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

<sup>3</sup> Publication in the Official Journal of the European Union No C351, 14.9.2022, p. 10.

- (2) The concentration is accomplished by way of public bid announced on 11 May 2022.

## **1. THE PARTIES**

- (3) PMI manufactures and sells various tobacco related products, including cigarettes (under the brands *Marlboro*, *Bond Street*, *Chesterfield*, *L&M*, *Lark* and *Philip Morris*), oral tobacco products (e.g. snus), nicotine pouches and accessories. PMI is active worldwide, including in Sweden. PMI is publicly listed on the New York Stock Exchange. PMI will acquire sole control over SM through its subsidiary Philip Morris Holland Holdings B.V. ('PMHH', The Netherlands).
- (4) SM manufactures and sells various oral tobacco products (e.g. snus, chew bags, tobacco bits, moist snuff etc.), nicotine pouches, as well as cigars, matches, lighters and other accessories. SM also distributes tobacco and nicotine-containing products through its wholly owned subsidiary, SMD Logistics AB ('SMD'), a former legal monopoly.<sup>4</sup> SM is publicly listed on Nasdaq Stockholm.

## **2. THE OPERATION**

- (5) On 11 May 2022, PMHH announced a public tender offer for SM of a total value of EUR 15 200 million. The initial acceptance period was supposed to expire around 30 September 2022. On 9 August 2022, the Notifying Party announced an extension of this acceptance period until 21 October 2022. This acceptance period was subsequently extended until 4 November 2022.
- (6) The offer is conditional upon reaching an acceptance level of more than 90% of the outstanding shares in SM, representing at least 90% of the votes. If the public tender is successful, PMI would thus acquire 90% of the outstanding shares and voting rights of SM, which would amount to an acquisition by PMI of sole control of SM.
- (7) According to the Notifying Party, the Transaction is part of PMI's broader strategy which aims at replacing cigarettes with less harmful alternatives. In this respect, the Notifying Party explains that the Transaction would: (i) enable PMI to continue its expansion into the oral nicotine sector, in which PMI currently has an immaterial presence, (ii) position PMI to directly enter and compete in the large, attractive and growing US smoke-free market, and (iii) increase SM's sales of oral nicotine products worldwide.
- (8) The Transaction will therefore result in a concentration pursuant to article 3(1) of the Merger Regulation.

## **3. UNION DIMENSION**

- (9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>5</sup> (EUR 28 376 million). Each of them has a Union-

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<sup>4</sup> SMD is also active in Norway but does not distribute third-party products in this EEA country.

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

wide turnover in excess of EUR 250 million (PMI EUR [...] million and Swedish Match EUR [...] million), but each does not achieve more than two-thirds of its aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

#### **4. RELEVANT MARKETS**

- (10) The Parties' activities overlap for the wholesale supply of snus<sup>6</sup> and nicotine pouches.<sup>7</sup> These overlaps give rise to horizontally affected markets for snus, in Sweden and Norway, and for nicotine pouches, in Sweden and Slovenia.
- (11) The Transaction also gives rise to vertically affected markets between:
  - (a) the manufacture and supply of several nicotine products<sup>8</sup> (upstream) and the distribution of combustible tobacco, smoke-free, and related products in Sweden (downstream);
  - (b) the wholesale supply of nicotine powder (upstream), and the wholesale supply of nicotine pouches in Spain, Bulgaria and Romania (downstream).
- (12) Finally, conglomerate links arise with respect to the Parties' activities for the wholesale supply of oral nicotine products (chiefly snus, and nicotine pouches in Sweden) and combustible tobacco products (chiefly Factory Made Cigarettes 'FMC') in Sweden and Norway.
- (13) Below is an overview of the Parties' overlaps, with a product categorisation provided by the Notifying Party.<sup>9</sup>

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<sup>6</sup> In Sweden and Norway.

<sup>7</sup> In Austria, Czechia, Estonia, Iceland, Poland, Slovenia, and Sweden.

<sup>8</sup> Including snus, combustible cigarettes, such as Factory Made Cigarettes ['FMC'] and Roll Your Own tobacco ['RYO'] and heated tobacco products.

<sup>9</sup> For the purposes of this Decision, combustible tobacco products include products such as FMC, RYO, pipe tobacco, cigars and cigarillos. For the purpose of this Decision, smoke-free products refer to nicotine-containing products that, according to the Notifying Party, have the potential to present less risk of harm to smokers, and include smokeless tobacco, e-cigarettes, heated tobacco, and nicotine pouches. For the purposes of this Decision, smokeless tobacco refers to smoke-free products containing tobacco that are taken orally or nasally, and include snus, chewing tobacco, tobacco bits and snuff. Please note that this description of products is used for convenience for this merger procedure, but use of the terms (and whether these products have or not the potential to present less risk of harm to smokers) should not be understood to reflect a Commission endorsement of any assessment of the technical features of these products, which the Commission understands are being litigated in at least some Member States.

**Figure 1 – Notifying Party’s classification of products, and overlaps between the Parties’ activities**

Category	Product	PMI	Swedish Match	Horizontal	Vertical <sup>1</sup>
	FMC	Y	N	N	Y – to distribution
Combustible tobacco products	RYO	Y	N	N	Y – to distribution
	Pipe tobacco	Y	N	N	N
	Cigars and cigarillos	Y	N	N	N
Smoke-free – products other than Smokeless tobacco and nicotine pouches	Heated tobacco products	Y	N	N	Y – to distribution
	E-cigarettes	Y	N	N	N
Smoke-free – Smokeless tobacco, nicotine pouches, and nicotine free pouches	Snus	Y	Y	Y	Y – to distribution
	Chewing tobacco	N	Y	N	N
	Tobacco bits	N	Y	N	N
	Snuff	N	N	N	N
	Nicotine pouches	Y	Y	Y	Y – to nicotine powder and distribution
	Tobacco and nicotine-free pouches	N	Y	N	N
Related markets	Nicotine powder	Y	N	N	Y – to nicotine pouches
	Distribution of tobacco / nicotine / related products in Sweden	N	Y	N	Y – to tobacco and nicotine products
Fire-lighting tools	Matches	N	Y	N	N
	Lighters	N	Y	N	N

Source: Form CO, table 2

#### 4.1. Snus

- (14) Snus is a smokeless tobacco product (the only smokeless tobacco one where the Parties’ activities overlap). It is a finely-ground or cut moist tobacco that comes in loose portions or in small sachets, which are placed between the lip and the gum. The nicotine present in the tobacco is absorbed through the oral mucosa. It comes in different blends and may be flavoured.

**Figure 2. Types of snus**



Source: Form CO

#### 4.1.1. Product market definition

##### 4.1.1.1. The Notifying Party's arguments

(15) The Notifying Party considers that smokeless tobacco products (such as snus) and combustible tobacco form part of different markets, and that smokeless tobacco products are distinct from other products, such as e-cigarettes, heated tobacco, and nicotine pouches.<sup>10</sup> The Notifying Party argues that no further segmentation is necessary within smokeless tobacco products generally, and snus in particular (for example in terms of brand, price, quality, strength, or flavouring).<sup>11</sup> In any case, the Notifying Party considers that there is no need to conclude on the exact market definition in relation to different categories of smoke-free products as there are no competition concerns.<sup>12</sup>

##### 4.1.1.2. The Commission's assessment

(16) In previous cases, while leaving the exact market definition open, the Commission found smokeless tobacco products (such as snus) to be distinct from combustible tobacco, and left open whether narrower potential product markets should be distinguished within the smokeless tobacco category.<sup>13</sup>

(17) Other competition authorities, namely the Swedish Competition Authority ('SCA') in the context of an antitrust case took the view that snus (in all forms available, i.e. without further sub segmentation) formed a distinct product market, separate from other smokeless tobacco products, such as chewing tobacco.<sup>14</sup> This market definition was confirmed by the Swedish Patent and Market Court of Appeal.<sup>15</sup> These two bodies considered the high degree of substitutability within producers of snus, and regular switching of end-consumers between snus of different price segments.<sup>16</sup>

(18) The Commission considers that snus is a separate market from other smokeless tobacco or nicotine products (including nicotine pouches) for the following reasons.

(19) **First**, as regards the question whether snus constitutes a separate product market, the majority of respondents of the market investigation who expressed an opinion agree that snus should be considered as forming a distinct product market, separate from other products such as nicotine pouches.<sup>17</sup> For example, a competitor indicated that customer bases for snus and nicotine pouches are different<sup>18</sup> and that loyalty of consumers to brands is higher for snus than for nicotine pouches, making entry harder for snus than for nicotine pouches.<sup>19</sup> Another competitor indicated that

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<sup>10</sup> Form CO, paragraph 110.

<sup>11</sup> Form CO, paragraph 116.

<sup>12</sup> Form CO, paragraph 111.

<sup>13</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 18.

<sup>14</sup> SCA's writ of summons, Dnr 815/2014, paragraphs 139 – 157.

<sup>15</sup> Judgment by the Swedish Patent and Market Court of Appeal, PMT 1988-17, p. 5.

<sup>16</sup> SCA's writ of summons, Dnr 815/2014, paragraphs 152 – 155; Judgment by the Patent and Market Court of Appeal, PMT 1988-17, pp. 5 and 42.

<sup>17</sup> Questionnaire Q1 to competitors, question 8.1; Questionnaire Q2 to customers in Sweden, question 12.1; Questionnaire Q3 to customers in Norway, question 11.1.

<sup>18</sup> Minutes of a call with a competitor of 290 June 2022, paragraph 3.

<sup>19</sup> Minutes of a call with a competitor of 29 June 2022, paragraphs 16 and 17.

the main difference between snus and nicotine pouches is that, while snus contains tobacco, nicotine pouches do not.<sup>20</sup>

- (20) **Second**, the Commission inquired into possible further segmentations within snus, including between the supply of loose snus on the one hand, and all portion snus, on the other hand. The majority of respondents who expressed an opinion considered loose snus and all portion snus to belong to the same product market, and to be comparable in terms of product characteristics (such as technical characteristics, performance, price or interchangeability).<sup>21</sup> The majority of respondents who expressed an opinion did not consider any additional segmentations relevant for the wholesale supply of snus.<sup>22</sup>
- (21) **Third**, the above findings are consistent with the Parties' internal documents. In its internal documents, the Parties [...].<sup>23</sup> The Parties' internal documents also point at the differences between snus and nicotine pouches (for example, as snus contains tobacco it is held to different regulatory requirements and bans); that while both products can have flavours, for snus the tobacco flavour is still dominating; and that snus leads to discolouring of teeth while nicotine pouches do not.<sup>24</sup> On the different customer bases, the Parties' internal documents show that [...].<sup>25</sup>
- (22) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that snus is a separate market from other smokeless tobacco or nicotine products (including nicotine pouches). The Commission considers that it is not necessary to further segment the product market for snus.

#### 4.1.2. *Geographic market definition*

##### 4.1.2.1. The Notifying Party's arguments

- (23) The Notifying Party considers that the markets for smokeless tobacco products are national in scope.<sup>26</sup> This is due to different regulatory, packaging, marketing and taxation requirements across EEA countries.<sup>27</sup> For example, in the EU, snus is only allowed for sale in Sweden, and within Europe, in Norway, the Faroe Islands, and Switzerland.
- (24) Figure 3 below shows the differences in requirements in terms of packaging, marketing and taxation, and legality of sales in the EU and Norway.

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<sup>20</sup> Questionnaire Q1 to competitors, question 8.1.1.1.

<sup>21</sup> Questionnaire Q1 to competitors, questions 8.1.1 and 8.1.1.1; Questionnaire Q2 to customers in Sweden, question 12.1.1; Questionnaire Q3 to customers in Norway, question 11.1.1.

<sup>22</sup> Questionnaire Q1 to competitors, question 8.1.2; Questionnaire Q2 to customers in Sweden, question 12.2; Questionnaire Q3 to customers in Norway, question 11.1.1.2.

<sup>23</sup> Annex 5.4.3 – 14 to the Form CO – SE NO SNUS Market Plans 2022.




<sup>24</sup> Annex 5.4.3 – 40 to the Form CO – Nicotine Pouches Landscape, March 2022, slide 2.

<sup>25</sup> Annex 5.4.3 – 25 to the Form CO, EU Touchpoint 06.07.2021 – P5 Update Nordics.

<sup>26</sup> Form CO, paragraph 121.

<sup>27</sup> Form CO, paragraph 122.

**Figure 3. Overview of EU and Norway regulatory environment – snus<sup>28</sup>**

Legislative Area	Sweden 	Norway 	Rest of EU 
Product Sales	Legal	Legal	Banned by virtue of Article 17 of the TPD
Package Branding	Permitted	Unified packaging across all brands	
Marketing	Banned, except for in-store signs	Banned in all channels	
Excise tax	EUR c.46/kg	EUR c.88/kg	

Source: Form CO, Figure 5

#### 4.1.2.2. The Commission’s assessment

- (25) In previous cases, the Commission considered that markets for all types of tobacco products (including for snus) are national in scope due to regulatory differences in taxation, marketing requirements and differences in distribution channels and retail prices across Member States.<sup>29</sup> This is also consistent with the SCA’s decisional practice.<sup>30</sup>
- (26) The Commission considers that the relevant geographic market for snus is national in scope for the following reasons.
- (27) *First*, the majority of respondents who expressed an opinion consider that the geographic market definition for snus is national in scope.<sup>31</sup> For example, a customer points out at the regulatory differences between countries for the wholesale supply of snus indicating that snus is mainly sold ‘*in Norway and Sweden due to EU regulation[s] prohibiting snus-products in other jurisdictions*’.<sup>32</sup> Another customer explains that conditions of competition vary, and are different in Norway than in other countries, as snus products sold in Norway require regulatory approval by the Norwegian Ministry of Health, and prices differ by country (they are higher in Norway than in neighbouring countries).<sup>33</sup>
- (28) *Second*, the products prices and margins vary per country. As a competitor indicates, in Norway, ‘*snus price is 2.5 to 3 times higher than in Sweden*’.<sup>34</sup> This is consistent with the Nielsen data submitted by the Notifying Party, which sets the

<sup>28</sup> TPD refers to Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

<sup>29</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 22; and M.4581 – *Imperial Tobacco / Altadis*, of 18 October 2007, paragraph 21.

<sup>30</sup> Swedish Competition Authority’s writ of summons, Dnr 815/2014, paras. 139-146.

<sup>31</sup> Questionnaire Q1 for competitors, question 8.2; Questionnaire Q2 for customers in Sweden, question 12.3; Questionnaire Q3 for customers in Norway, question 11.2.

<sup>32</sup> Minutes of the call with a customer of 1 July 2022, paragraph 3.

<sup>33</sup> Questionnaire Q3 for customers in Norway, question 11.2.1.

<sup>34</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 17.



average price for a can of snus on EUR 3.81 for Sweden and EUR 7.65 for Norway.<sup>35</sup>

- (29) **Third**, regulatory requirements also shape the marketing efforts competitors undertake in different countries. For instance, in Sweden, snus can be marketed through in-store signage and each brand bears its own distinct packaging features.<sup>36</sup> Conversely, in Norway, advertising of snus is banned, packaging is uniform, it cannot be displayed in retail outlets and is stored in dark shelves.<sup>37</sup>
- (30) **Fourth**, the finding that the market for snus is national in scope is consistent with the Parties' internal documents.<sup>38</sup> The Parties provided as an internal document a report by a snus retailer that analyses the profile of snus users per country, for example, in Sweden.<sup>39</sup> Another internal document analyses the regulatory landscape of snus separately for different countries (e.g. Sweden, Norway, US).<sup>40</sup>
- (31) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for snus is national in scope.

## 4.2. Nicotine pouches

- (32) Nicotine pouches are oral nicotine-delivery products that come in pre-portioned pouches. They are white in colour and contain nicotine powder mixed with flavouring agents. When consumed, nicotine pouches are put between the lip and the gum of the user, releasing nicotine which is absorbed through the oral mucosa. Nicotine pouches do not contain tobacco.

**Figure 4. Example of a nicotine pouch**



*Source: Form CO*

### 4.2.1. Product market definition

#### 4.2.1.1. The Notifying Party's arguments

- (33) The Notifying Party considers that a distinction between snus and nicotine pouches is relevant, but considers that the market should be left open in any case, due to a lack of competition concerns.<sup>41</sup> It submits that the narrowest plausible market

<sup>35</sup> Form CO, paragraph 250.

<sup>36</sup> Form CO, paragraph 251.

<sup>37</sup> Minutes of a call with a customer of 1 July 2022, paragraph 13.

<sup>38</sup> See for example Annex 5.4.3 – 50 (Snusrapporten 2021 Sverige (EN)).

<sup>39</sup> See for example Annex 5.4.3 – 50 (Snusrapporten 2021 Sverige (EN)).

<sup>40</sup> Annex 5.4.2 – 4 to the Form CO, slide 54.

<sup>41</sup> Form CO, paragraph 129.

encompasses all nicotine pouches.<sup>42</sup> The Notifying Party does not consider that nicotine pouches form part of the same market as combustible tobacco products, because of differences in the format and consumption of both products.<sup>43</sup> It also considers that nicotine pouches do not form part of the same market as tobacco-free nicotine products in the context of smoking cessation aids (such as patches, gums and lozenges) given that nicotine pouches do not have ‘medicinal features’ and are not marketed or regulated as medicinal products.<sup>44</sup>

#### 4.2.1.2. The Commission’s assessment

- (34) The Commission has not assessed the relevant market definition for nicotine pouches specifically in previous cases. The Commission considers that nicotine pouches are a separate market from other smokeless tobacco or nicotine products (including snus) for the following reasons.
- (35) **First**, as regards the question whether nicotine pouches should be a separate product market, the majority of respondents to the market investigation who expressed an opinion agree that nicotine pouches should be considered as forming a distinct product market, separate from other products such as snus.<sup>45</sup> As mentioned in paragraph (19), market participants indicated that customer bases and loyalty levels differed for snus and nicotine pouches.
- (36) **Second**, the Commission inquired into possible further segmentations within nicotine pouches (for example, based on flavour, brand, price or strength). The majority of respondents who expressed an opinion did not consider any additional segmentations relevant for the wholesale supply of nicotine pouches.<sup>46</sup> A competitor indicated that ‘*Further segmentation into pricing, brands, taste etc. is not relevant and would be arbitrary*’.<sup>47</sup> A customer indicated that there is the same type of customer usage, irrespective of the nicotine pouch.<sup>48</sup>
- (37) **Third**, the Parties’ internal documents are consistent with the finding of nicotine pouches being a separate market without further segmentations. For example, [...].<sup>49</sup> Further, a report on the global state of tobacco and cannabis reports information for nicotine pouches as a separate category, without further segmentations.<sup>50</sup> Another internal document [...], and points at its differences with snus, as seen in Figure 5 below.<sup>51</sup>

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<sup>42</sup> Form CO, paragraph 126.

<sup>43</sup> Form CO, paragraph 128.

<sup>44</sup> Form CO, paragraphs 125 and 126.

<sup>45</sup> Questionnaire Q1 to competitors, question 9.1; Questionnaire Q2 to customers in Sweden, question 13.1; Questionnaire Q3 to customers in Norway, question 12.1.

<sup>46</sup> Questionnaire Q1 to competitors, question 9.1.1; Questionnaire Q2 to customers in Sweden, question 13.1.1; Questionnaire Q3 to customers in Norway, question 12.1.1.

<sup>47</sup> Questionnaire Q1 to competitors, question 9.1.1.1.

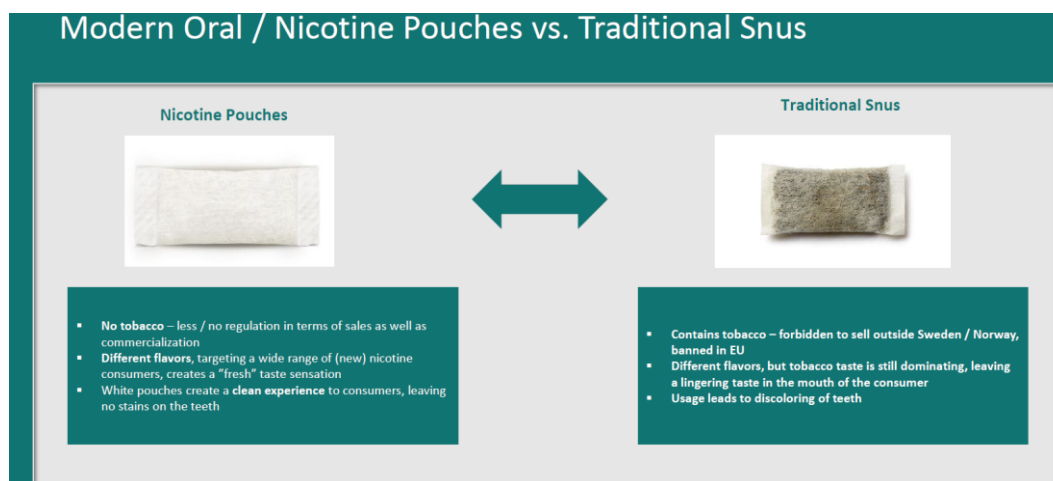
<sup>48</sup> Questionnaire Q2 to customers in Sweden, question 13.1.1.1.

<sup>49</sup> Annex 5.4.3 – 45 to the Form CO – Nicotine pouches Category Exploration Debrief – SWE.

<sup>50</sup> Annex 5.4.3 – 46 to the Form CO – Barclays State of global tobacco and cannabis 1Q 22, slide 114.

<sup>51</sup> Annex 5.4.3 – 40 to the Form CO – Nicotine Pouches Landscape.

**Figure 5. Differences between nicotine pouches and snus**



Source: Annex 5.4.3 – 40 to the Form CO

(38) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that nicotine pouches are a separate market from other smokeless tobacco or nicotine products (including snus). The Commission considers that it is not necessary to further segment the product market for nicotine pouches.

#### 4.2.2. Geographic market definition

##### 4.2.2.1. The Notifying Party’s arguments

(39) The Notifying Party submits that the scope for the wholesale supply of nicotine pouches should be defined as national in scope.<sup>52</sup> The Notifying Party explains that the regulatory environment is evolving and different for nicotine pouches across EEA countries.<sup>53</sup> Further, nicotine pouches are taxed differently per country, and in certain countries nicotine pouches are subject to excise taxes, while in others they are not.<sup>54</sup>

##### 4.2.2.2. The Commission’s assessment

(40) In previous cases, the Commission considered that markets for all types of tobacco products are national in scope due to regulatory differences in taxation, marketing

<sup>52</sup> Form CO, paragraph 140.

<sup>53</sup> For example, certain countries do not have sector specific regulations for nicotine pouches (e.g. Poland and Austria). Others regulate nicotine pouches in a similar manner as tobacco products (e.g. Hungary, Denmark, Czechia and Estonia). Others treat nicotine pouches as medicinal products (e.g. Belgium and Finland). Others treat nicotine pouches as consumer products, subject to standard consumer product requirements (e.g. Sweden, France, Slovenia, and Slovakia). Finally, nicotine pouches are not allowed for sale in certain EEA countries (e.g. Norway).

<sup>54</sup> EEA countries that apply excise taxes on nicotine pouches include Estonia (EUR 97.1/kg), Hungary (HUG 23 600/kg), Latvia (EUR 80/kg), and Sweden (EUR 20.1/kg). EEA countries that do not apply excise taxes on nicotine pouches include Austria, Croatia, Czechia, Denmark, Poland, Slovakia, and Slovenia.

requirements and differences in distribution channels and retail prices across Member States.<sup>55</sup>

- (41) The Commission considers that the relevant geographic market for nicotine pouches is national in scope for the following reasons.
- (42) **First**, the majority of respondents who expressed an opinion consider that the geographic market definition for nicotine pouches is national in scope,<sup>56</sup> and pointed at the existence of several national features. These features include (i) differences between regulatory frameworks across EEA countries (e.g. nicotine pouches are not allowed for sale in Norway)<sup>57</sup>; (ii) the wholesale customers and suppliers are different across EEA countries; (iii) end consumers have national preferences;<sup>58</sup> and (iv) the level of retail prices and excise duties are different across EEA countries.<sup>59</sup>
- (43) For example, a competitor indicates that *‘[g]iven that regulations for nicotine pouches are not harmonised within the EU, all countries (where the sale of nicotine pouches is legal) have taken different approaches in regulating the products. This means that some countries may require health warnings on the cans, ban marketing, restrict nicotine content etc. whereas other countries will not. Furthermore, some countries impose an excise duty on nicotine pouches and require the cans to be labelled with tax stamps. Prices also vary substantially from market to market.’*<sup>60</sup> As a customer indicates, *‘nicotine pouches are [...] illegal in Norway’*.<sup>61</sup>
- (44) **Second**, the finding that the market for nicotine pouches is national in scope is consistent with the Parties’ internal documents.<sup>62</sup> In its internal documents, [...].<sup>63</sup> When assessing entry, an internal document of PMI’s subsidiary Fertin Pharma AS (‘Fertin’) [...].<sup>64</sup> Another internal document analyses the regulatory landscape of nicotine pouches separately for different countries (e.g. Sweden, Norway, US).<sup>65</sup>
- (45) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for nicotine pouches is national in scope.

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<sup>55</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 22; and M.4581 – *Imperial Tobacco / Altadis*, of 18 October 2007, paragraph 21.

<sup>56</sup> Questionnaire Q1 for competitors, question 9.2; Questionnaire Q2 for customers in Sweden, question 13.2; Questionnaire Q3 for customers in Norway, question 12.2.

<sup>57</sup> Questionnaire Q3 for customers in Norway, question 12.1.1.1.; Minutes of a call with a competitor of 30 June 2022, paragraph 3.

<sup>58</sup> Form CO, paragraphs 320, 335, 336, and 339.

<sup>59</sup> For example, a Slovenian customer explained that nicotine pouches are not subject to excise duties in Slovenia (Minutes of a call with a customer of 15 September 2022, paragraph 6). Further, price promotion is not allowed for nicotine pouches in Slovenia (see Form CO, paragraph 323 and footnote 173).

<sup>60</sup> Questionnaire Q1 for competitors, question 9.2.1.

<sup>61</sup> Minutes of a call with a customer of 29 June 2022, paragraph 3.

<sup>62</sup> See for example Annex 5.4.3 – 27 (Nicotine Strengths Nordics).

<sup>63</sup> See for example Annex 5.4.3 – 26 (Strategy review – Nicotine pouches (17 May 2021)).

<sup>64</sup> Annex 1.d to Response to P1 RFI 9, Fertin Internal Strategy.

<sup>65</sup> Annex 5.4.2 – 4 to the Form CO, slide 54.

### 4.3. FMC

(46) FMC consist primarily of tobacco leaves wrapped in cigarette paper. They may also contain a filter, chemical additives, or other components.

#### 4.3.1. Product market definition

##### 4.3.1.1. The Notifying Party's arguments

(47) The Notifying Party agrees with the previous decisional practice of the Commission of defining separate product markets for each type of combustible tobacco product. The Notifying Party considers that the narrowest plausible market would be all FMC.<sup>66</sup>

##### 4.3.1.2. The Commission's assessment

(48) In previous cases, the Commission defined separate product markets for each type of combustible tobacco product (such as FMC, Roll-Your-Own tobacco 'RYO', pipe tobacco, and cigars).<sup>67</sup> It has taken the view that any other division of the FMC market according to factors such as brand image, price, taste etc. would be arbitrary and not meaningful.<sup>68</sup>

(49) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice for the following reasons.

(50) *First*, the majority of market participants who expressed an opinion consider that FMC should be considered as a separate product market from other combustible tobacco products (such as RYO), and that no further segmentations are relevant.<sup>69</sup> In this line, a customer indicates that '*products have a similar outward appearance and the same intended use. Although there may be differences in characteristics such as tobacco content, flavour or tar content, [the Company] is of the view that it would not be meaningful to segment an FMC product market on the basis of any one or more of these characteristics*'.<sup>70</sup> Another customer explains that '*the FMC cigarettes we carry are largely interchangeable and we don't see any reason to make further distinctions*'.<sup>71</sup> A competitor explained that '*[t]he physical and technical characteristics of RYO are different from FMCs and RYO is generally taxed at a lower level than FMCs. Substitutability is low. Further segmentation of the FMC market into pricing, brands, taste etc. is not relevant and would be arbitrary*'.<sup>72</sup>

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<sup>66</sup> Form CO, paragraph 184.

<sup>67</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 18; and M.4581 Imperial Tobacco / Altadis, of 18 October 2017, paragraphs 7-17.

<sup>68</sup> M.4581 Imperial Tobacco / Altadis, of 18 October 2017, paragraph 11; M.2779 Imperial Tobacco / Reemtsma Cigarettenfabriken, of 8 May 2002, paragraph 11.

<sup>69</sup> Questionnaire Q1 for competitors, questions 10.1 and 10.1.1; Questionnaire Q2 for customers in Sweden, questions 14.1 and 14.1.1; Questionnaire Q3 for customers in Norway, questions 13.1 and 13.1.1.

<sup>70</sup> Questionnaire Q3 for customers in Norway, question 13.1.1.1.

<sup>71</sup> Questionnaire Q2 for customers in Sweden, question 14.1.1.1.

<sup>72</sup> Questionnaire Q1 for competitors, question 10.1.1.1.

(51) **Second**, this finding is consistent with the Parties' internal documents. For example, a consultancy report prepared for PMI [...].<sup>73</sup>

(52) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that FMC are a separate market from other combustible tobacco products. The Commission considers that it is not necessary to further segment the product market for FMC.

#### 4.3.2. *Geographic market definition*

##### 4.3.2.1. The Notifying Party's arguments

(53) The Notifying Party agrees with the Commission precedents and submits that the relevant geographic market for FMC is national in scope.<sup>74</sup>

##### 4.3.2.2. The Commission's assessment

(54) In previous cases, the Commission considered that the markets for all types of tobacco products are national.<sup>75</sup>

(55) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice for the following reasons.

(56) **First**, the majority of competitors who expressed an opinion consider that the relevant geographic market for FMC is national in scope.<sup>76</sup> In this line, a competitor explains that *'[i]n the case of Sweden, the market for the wholesale distribution of tobacco and nicotine products at the wholesale level is national in practice. This is due in part to regulatory complexities including, excise, track and trace etc. which requires specialized distributors. It is also based on the structure of the wholesale market in nearby countries, being national in nature.'*<sup>77</sup>

(57) **Second**, the Parties' internal documents are consistent with a national geographic market for FMC. For example, a report prepared by a bank discussing the state of tobacco and cannabis worldwide, and submitted by the Notifying Party, points at different regulatory requirements in different countries, including bans in certain products.<sup>78</sup>

(58) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for FMC is national in scope.

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<sup>73</sup> Annex 5.4.3 – 43 to the Form CO – SE\_2021\_Snus\_Explorative research.

<sup>74</sup> Form CO, paragraph 186.

<sup>75</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 22.

<sup>76</sup> Questionnaire Q1 for competitors, question 10.2. While customers pointed at a worldwide geographic market, in balance, and in light of all the information available, a national scope is more appropriate, due to the different regulatory requirements.

<sup>77</sup> Questionnaire Q1 for competitors, question 10.2.1.

<sup>78</sup> Annex 5.4.3 – 46 to the Form CO – Barclays State of global tobacco and cannabis 1Q 22.

#### 4.4. RYO

(59) RYO is used to make cigarettes by the end user, with rolling paper (sometimes also a filter).

##### 4.4.1. Product market definition

##### 4.4.1.1. The Notifying Party's arguments

(60) The Notifying Party agrees with the previous decisional practice of the Commission of defining separate product markets for each type of combustible tobacco product. The Notifying Party considers that the narrowest plausible market would be all RYO.<sup>79</sup>

##### 4.4.1.2. The Commission's assessment

(61) In previous cases, the Commission defined separate product markets for each type of combustible tobacco product (such as FMC, RYO, pipe tobacco, and cigars).<sup>80</sup> It has taken the view that any other division of the RYO would not be appropriate.<sup>81</sup>

(62) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice.

(63) The majority of market participants who expressed an opinion consider that RYO should be considered as a separate product market from other combustible tobacco products (such as FMC), and that no further segmentations are relevant.<sup>82</sup> In this line, a competitor expresses that '*further segmentation of the RYO market into pricing, brands, taste etc. is not relevant and would be arbitrary*', and another competitor explains that '*RYO products are quite homogeneous in terms of characteristics and price.*'<sup>83</sup> Further, a customer indicates that it '*does not consider that further segmentation within RYO is relevant. RYO products are, however, distinct from FMC products, given it is a 'semi-finished' product. In addition RYO products tend to have a slightly lower price point than FMC products*'.<sup>84</sup>

(64) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that RYO are a separate market from other combustible tobacco products. The Commission considers that it is not necessary to further segment the product market for RYO.

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<sup>79</sup> Form CO, paragraph 184.

<sup>80</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 18; and M.4581 Imperial Tobacco / Altadis, of 18 October 2017, paragraphs 7-17.

<sup>81</sup> M.4581 Imperial Tobacco / Altadis, of 18 October 2017, paragraph 13.

<sup>82</sup> Questionnaire Q1 for competitors, questions 11.1 and 11.1.1 ; Questionnaire Q2 for customers in Sweden, questions 15.1 and 15.1.1; Questionnaire Q3 for customers in Norway, questions 14.1 and 14.1.1.

<sup>83</sup> Questionnaire Q1 for competitors, question 11.1.1.1.

<sup>84</sup> Questionnaire Q3 for customers in Norway, question 14.1.1.1.

#### 4.4.2. Geographic market definition

##### 4.4.2.1. The Notifying Party's arguments

(65) The Notifying Party agrees with the Commission precedents and submits that the relevant geographic market for RYO is national in scope.<sup>85</sup>

##### 4.4.2.2. The Commission's assessment

(66) In previous cases, the Commission considered that the markets for all types of tobacco products are national.<sup>86</sup>

(67) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice.

(68) The majority of competitors who expressed an opinion consider that the relevant geographic market for RYO is national in scope.<sup>87</sup> In this line, a competitor submits that the appropriate geographic market should be national '*due to the different national excise regimes imposed*'.<sup>88</sup> Another competitor explains that '*[i]n the case of Sweden, the market for the wholesale distribution of tobacco and nicotine products at the wholesale level is national in practice. This is due in part to regulatory complexities including, excise, track and trace etc. which requires specialized distributors. It is also based on the structure of the wholesale market in nearby countries, being national in nature.*'<sup>89</sup>

(69) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for RYO is national in scope.

#### 4.5. Heated tobacco products

(70) Heated tobacco products are a relatively novel product, first commercially introduced in 2014.<sup>90</sup> They consist of processed tobacco plugs. A processed tobacco plug is then placed into an electronic device, where it heats. The tobacco is heated to a lower temperature than a combusted cigarette to create an aerosol, then inhaled by the user.<sup>91</sup> For the purposes of this Decision, when referring to heated tobacco products, this is meant to refer to the consumable part, i.e. the tobacco plugs.<sup>92</sup>

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<sup>85</sup> Form CO, paragraph 187.

<sup>86</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 22.

<sup>87</sup> Questionnaire Q1 for competitors, question 11.2.

<sup>88</sup> Questionnaire Q1 for competitors, question 11.2.1.

<sup>89</sup> Questionnaire Q1 for competitors, question 11.2.1. While customers pointed at a worldwide geographic market, in balance, and in light of all the information available, a national scope is more appropriate.

<sup>90</sup> Form CO, paragraph 62.

<sup>91</sup> See FDA, *How are Non-Combusted Cigarettes, Sometimes Called Heat-Not-Burn Products, Different from E-Cigarettes and Cigarettes?*, 2020, available at <https://www.fda.gov/tobacco-products/products-ingredients-components/how-are-non-combusted-cigarettes-sometimes-called-heat-not-burn-products-different-e-cigarettes-and>, as submitted by the Parties, see footnote 24 of the Form CO.

<sup>92</sup> The electronic devices for use with the tobacco plugs, such as PMI's IQOS, are considered as a consumer electronic product in Sweden, and not a tobacco or nicotine related product.



#### 4.5.1. Product market definition

##### 4.5.1.1. The Notifying Party's arguments

(71) The Notifying Party submits that the Commission should – in line with its practice of defining separate product markets for each type of tobacco product – define also a market for heated tobacco products. The Notifying Party considers that the narrowest plausible market would be heated tobacco products in general.<sup>93</sup>

##### 4.5.1.2. The Commission's assessment

(72) The Commission has not assessed the relevant market definition for heated tobacco products specifically in previous cases, given that these are a relatively novel class of tobacco products.<sup>94</sup>

(73) The Commission considers that heated tobacco products are a separate market from combustible tobacco products and that it is not necessary to further segment the product market for heated tobacco products for the following reasons.

(74) **First**, as regards the question whether heated tobacco products constitute a separate product market. The majority of market participants who expressed an opinion consider that heated tobacco products should be considered as a separate product market from other tobacco and nicotine products.<sup>95</sup> Further, the Commission considers that supply-side substitutability is not evident, as heated tobacco products require an electronic device for use, which is not the case for other tobacco products, for example, FMC.

(75) **Second**, the Commission inquired into possible further segmentations within heated tobacco products. The majority of respondents who expressed an opinion indicated that it depends but did not provide further insights on what type of segmentations would be relevant or why.<sup>96</sup>

(76) **Third**, the Parties' internal documents are also consistent with a separate market for heated tobacco products without further segmentations. For instance, an industry report on tobacco reports separately for heated tobacco products, without any further segmentations,<sup>97</sup> [...].<sup>98</sup> Further, the Parties' internal documents [...].<sup>99</sup> An industry report also differentiates between e-cigarettes and heated tobacco when assessing its developments, and considers vapour products as being less toxicants than heated tobacco products.<sup>100</sup>

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<sup>93</sup> Form CO, paragraphs 184 and 190.

<sup>94</sup> According to the Notifying Party, these were first introduced in 2014.

<sup>95</sup> Questionnaire Q1 for competitors, question 12.1; Questionnaire Q2 for customers in Sweden, question 16.1; Questionnaire Q3 for customers in Norway, question 15.1.

<sup>96</sup> Questionnaire Q1 for competitors, question 12.1.1; Questionnaire Q2 for customers in Sweden, question 16.1.1; Questionnaire Q3 for customers in Norway, question 15.1.1.

<sup>97</sup> Annex 5.4.3 – 47 to the Form CO – [...].

<sup>98</sup> Annex 5.4.3 – 12 to the Form CO – Corporate Ambition Document, slide 4; Annex 5.4.3 – 14 to the Form CO – SE NO SNUS Market Plans 2022, slide 3; Annex 5.4.3 – 48 to the Form CO – PMI Competitive Intelligence Report Q1 2022, slides 4 and ff.

<sup>99</sup> Annex 4.5.3 – 48 to Form CO – PMI Competitive Intelligence Report Q1 2022.

<sup>100</sup> Annex 5.4.3 – 47 to Form CO – [...].

(77) According to an article by the US Food and Drug Administration, submitted by the Notifying Party, one of the differences between heated tobacco products and vaping products (such as an e-cigarette) is their functioning. Heated tobacco products are tobacco plugs, where the tobacco is heated to a lower temperature than a combusted cigarette to create an aerosol that the user inhales. E-cigarettes use an e-liquid which is heated by an electric heat source to create an aerosol that the user inhales.<sup>101</sup>

(78) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that heated tobacco products are a separate market from other combustible tobacco products. The Commission considers that it is not necessary to further segment the product market for heated tobacco products.

#### 4.5.2. Geographic market definition

##### 4.5.2.1. The Notifying Party's arguments

(79) The Notifying Party submits that the scope for the wholesale supply of heated tobacco products should be defined as national in scope.<sup>102</sup>

##### 4.5.2.2. The Commission's assessment

(80) In previous cases, while not directly addressing heated tobacco products the Commission considered that the markets for all types of tobacco product are national.<sup>103</sup>

(81) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice for the following reasons.

(82) *First*, the majority of competitors who expressed an opinion consider that the relevant geographic market for heated tobacco products is national in scope.<sup>104</sup> In this line, a competitor indicated that *'the conditions of competition for the wholesale supply of HTP to retail vary on a nation-by-nation basis'* and another competitor indicated that this market is national in scope due to *'multiple reasons, predominantly due to different national excise regimes imposed'*. A third competitor explained that they considered markets to be national in scope due to *'varying legislation and different consumer preferences with incomparable market maturities (i.e. awareness and acceptance of [heated tobacco products]). Trade-set up and distribution are extremely different depend[ing] on geography. Taxation and price point variation in between markets create further differentiation'*.<sup>105</sup> While the majority of customers pointed at a worldwide geographic scope for heated tobacco products, on the other hand they contradicted this statement in their

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<sup>101</sup> See FDA, *How are Non-Combusted Cigarettes, Sometimes Called Heat-Not-Burn Products, Different from E-Cigarettes and Cigarettes?*, 2020, available at <https://www.fda.gov/tobacco-products/products-ingredients-components/how-are-non-combusted-cigarettes-sometimes-called-heat-not-burn-products-different-e-cigarettes-and>, as submitted by the Parties, see footnote 24 of the Form CO.

<sup>102</sup> Form CO, paragraph 184.

<sup>103</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 22.

<sup>104</sup> Questionnaire Q1 for competitors, question 12.2.

<sup>105</sup> Questionnaire Q1 for competitors, question 12.2.1.

comments.<sup>106</sup> For example, a customer indicated that ‘*the regulatory regime put in place in Norway to govern such sales could, potentially, result in such different conditions of competition that the wholesale supply of such products would need to be considered as [a] national market*’.<sup>107</sup> Further, a customer pointed at the regulatory barriers that exist between countries, indicating that heated tobacco products ‘*cannot be lawfully sold in Norway for the time being*’.<sup>108</sup>

(83) **Second**, the Parties’ internal documents are also consistent with national markets for heated tobacco products. For example, a report [...] indicated the different regulatory policies European countries follow regarding heated tobacco products, including specific taxes and excise duties.<sup>109</sup> A Notifying Party internal document also [...].<sup>110</sup>

(84) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for heated tobacco products is national in scope.

#### **4.6. Nicotine powder**

(85) Nicotine powder is used in the production of nicotine pouches.<sup>111</sup> To bind the nicotine, most nicotine pouches are filled with a mixture of pure nicotine combined with an acid to create a nicotine salt.<sup>112</sup> However, it is also possible to bind the nicotine using a resin instead of an acid, [...]. According to the Notifying Party, ‘nicotine powder’ and ‘nicotine salt’ are used interchangeably in the industry to refer to the filler for nicotine pouches.<sup>113</sup>

(86) PMI is active in this market through its subsidiary, Fertin. [...]. SM does not manufacture nicotine powder, [...].<sup>114</sup>

##### *4.6.1. Product market definition*

###### *4.6.1.1. The Notifying Party’s arguments*

(87) The Notifying Party considers that nicotine powder (including both powder and salt formulations to bind the nicotine) should be viewed as a single product market regardless of chemical composition.<sup>115</sup>

(88) From the demand-side perspective, the Notifying Party argues that both nicotine powder and salt are interchangeable, and the manufacturing process does not differ materially based on the filler used for the pouches. Further, there is no difference in

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<sup>106</sup> Questionnaire Q2 for customers in Sweden, question 16.2; Questionnaire Q3 for customers in Norway, question 15.2.

<sup>107</sup> Questionnaire Q3 for customers in Norway, question 15.2.1.

<sup>108</sup> Questionnaire Q3 for customers in Norway, question 15.1.1.1.

<sup>109</sup> Annex 5.4.3 – 46 to the Form CO – Barclays State of global tobacco and cannabis 1Q 22, slides 56 and ff.

<sup>110</sup> Annex 5.4.3 – 48 to the Form CO – [...].

<sup>111</sup> As well as other products, such as Nicotine Replacement Therapy products (for example, gums and lozenges) as well as in e-cigarettes.

<sup>112</sup> Form CO, paragraph 146.

<sup>113</sup> Form CO, paragraph 146.

<sup>114</sup> Form CO, paragraphs 11 and 91.

<sup>115</sup> Form CO, paragraph 149.

cost or use for the end-consumer, nor is the end-consumer aware of what methods are used for binding nicotine.<sup>116</sup>

- (89) From the supply-side perspective, the Notifying Party argues that several options exist for manufacturers to bind nicotine, including liquid nicotine, resins, and acids.<sup>117</sup>

#### 4.6.1.2. The Commission's assessment

- (90) The Commission has not considered the market for the supply for nicotine powder for use in nicotine pouches or any other applications in its past practice.

- (91) The market investigation has not contradicted the Notifying Party's arguments on nicotine powder being a single product market, including all methods to bind the nicotine. For example, competitors [...] do not make distinctions regarding the content of the nicotine powder, and refer to it as a whole, as the 'content' of the nicotine pouch.<sup>118</sup> Further, customers do not make distinctions about the content of nicotine pouches or the differences of nicotine binding when referring to nicotine pouches.<sup>119</sup>

- (92) For the purposes of the Decision and in light of all information available to it, the Commission considers it appropriate to leave open the exact product market definition of nicotine powder and salt,<sup>120</sup> irrespective of the formulation for binding the nicotine (e.g. resin or acid), since the competitive assessment would not differ irrespective of the segmentation.

#### 4.6.2. Geographic market definition

##### 4.6.2.1. The Notifying Party's arguments

- (93) The Notifying Party submits that the market for nicotine powder should be at least EEA-wide if not global.

##### 4.6.2.2. The Commission's assessment

- (94) The Commission has not considered the market for the supply for nicotine powder for use in nicotine pouches or any other applications.

- (95) The market investigation has not contradicted the Notifying Party's arguments on nicotine powder being at least EEA-wide in scope for the following reasons.

- (96) **First**, there are low transportation costs, no regulatory barriers,<sup>121</sup> and [...].<sup>122</sup>

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<sup>116</sup> Form CO, paragraphs 150 and 151.

<sup>117</sup> Form CO, paragraphs 153 and 154.

<sup>118</sup> Minutes of a call with a competitor of 9 September 2022, paragraph 8, form CO, paragraph 212.

<sup>119</sup> eQ2 to customers in Sweden.

<sup>120</sup> For the purposes of this Decision, references to nicotine powder hereinafter refer to nicotine powder and salt formulations.

<sup>121</sup> Form CO, paragraph 156.

<sup>122</sup> Response to P1 RFI 8, paragraphs 6.1 and 6.2.

(97) **Second**, the same nicotine powder is supplied by players that are active globally. For example, there are a number of suppliers of nicotine powder which are active globally, and from which players such as SM source their nicotine powder needs (for example, [...]).<sup>123</sup> Further, [...].<sup>124</sup>

(98) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers it appropriate to leave open the exact geographic market definition since the competitive assessment would not differ irrespective of the segmentation.

#### **4.7. Wholesale distribution of combustible tobacco, smoke-free, and related products**

##### *4.7.1. Product market definition*

###### 4.7.1.1. The Notifying Party's arguments

(99) The Notifying Party submits that the product market definition should be that of an overall market for third party logistics in Sweden (as was defined by the SCA).<sup>125</sup> At the same time, the Notifying Party considers that the narrowest plausible market definition encompasses the distribution of combustible tobacco, smoke-free, and related products (e.g. devices used for consumption of these products and accessories).<sup>126</sup>

###### 4.7.1.2. The Commission's assessment

(100) In previous cases, the Commission suggested that there is a market for the wholesale distribution of manufactured tobacco products that should be distinguished from the distribution of non-tobacco goods primarily because of regulatory and fiscal reasons.<sup>127</sup>

(101) The Commission has not assessed the market for distribution of other nicotine-containing products explicitly or separately from the distribution of tobacco products.

(102) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice for the following reasons.

(103) **First**, manufacturers usually choose distributors with a network that covers the resale outlets where their products (e.g. FMC, RYO, snus, nicotine pouches) are sold, and these resale outlets are to a large extent the same.<sup>128</sup>

(104) **Second**, while different combustible tobacco, smoke-free, and related products are subject to slightly different regulatory requirements, the distribution process and

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<sup>123</sup> Form CO, paragraph 210.

<sup>124</sup> Form CO, paragraph 210.

<sup>125</sup> SCA Case no. 206/2002 (Årende dnr. 206/2002).

<sup>126</sup> Form CO, paragraph 163.

<sup>127</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 10; Case M.3553 - LOGISTA / ETINERA / TERZIA, of 4 October 2004, paragraph 19; Case M.1735 - SEITA / TABACALERA, of 3 December 1999, paragraph 20.

<sup>128</sup> See for example minutes of a call with a competitor of 9 September 2022, paragraph 18.

know-how for these products is similar,<sup>129</sup> including developing a platform for retailers to order these products through, as a competitor mentioned.<sup>130</sup>

- (105) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the wholesale distribution of combustible tobacco, smoke-free, and related products is a separate market from the distribution of other products. The Commission considers that it is not necessary to further segment the product market for the wholesale distribution of combustible tobacco, smoke-free, and related products.

#### 4.7.2. Geographic market definition

##### 4.7.2.1. The Notifying Party's arguments

- (106) The Notifying Party agrees with the Commission precedents and considers that the distribution market is national in scope on the basis of the different regulatory requirements regarding tax, selling permissions, and marketing.<sup>131</sup>

##### 4.7.2.2. The Commission's assessment

- (107) In previous cases, the Commission found that the market for distribution of tobacco products is national in scope, due to national characteristics in tax, public health protection, advertising and distribution, as well as the presence of different competitors and varying market shares.<sup>132</sup> The Commission has not assessed the market for distribution of other nicotine-containing products explicitly or separately from the distribution of tobacco products.
- (108) Based on the market investigation in this case it seems that there are no reasons to depart from the Commission's previous practice for the following reasons.
- (109) **First**, the majority of tobacco and nicotine products manufacturers who expressed an opinion submitted that different companies distribute their products in Sweden and in other EEA countries.<sup>133</sup> As a competitor indicates, '*there is no distributor active in all EEA markets*'. Another competitor explains that '*in Sweden, SMD is our exclusive distributor. In other markets, the distribution is managed by local distributors*'.<sup>134</sup> This is also applicable to the Notifying Party, who uses SMD to distribute its products in Sweden, whereas it uses other logistic companies for other countries.<sup>135</sup>
- (110) **Second**, the market investigation has revealed that different countries have different regulatory requirements and prices. The majority of the tobacco and nicotine products manufacturers who expressed an opinion indicated that there are significant price, network coverage, and handling of excise duties differences across EEA countries for the distribution of tobacco and/or smoke-free products, as

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<sup>129</sup> Minutes of a call with a competitor of 9 September 2022, paragraph 18.

<sup>130</sup> Minutes of a call with a competitor of 8 September 2022, paragraph 14.

<sup>131</sup> Form CO, paragraph 179.

<sup>132</sup> Case M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI, of 27 June 2008, paragraph 18; M.4581 – *Imperial Tobacco / Altadis*, of 18 October 2007, paragraph 22.

<sup>133</sup> Questionnaire Q1 for competitors, question 13.1.

<sup>134</sup> Questionnaire Q1 for competitors, question 13.1.1.

<sup>135</sup> Form CO, paragraphs 257, 262, and 475.

well as small differences in delivery timing.<sup>136</sup> In this line, a competitor explained that *‘The Norwegian market is characterized by fewer key account retailers, different requirements for the payment of excise duties, different licence requirements for the distribution of combustible and smoke-free products, and generally a higher cost base.’*<sup>137</sup> Further, there are differences between the distribution fees paid by tobacco and nicotine products manufacturers in Sweden and Norway. For example, PMI pays a distribution fee (as a share of the retail selling price) of between [0-5]% in Sweden, depending on the product, whereas this drops from [0-5]% in Norway.<sup>138</sup>

- (111) For the purpose of this Decision and in light of all information available to it, the Commission therefore considers that the relevant geographic market for the wholesale distribution of combustible tobacco, smoke-free, and related products is national in scope.

#### **4.8. Conclusion on market definition**

- (112) On the basis of the foregoing, the Commission concludes that, for the purpose of carrying out its assessment of the Transaction:
- (a) Separate relevant product markets arise for the manufacturing and supply of snus, which are national in scope;
  - (b) Separate relevant product markets arise for the manufacturing and supply of nicotine pouches, which are national in scope;
  - (c) Separate relevant product markets arise for the manufacturing and supply of FMC, which are national in scope;
  - (d) Separate relevant product markets arise for the manufacturing and supply of RYO, which are national in scope;
  - (e) Separate relevant product markets arise for the manufacturing and supply of heated tobacco products, which are national in scope;
  - (f) The precise product and geographic market definition (i.e. EEA or wider) can be left open for the supply of nicotine powder;
  - (g) Separate relevant product markets arise for the wholesale distribution of combustible tobacco, smoke-free, and related products, which are national in scope.

### **5. COMPETITIVE ASSESSMENT**

- (113) The Transaction gives rise to:
- (a) horizontally affected markets in (i) the manufacture and supply of snus in Sweden and Norway; and (ii) the manufacture and supply of nicotine pouches in Sweden and Slovenia;

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<sup>136</sup> Questionnaire Q1 for competitors, question 13.2.

<sup>137</sup> Minutes of a call with a competitor of 8 September 2022, paragraph 13.

<sup>138</sup> Form CO, table 35.

- (b) vertically affected markets between:
  - the wholesale supply of snus, nicotine pouches, FMC, RYO and heated tobacco in Sweden (upstream) and the market for the distribution of combustible tobacco, smoke-free, and related products in Sweden (downstream);<sup>139</sup> and
  - the wholesale supply of nicotine powder (bound with resin or with acid) in the EEA (upstream) and the market for the wholesale supply of nicotine pouches in Spain, Romania and Bulgaria (downstream).
- (c) conglomerate relationships between:
  - SM's activities for the wholesale supply of oral nicotine products; and
  - PMI's activities for the wholesale supply of combustible tobacco products.

## 5.1. Legal framework

(114) Pursuant to Article 2(2) and (3) of the Merger Regulation<sup>140</sup>, the Commission must assess whether a concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. In this respect, a merger can entail horizontal and/or non-horizontal effects.

### 5.1.1. Horizontal effects

(115) The Commission Guidelines on the assessment of horizontal mergers under the Merger Regulation (the "Horizontal Merger Guidelines") distinguish two main ways in which mergers between actual or potential competitors on the same relevant market may significantly impede effective competition, namely non-coordinated effects and coordinated effects.<sup>141</sup>

(116) Non-coordinated effects may significantly impede effective competition by eliminating the competitive constraint imposed by one merging party on the other, as a result of which the merged entity would have increased market power without resorting to coordinated behaviour. According to recital 25 of the Merger Regulation, a significant impediment to effective competition can result from the anticompetitive effects of a concentration even if the merged entity would not have a dominant position on the market concerned. In this regard, the Horizontal Merger Guidelines consider not only the direct loss of competition between the merging firms, but also the reduction in competitive pressure on non-merging firms in the same market that could be brought about by the merger.<sup>142</sup>

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<sup>139</sup> The markets for the wholesale supply of FMC, RYO, snus, heated tobacco and nicotine pouches are presented as being upstream and the market for distribution downstream. However, it could also be sensible to consider the market for distribution as being upstream in the case at hand given that: (i) the price charged by SMD to retailers are not set by SMD itself but by the manufacturers (i.e. wholesale suppliers), (ii) the price for distribution services offered by SMD is paid by manufacturers (as a percentage of the price they charge to retailers) and not by retailers.

<sup>140</sup> As regards the EEA, annex XIV of the EEA Agreement contains a set of specific rules.

<sup>141</sup> OJ C 31, 5.2.2004, p. 5. The remainder of this Decision focuses on non-coordinated effects.

<sup>142</sup> Horizontal Merger Guidelines, paras. 24-38.



- (117) The Horizontal Merger Guidelines list a number of factors, which may influence the rise of substantial non-coordinated effects from a merger, such as: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; or the fact that the merger would eliminate an important competitive force. The list of factors applies equally if a merger would create or strengthen a dominant position, or would otherwise significantly impede effective competition due to non-coordinated effects. Furthermore, not all of those factors need to be present to make significant non-coordinated effects likely and the list itself is not an exhaustive list.<sup>143</sup>

#### 5.1.2. *Non-horizontal effects*

- (118) A merger can entail non-horizontal effects when it involves companies operating at different levels of the same value chain or in closely related markets.
- (119) In assessing potential vertical effects of a merger, the Commission analyses, among other things, whether the merger results in foreclosure so that actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.<sup>144</sup> Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market. It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of their competitors as well — are as a result able to profitably increase the price charged to consumers.
- (120) The Non-Horizontal Merger Guidelines distinguish between two forms of foreclosure: (i) input foreclosure, when access of downstream rivals to supplies is hampered;<sup>145</sup> and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.<sup>146</sup>
- (121) In assessing both types of foreclosure, the Commission assesses whether the merged entity (i) would have the ability to engage in foreclosure, (ii) whether it would have the incentive to do so, and (iii) what would be the overall impact on effective competition in the affected markets. All of these criteria must be cumulatively met for foreclosure concerns to arise.

#### 5.1.3. *Conglomerate effects*

- (122) Conglomerate mergers consist of mergers between companies that are active in closely related markets, for instance suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use.<sup>147</sup>
- (123) According to the Non-Horizontal Merger Guidelines, in most circumstances, conglomerate mergers do not lead to any competition problems.<sup>148</sup> However,

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<sup>143</sup> Horizontal Merger Guidelines, paras. 24-38.

<sup>144</sup> Non-Horizontal Merger Guidelines, paras. 20-29.

<sup>145</sup> Non-Horizontal Merger Guidelines, para. 31.

<sup>146</sup> Non-Horizontal Merger Guidelines, para. 58.

<sup>147</sup> Non-Horizontal Merger Guidelines, para. 91.

<sup>148</sup> Non-Horizontal Merger Guidelines, para. 92.

foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices.<sup>149</sup>

- (124) The Non-Horizontal Merger Guidelines distinguish between bundling, which usually refers to the way products are offered and priced by the merged entity<sup>150</sup> and tying, usually referring to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good).<sup>151</sup>
- (125) Within bundling practices, the distinction is also made between pure bundling and mixed bundling. In the case of pure bundling the products are only sold jointly in fixed proportions. With mixed bundling the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price.<sup>152</sup>
- (126) Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors).
- (127) While tying and bundling have often no anticompetitive consequences, in certain circumstances such practices may lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.<sup>153</sup>
- (128) In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals<sup>154</sup>, second, whether it would have the economic incentive to do so<sup>155</sup> and, third, whether a foreclosure strategy would have a significant detrimental effects on competition, thus causing harm to consumers.<sup>156</sup> In practice, these factors are often examined together as they are closely intertwined.

## **5.2. Horizontal effects**

### *5.2.1. Wholesale supply of snus*

- (129) In the EEA snus is only allowed for sale in Sweden and Norway. The Parties are both active in each of these countries, where the Transaction gives rise to horizontally affected markets. The tables below provide the Parties' and their main competitors' market shares in each of these markets for the past three years:

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<sup>149</sup> Non-Horizontal Merger Guidelines, para. 93.  
<sup>150</sup> Non-Horizontal Merger Guidelines, para. 96.  
<sup>151</sup> Non-Horizontal Merger Guidelines, para. 97.  
<sup>152</sup> Non-Horizontal Merger Guidelines, para. 96.  
<sup>153</sup> Non-Horizontal Merger Guidelines, paras. 91 and 93.  
<sup>154</sup> Non-Horizontal Merger Guidelines, paras. 95 to 104.  
<sup>155</sup> Non-Horizontal Merger Guidelines, paras. 105 to 110.  
<sup>156</sup> Non-Horizontal Merger Guidelines, paras. 111 to 118.

**Table 1 – Parties’ market shares for the wholesale supply of snus in Sweden and Norway (2021)**

2021	Sweden		Norway	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[0-5]%	[0-5]%
SM	[50-60]%	[60-70]%	[40-50]%	[40-50]%
Combined	<i>[60-70]%</i>	<i>[60-70]%</i>	<i>[40-50]%</i>	<i>[40-50]%</i>
Imperial	[10-20]%	[10-20]%	[30-40]%	[30-40]%
BAT	[10-20]%	[10-20]%	[10-20]%	[10-20]%
JTI	[5-10]%	[0-5]%	[0-5]%	[0-5]%

Source: Form CO, Section 7

**Table 2 – Parties’ market shares for the wholesale supply of snus in Sweden and Norway (2020)**

2020	Sweden		Norway	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[0-5]%	[0-5]%
SM	[60-70]%	[60-70]%	[40-50]%	[40-50]%
Combined	<i>[60-70]%</i>	<i>[60-70]%</i>	<i>[40-50]%</i>	<i>[40-50]%</i>
Imperial	[10-20]%	[10-20]%	[30-40]%	[30-40]%
BAT	[10-20]%	[10-20]%	[10-20]%	[10-20]%
JTI	[5-10]%	[5-10]%	[0-5]%	[0-5]%

Source: Form CO, Section 7

**Table 3 – Parties’ market shares for the wholesale supply of snus in Sweden and Norway (2019)**

2019	Sweden		Norway	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[0-5]%	[0-5]%
SM	[60-70]%	[60-70]%	[40-50]%	[40-50]%
Combined	<i>[60-70]%</i>	<i>[60-70]%</i>	<i>[40-50]%</i>	<i>[40-50]%</i>
Imperial	[10-20]%	[10-20]%	[30-40]%	[30-40]%
BAT	[10-20]%	[10-20]%	[10-20]%	[10-20]%
JTI	[5-10]%	[0-5]%	[0-5]%	[0-5]%

Source: Form CO, Section 7

#### 5.2.1.1. Sweden

- (130) On the market for the wholesale supply of snus in Sweden, despite a high combined market share ([60-70]%), the increment brought about by PMI remains limited ([0-5]%). Besides, the merged entity will continue to face significant competitors,

including Imperial ([10-20]%), BAT ([10-20]%) and JTI ([0-5]%) all of whom with market shares significantly higher than PMI.

- (131) This is consistent with the results of the market investigation. As one retailer explained: *‘The main competitor for the supply of snus in Norway and Sweden is Imperial Tobacco through its subsidiary Skruf. It is the largest brand comparable to that of SM’*.<sup>157</sup>
- (132) It can also be noted that PMI’s value market share ([0-5]%) is lower than its volume market share ([0-5]%) in contrast to SM, whose value market share ([60-70]%) exceeds its volume market share ([50-60]%). This in turn suggests that PMI’s brands are of a relatively low value compared to SM’s brands and that the Parties are not close competitors. This is consistent with third-party market reports submitted by the Notifying Party which do not list any of PMI’s brands among the best-selling brands or which do not even refer to these brands.<sup>158</sup>
- (133) This is also confirmed by the response to the investigation, especially from retailers who confirmed that PMI’s brands are not must-have brands and have a low value. According to one retailer for instance *‘PMI’s brands for the supply of snus [...] are little known and none of them is a must-stock brand for retailers in Sweden’*.<sup>159</sup> Finally, the retailers who participated to the investigation also confirmed that they do not expect PMI to significantly grow on the market absent the Transaction.<sup>160</sup>
- (134) Overall, the Commission thus concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement for the wholesale supply of snus in Sweden.

#### 5.2.1.2. Norway

- (135) The Parties’ combined market share is lower in Norway ([40-50]%) and the increment bought about by PMI is also limited ([0-5]%). On this market, the merged entity will continue to face competitive pressure from Imperial ([30-40]%) and BAT ([10-20]%) whose market shares exceed that of PMI.
- (136) Overall, the results of the investigation confirm that PMI is not a significant competitor. As one retailer explains: *‘Currently PMI has not really penetrated the Norwegian market’*.<sup>161</sup> According to another retailer: *‘based on [this retailer]’s projections there is nothing to suggest that [this retailer] will sell significantly more Kapten or Shiro in 3 years time than it does today, although the brands have grown incrementally’*.<sup>162</sup>
- (137) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement for the wholesale supply of snus in Norway.

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<sup>157</sup> Minutes of the call with a customer of 1 July 2022, paragraph 12.

<sup>158</sup> See e.g. Annex 5.4.3 – 50 to the Form CO.

<sup>159</sup> Minutes of the call with a customer of 1 July 2022, paragraph 14.

<sup>160</sup> Questionnaire Q2 to customers in Sweden, question 10.1.

<sup>161</sup> Minutes of a call with a customer of 29 June 2022, paragraph 14.

<sup>162</sup> Questionnaire Q3 to customers in Norway, questions 3 to 10.

5.2.2. Wholesale supply of nicotine pouches

- (138) Unlike snus, nicotine pouches are allowed for sale in all EEA Member States except Norway. Accordingly, the Parties' activities overlap in several EEA Member States but the Transaction only gives rise to horizontally affected markets in Sweden and Slovenia. The tables below provide the Parties' and their main competitors' market shares in each of these markets for the past three years:

**Table 4 – Parties' market shares for the wholesale supply of nicotine pouches in Sweden and Slovenia (2021)**

2021	Sweden		Slovenia	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[5-10]%	[5-10]%
SM	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Combined	<i>[20-30]%</i>	<i>[20-30]%</i>	<i>[20-30]%</i>	<i>[20-30]%</i>
Comp. 1	BAT		GN Tobacco	
	[50-60]%	[60-70]%	[30-40]%	[30-40]%
Comp. 2	JTI		BAT	
	[0-5]%	[0-5]%	[10-20]%	[10-20]%
Comp. 3	Altria		NGP Tobacco	
	[0-5]%	[0-5]%	[10-20]%	[10-20]%

Source: Form CO, Section 7

**Table 5 – Parties' market shares for the wholesale supply of nicotine pouches in Sweden and Slovenia (2020)**

2020	Sweden		Slovenia	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[5-10]%	[5-10]%
SM	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Combined	<i>[20-30]%</i>	<i>[20-30]%</i>	<i>[30-40]%</i>	<i>[30-40]%</i>
Comp. 1	BAT		GN Tobacco	
	[50-60]%	[60-70]%	[30-40]%	[30-40]%
Comp. 2	JTI		BAT	
	[5-10]%	[0-5]%	[10-20]%	[10-20]%
Comp. 3	Altria		NGP Tobacco	
	[5-10]%	[5-10]%	[10-20]%	[10-20]%

Source: Form CO, Section 7

**Table 6 – Parties’ market shares for the wholesale supply of nicotine pouches in Sweden and Slovenia (2019)**

2019	Sweden		Slovenia	
	<i>Vol.</i>	<i>Val.</i>	<i>Vol.</i>	<i>Val.</i>
PMI	[0-5]%	[0-5]%	[5-10]%	[5-10]%
SM	[20-30]%	[20-30]%	[60-70]%	[60-70]%
<i>Combined</i>	<i>[20-30]%</i>	<i>[20-30]%</i>	<i>[70-80]%</i>	<i>[70-80]%</i>
Comp. 1	BAT		GN Tobacco	
	[50-60]%	[60-70]%	[10-20]%	[10-20]%
Comp. 2	JTI		BAT	
	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Comp. 3	Altria		NGP Tobacco	
	[5-10]%	[5-10]%	[0-5]%	[0-5]%

Source: Form CO, Section 7

#### 5.2.2.1. Sweden

- (139) Although the market for the wholesale supply of nicotine pouches in Sweden is horizontally affected, the Parties’ combined market share remains below 25% ([20-30]%) and the increment is limited ([0-5]%). The merged entity will remain behind BAT ([60-70]%) and will continue to face competitors with sizeable market shares such as Altria ([0-5]%) and JTI ([0-5]%) whose market shares exceed that of PMI.
- (140) The results of the investigation also confirm that the Parties are not close competitors. As one retailer explains: ‘For nicotine pouches, the leader in Sweden is BAT, followed by SM [...] PMI’s brands for the supply of snus and nicotine pouches are little known and none of them is a must-stock brand for retailers in Sweden’.<sup>163</sup> Likewise, a competitor explained that: ‘PMI’s brands include Shiro and Sirius. None of these brands can be regarded as a must-stock brand’.<sup>164</sup> Finally, the retailers who participated to the market investigation confirmed that they do not expect any significant increase in PMI’s sales of nicotine pouches.<sup>165</sup>
- (141) Overall, the Commission thus concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement for the wholesale supply of nicotine pouches in Sweden.

#### 5.2.2.2. Slovenia

- (142) The Parties’ combined market share for the supply of nicotine pouches in Slovenia ([20-30]%) exceeds 25%<sup>166</sup> but remains below 30%.<sup>167</sup> Furthermore, the merged

<sup>163</sup> Minutes of the call with a customer of 1 July 2022, paragraphs 12 and 14.

<sup>164</sup> Minutes of a call with a competitor of 30 June 2022, paragraph 16.

<sup>165</sup> Questionnaire Q2 to customers in Sweden, question 10.1.

<sup>166</sup> According to the Horizontal Merger Guidelines, a combined market share below 25% remains limited and may serve as an indication that the concentration is not liable to significantly impede effective competition (para. 18).

entity will continue to face significant competitors including GN Tobacco, who will remain the market leader ([30-40]%), BAT ([10-20]%) and NGP Tobacco ([10-20]%), who both have market shares higher than that of PMI.

- (143) The evolution of the market structure over the past three years shows that the market for nicotine pouches in Slovenia is small and relatively new. As a result, the barriers to entry and expansion on this market are relatively low, which explains why the Parties have lost significant market shares while competitors like GN Tobacco, BAT and NGP Tobacco managed to enter and significantly expand on this market.
- (144) This is consistent with the results of the market investigation which did not elicit any concern with respect to the wholesale supply of nicotine pouches in Slovenia.<sup>168</sup>
- (145) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement for the wholesale supply of nicotine pouches in Slovenia.

### **5.3. Vertical effects**

#### *5.3.1. Wholesale supply of FMC, RYO, snus, nicotine pouches and heated tobacco (upstream) / Distribution of combustible tobacco, smoke-free, and related products (downstream)*

- (146) The Transaction gives rise to vertically affected markets between (i) the Parties' activities for the wholesale supply of FMC, RYO, snus, nicotine pouches and heated tobacco in Sweden (upstream) and (ii) SM's activities for the distribution of combustible tobacco, smoke-free, and related products in Sweden (through SMD).

##### 5.3.1.1. Market shares

- (147) The table below provides an overview of the Parties' market shares on all vertically affected markets:

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<sup>167</sup> This is less than the market share of GN Tobacco ([30-40]%).

<sup>168</sup> Minutes of the call with a customer of 28 September 2022; minutes of a call with a customer of 12 September 2022.

**Table 7 – Wholesale and distribution of combustible tobacco, smoke-free, and related products in Sweden – Parties’ Value market shares (2021)**

UPSTREAM				DOWNSTREAM	
Relevant market	PMI	SM	∑	Relevant market	SM
FMC	[30-40]%	[0-5]	[30-40]%	Distribution of combustible tobacco and smoke-free products	[90-100]%
RYO	[20-30]%	[0-5]	[20-30]%		
Snus	[0-5]%	[60-70]%	[60-70]%		
Heated tobacco	[90-100]%	[0-5]	[90-100]%		
Nicotine pouches	[0-5]%	[20-30]%	[20-30]%		

Source: Form CO, Section 7

- (148) In addition, the tables below provide an overview of PMI’s and its main competitors’ market shares for the wholesale supply of FMC, RYO, snus, heated tobacco and nicotine pouches in Sweden over the past three years:

**Table 8 – Wholesale supply of combustible tobacco, smoke-free, and related products in Sweden (2021)**

2021 (in value)	FMC		RYO		Snus		Nicotine Pouches		Heated tobacco	
	Vol	Val	Vol	Val	Vol	Val	Vol	Val	Vol	Val
PMI	[30-40]%	[30-40]%	[10-20]%	[20-30]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[90-100]%	[90-100]%
SM	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[50-60]%	[60-70]%	[20-30]%	[20-30]%	[0-5]%	[0-5]%
Combin ed	[30-40]%	[30-40]%	[10-20]%	[20-30]%	[60-70]%	[60-70]%	[20-30]%	[20-30]%	[90-100]%	[90-100]%
Comp. 1	JTI		JTI		Imperial		BAT		[0-5]%	
	[40-50]%	[40-50]%	[50-60]%	[40-50]%	[10-20]%	[10-20]%	[50-60]%	[60-70]%		
Comp. 2	BAT		Scandinavian Tobacco		BAT		Altria		[0-5]%	
	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[5-10]%	[0-5]%		
Comp. 3	Heupink		Olav		JTI		JTI		[0-5]%	
	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]%	[0-5]%		

Source: Form CO, Section 7



**Table 9 - Wholesale supply of combustible tobacco, smoke-free, and related products in Sweden (2020)**

2021 (in value)	FMC		RYO		Snus		Nicotine Pouches		Heated tobacco	
	<i>Vol</i>	<i>Val</i>	<i>Vol</i>	<i>Val</i>	<i>Vol</i>	<i>Val</i>	<i>Vol</i>	<i>Val</i>	<i>Vol</i>	<i>Val</i>
PMI	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[90-100]%	[90-100]%
SM	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[60-70]%	[60-70]%	[20-30]%	[20-30]%	[0-5]%	[0-5]%
<i>Combined</i>	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[60-70]%	[60-70]%	[20-30]%	[20-30]%	[90-100]%	[90-100]%
Comp. 1	JTI		JTI		Imperial		BAT		[0-5]%	
	[40-50]%	[40-50]%	[50-60]%	[50-60]%	[10-20]%	[10-20]%	[50-60]%	[60-70]%		
Comp. 2	BAT		Scandinavian Tobacco		BAT		Altria		[0-5]%	
	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%		
Comp. 3	Heupink		Olav		JTI		JTI		[0-5]%	
	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[5-10]%	[0-5]%		

Source: Form CO, Section 7

**Table 10 - Wholesale supply of combustible tobacco, smoke-free, and related products in Sweden (2019)**

2021 (in value)	FMC		RYO		Snus		Nicotine Pouches		Heated tobacco	
	Vol	Val	Vol	Val	Vol	Val	Vol	Val	Vol	Val
PMI	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[90-100]%	[90-100]%
SM	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[60-70]%	[60-70]%	[20-30]%	[20-30]%	[0-5]%	[0-5]%
Combined	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[60-70]%	[60-70]%	[20-30]%	[20-30]%	[90-100]%	[90-100]%
Comp. 1	JTI		JTI		Imperial		BAT		[0-5]%	
	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[10-20]%	[10-20]%	[50-60]%	[60-70]%		
Comp. 2	BAT		Scandinavian Tobacco		BAT		Altria		[0-5]%	
	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%		
Comp. 3	Heupink		Olav		JTI		JTI		[0-5]%	
	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%		

Source: Form CO, Section 7

- (149) In view of the above, it appears that the markets for the wholesale supply of FMC, RYO, snus, nicotine pouches and heated tobacco products are all affected, especially because of SMD's historic and former legal monopoly for the distribution of combustible tobacco, smoke-free, and related products in Sweden.<sup>169</sup>
- (150) The merged entity would thus control the distribution of products in Sweden for which PMI already has a significant market share, which may give it an incentive after the Transaction to foreclose competitors on these markets (customer foreclosure).
- (151) In addition, the downward integration of PMI may reduce the size of the addressable market for the distribution of combustible tobacco, smoke-free, and related products in Sweden and thus foreclose potential new entrants on this market by further increasing barriers to entry (input foreclosure).<sup>170</sup>

<sup>169</sup> Historically, SMD had a legal monopoly over the distribution of tobacco products in Sweden. SMD has remained the primary distributor of third-party combustible tobacco products after the abolition of the tobacco distribution monopoly in 1962-1963.

<sup>170</sup> By increasing barriers to entry for the distribution of combustible tobacco, smoke-free, and related products in Sweden, the transaction forecloses potential competitors of SMD downstream.

### 5.3.1.2. Customer foreclosure

#### 5.3.1.2.1. The Notifying Party's arguments

(152) According to the Notifying Party, the Transaction does not raise customer foreclosure concerns because:

- (a) the merged entity would lack the ability to foreclose PMI's competitors. In this respect, the Notifying Party explains that: (i) SMD does not have market power as there are multiple ways for manufacturers to distribute their products, (ii) SMD is a mere service provider that does not materially influence competition, (iii) SMD's absence of market power is reflected in the distribution of the joint profit margins,<sup>171</sup> (iv) there is no material change to the market structure [...], (v) SMD operates as a separate business and will continue to do so following the Transaction.
- (b) the merged entity would lack the incentive to foreclose PMI's competitors. According to the Notifying Party (i) manufacturers could move to alternative fulfilment channels to reach customers, (ii) SMD cannot selectively degrade the quality of its services and (iii) a foreclosure strategy would contradict its incentive to distribute as high a volume of products as possible.
- (c) any foreclosure attempt by the merged entity would lack significant impact. The Notifying Party explains in this regard that (i) manufacturers have alternative distribution options that would not affect their competitiveness vis-à-vis retailers or end-consumers, (ii) [...] and (iii) [..].

#### 5.3.1.2.2. The Commission's assessment

(153) As explained below, the Commission considers that the merged entity would have the ability and incentive to successfully engage in customer foreclosure post-Transaction.

##### 5.3.1.2.2.1. Ability

(154) For customer foreclosure to be a concern, a vertical concentration must involve a company which is an important customer with a significant degree of market power in the downstream market.<sup>172</sup> In the case at hand, the results of the market investigation confirm that SMD has a significant degree of market power for the distribution of combustible tobacco, smoke-free, and related products in Sweden for the following reasons.

(155) **First**, despite the abolition of the tobacco distribution monopoly in Sweden in 1963, SMD continues to hold a *de facto* monopoly for the distribution of combustible tobacco, smoke-free, and related products in Sweden and, as a matter of fact, there has been no entry on this market since 1963.<sup>173</sup>

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<sup>171</sup> According to the data submitted by the Notifying Party, PMI would receive [...] % of the joint profit margin and SMD [...] %. This means that SMD receives only [...] % of the joint margin ultimately paid by end consumers, whereas PMI would receive [...] % of this joint margin. Accordingly, the Notifying Party submits that SMD would have no market power.

<sup>172</sup> Non-Horizontal Merger Guidelines, para. 58.

<sup>173</sup> Form CO, para. 484.

- (156) **Second**, all manufacturers of combustible tobacco, smoke-free, and related products who participated in the investigation confirmed that the volumes distributed through SMD represents all or almost all of their sales in Sweden (the remainder corresponding to sales made by these competitors directly on their own websites).<sup>174</sup>
- (157) All of these competitors also confirmed that SMD is an unavoidable trading partner in Sweden<sup>175</sup> and that they would not switch to an alternative distributor in response to a 5-10% increase in the distribution fees charged by SMD.<sup>176</sup>
- (158) As one competitor explains: *‘There are currently no other realistic alternatives for broad distribution in Sweden’*.<sup>177</sup> According to another competitor: *‘It would not be financially viable for one [distributor] to enter the Swedish market as the set up costs are prohibitive given the strict regulatory environment and it is almost impossible to compete with SMD Logistics’ extensive distribution network and associated economies of scale and efficiencies, decreasing the costs of its operations’*.<sup>178</sup> A third competitor also stated that: *‘SMD’s services are currently unique in the market’*<sup>179</sup> and that *‘There is currently no alternative’*.<sup>180</sup>
- (159) Swedish retailers also confirmed that SMD is an unavoidable trading partner.<sup>181</sup> As one retailer explains: *‘SMD Logistics is the only trading partner that can deliver the products that our stores need all over the country’*.<sup>182</sup> Similarly, another retailer explains that: *‘this is usually critical for suppliers to have access to SMD in order to distribute their products in brick and mortar shops in Sweden.’*<sup>183</sup>
- (160) This is also consistent with PMI’s internal documents. By way of illustration, in one document [...]:

**Figure 6 – Internal document from PMI ([...])**

*Source: Annex 1 to the Parties’ memorandum dated 26 September 2022*

- (161) **Third**, the results of the investigation confirmed the existence of a number of barriers which make entry difficult and strengthen SMD’s market power for the distribution of combustible tobacco, smoke-free, and related products in Sweden.
- (162) *In the first place*, scale appears to constitute the main barrier to entry. As one competitor explains *‘SMD [...] has an extensive and intricate distribution network characterized by insurmountable efficiencies of scale. There is no easy alternative for manufacturers and it would be difficult to develop an alternative distribution*

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<sup>174</sup> Questionnaire Q1 to competitors, question 6.  
<sup>175</sup> Questionnaire Q2 to customers in Sweden, question 17.1.  
<sup>176</sup> Questionnaire Q1 to competitors, question 13.4.2.  
<sup>177</sup> Questionnaire Q1 to competitors, question 13.4.  
<sup>178</sup> Questionnaire Q1 to competitors, question 13.4.  
<sup>179</sup> Questionnaire Q1 to competitors, question 13.7.1.  
<sup>180</sup> Questionnaire Q1 to competitors, question 13.4.  
<sup>181</sup> Questionnaire Q2 to customers in Sweden, question 17.1.  
<sup>182</sup> Questionnaire Q2 to customers in Sweden, question 17.1.1.  
<sup>183</sup> Minutes of the call with a customer of 1 July 2022, paragraph 10.

*model under reasonable economic conditions*'.<sup>184</sup> According to another competitor, sponsoring a new entrant would require to roll out a new distribution network, which in turn "would have to be set up with some technical, regulatory and especially scale barriers to overcome".<sup>185</sup>

- (163) This is also consistent with PMI's internal documents [...]. As these internal documents show, [...]:

**Figure 7 – Internal document from PMI ([...])**

*Source: Annex 1 to the Parties' memorandum dated 26 September 2022*

- (164) As shown above, [...].<sup>186</sup> This confirms the particular importance of scale in this market, which plays as a significant barrier to entry.
- (165) *In the second place*, [...], which makes it more difficult for new entrants to enter this market.<sup>187</sup>
- (166) *In the third place*, the existence of several regulatory barriers for the payment of excise duties and for compliance purposes with track and trace obligations make entry more difficult.
- (167) As one competitor explains: 'if SMD were to stop distributing or start discriminating the Company's products in Sweden, it would also take time and require significant investments from [confidential] in order to be able to distribute the Company's products in SMD's stead with the same level of performance. This is because [confidential] would also have to get an excise duty licence, comply with track and trace requirements, adapt its warehouses and vehicles to handle tobacco products and develop a platform for retailers to order products through'.<sup>188</sup>
- (168) *In the fourth place*, there are other barriers to entry in terms of investments, know-how and technical requirements. As one competitor explains: 'Technically, developing an alternative distribution network is very difficult not only due to the necessity to develop track and trace to comply with regulation but also due to the nature of the premises that are required in terms of security for handling the product. SMD also invested heavily on security due to the nature of the product that is regularly targeted by thefts. SMD has invested in their trucks, security cameras and guards to avoid thefts and ensure delivery to retailers. In addition, products like snus require refrigeration, which is an additional technical requirement'.<sup>189</sup>
- (169) **Fourth**, the results of the investigation and the internal documents received from the Parties and market participants also confirm that while sponsoring entry appears to be possible, such entry would nevertheless take significant time<sup>190</sup>, would be

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<sup>184</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 10.

<sup>185</sup> Questionnaire Q1 to competitors, question 13.4.

<sup>186</sup> [...].

<sup>187</sup> Form CO, annexes 8.11.C.11, 8.11.C.2, 8.11.C.3.

<sup>188</sup> Minutes of a call with a competitor of 8 September 2022, paragraph 14.

<sup>189</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 12.

<sup>190</sup> This is also consistent with PMI's internal documents according to which '[...]' (Form CO, Annex 8.1.C.A.4 – 4).

expensive for manufacturers and would not deliver the same level of coverage, especially for small retailers (e.g. independent stores, petrol stations, etc.). Furthermore, the results of the investigation confirm that such sponsoring would only be economically viable if a sufficient number of manufacturers decide to switch simultaneously, which seems unrealistic without coordination.

- (170) Accordingly, despite the fact that SMD’s monopoly may not be a perfect monopoly due to a possible threat of entry, this threat does not appear to negate SMD’s significant market power.
- (171) As one competitor explains: “[we] analysed the alternative of developing a standalone distribution network, for example with a logistics partner like DHL. However: The switching costs would be very high since the development of an alternative distribution network means losing the scale of the rest of the industry [...]. SMD is distributing tobacco products in all Sweden including in small shops. Such distribution model would not be economically viable for an alternative distributor of a lower scale than SMD [...]. Turning to an alternative distributor would also be challenging from a customer’s point of view: retailers are used to deal with SMD and to place their orders for tobacco and smokeless products simultaneously through a single platform. [...] Additionally, ad hoc distributions by logistics service providers are also expensive compared to distribution by a wholesaler’.<sup>191</sup>
- (172) **Fifth**, as shown below, the margins of SMD are high in absolute terms (with gross margins between [...] % and [...] % and net margins ranging from [...] % to [...] %), which supports the existence of a significant degree of market power:

**Table 11 – SMD Logistics’ margins in Sweden (2021)**

Products	Gross margin	EBITDA margin	EBIT margin	Net margin
FMC	[...] %	[...] %	[...] %	[...] %
RYO	[...] %	[...] %	[...] %	[...] %
Heated tobacco	[...] %	[...] %	[...] %	[...] %
Snus	[...] %	[...] %	[...] %	[...] %
Nicotine pouches	[...] %	[...] %	[...] %	[...] %

Source: Form CO, Table 33

- (173) **Sixth**, the downward integration of PMI resulting from the Transaction would further reduce the addressable market. Such reduction would make entry more difficult and less likely, thereby reducing the risk and likelihood of entry and increasing SMD’s bargaining power.
- (174) Given that PMI represents [10-20] % of combustible tobacco, smoke-free, and related products sold in Sweden<sup>192</sup> and in view of the importance of economies of scale on this market, PMI’s downward integration would significantly increase barriers to entry and SMD’s market power.

<sup>191</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 13.

<sup>192</sup> The merged entity would represent around [40-50] % of the market.



(175) In light of the foregoing, the Commission concludes that the merged entity would benefit from a significant degree of market power for the distribution of combustible, smoke-free, and related products as SMD is an indispensable customer for manufacturers. As a result, the transaction would enable the merged entity to foreclose actual or potential competitors for the wholesale supply of FMC, RYO, snus, nicotine pouches and heated tobacco.

5.3.1.2.2.2. Incentive

(176) In terms of incentive, a distinction can be made between snus and nicotine pouches, on the one hand, and FMC, RYO and heated tobacco, on the other hand.

(177) With respect to snus and nicotine pouches, SMD is already vertically integrated. In view of the low increments brought about by PMI ([0-5]%), the Transaction is unlikely to significantly change the incentive of SMD to foreclose competitors on these markets. This is consistent with the results of the investigation which show that PMI does not currently play a significant role for the supply of snus and nicotine pouches and that Swedish retailers do not expect PMI to significantly grow on these markets.<sup>193</sup>

(178) The situation is different for FMC, RYO and heated tobacco since SM does not currently sell these products and PMI’s market shares are significant ([30-40]%, [20-30]% and [90-100]% respectively). In this regard, the results of the investigation confirm that the merged entity would likely have an incentive to foreclose PMI’s competitors in Sweden for the following reasons.

(179) *First*, as shown below, despite the significant and high margins in absolute terms of SMD (with gross margins between [...] % and [...] %), the upstream margins of PMI for the wholesale supply of FMC and RYO are even higher.

**Table 12 – PMI’s margins in Sweden (2021)**

Products	Gross margin	EBITDA margin	EBIT margin	Net margin
FMC	[...] %	[...] %	[...] %	[...] %
RYO	[...] %	[...] %	[...] %	[...] %
Heated tobacco	[...] %	[...] %	[...] %	[...] %
Snus	[...] %	[...] %	[...] %	[...] %
Nicotine pouches	[...] %	[...] %	[...] %	[...] %

Source: Form Co, Table 32

(180) *Second*, the results of the investigation confirm that the merged entity would have a financial incentive to foreclose PMI’s rivals. As one competitor explained: ‘*The Transaction may give an incentive to PMI to stop delivering the same level of satisfaction to the Company for the distribution of the Company’s products in Sweden through SMD*’.<sup>194</sup>

<sup>193</sup> See section 5.2.

<sup>194</sup> Minutes of a call with a competitor of 8 September 2022, paragraph 11.

- (181) Likewise, according to another competitor: ‘*Post-closing, SMD will have a strong incentive to self-preference PMI’s combustible products over those of competitors [...] PMI could have an incentive to bear the extra cost of excluding or limiting the access to markets of its competitors through SMD if it enables PMI to increase its market share for combustible tobacco products at the retail level*’.<sup>195</sup>
- (182) **Third**, the above elements are not contradicted by the relatively high brand loyalty of end consumers for combustible tobacco, smoke-free, and related products. As one competitor explains: ‘*The fairly high brand loyalty that exists for tobacco and related products does not put into question the interest that PMI may have to discriminate competing products post-acquisition. This is because for low cost brands, demand’s elasticity tends to be higher (i.e. consumers tend to be more sensitive to price increases) and a large number of them would likely switch to a competing brand in response to an increase in retail prices*’.<sup>196</sup>
- (183) Furthermore, even in the absence of demand diversion, PMI may have an interest to increase the distribution costs of its rivals if it translates into an increase in retail prices, as this would allow PMI to increase its own prices.
- (184) In view of the above, the Commission concludes that the Transaction is likely to give an incentive to the merged entity to foreclose competitors for the wholesale supply of FMC, RYO and heated tobacco.

#### 5.3.1.2.2.3. Impact

- (185) The results of the investigation confirm that the merged entity would be able to partially foreclose PMI’s competitors for the wholesale supply of FMC and RYO, through price based or non-price based mechanisms for the following reasons.
- (186) **First**, market participants confirmed that the merged entity would likely decide to partially foreclose competing FMC and RYO manufacturers in Sweden by increasing SMD’s distribution fees.<sup>197</sup>
- (187) In response to such price increase, several competitors explained that they may decide to increase the prices they charge to retailers. One competitor explained for example that ‘*distribution costs is of course an important factor. A price increase is certainly an option and can be the outcome of this analysis*’.<sup>198</sup> This is consistent with the results of the investigation which confirmed that distribution accounts for a sizeable portion ([5-15]%) of the overall costs incurred by manufacturers in Sweden.<sup>199</sup>
- (188) **Second**, market participants also confirmed that the merged entity would be able to foreclose PMI’s competitors through non-price based mechanisms, for instance by refusing to distribute certain of their products, by preventing them from launching new products on the market, by degrading the conditions under which these

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<sup>195</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 11.

<sup>196</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 15.

<sup>197</sup> Questionnaire Q1 to competitors, question 15.

<sup>198</sup> Response from a competitor to Phase 1 RFI 1 dated 16 September 2022.

<sup>199</sup> Response to Phase 1 RFI 4; responses from two competitors to Phase 1 RFI 1 dated 16 September 2022; minutes of a call with a competitor of 9 September 2022, paragraphs 17-18.



products are distributed and/or by making use of competitively sensitive information to which it may get access via SMD.<sup>200</sup>

- (189) As one competitor explained: ‘*PMI could foreclose the access of competitors to the market, for example if a tobacco product manufacturer wanted to launch a new innovative products, SMD could try to prevent the product reaching the market by claiming compliance issues of this product. By way of illustration, [this competitor] recently launched a product where the biggest hurdle was to convince SMD that the product was compliant*’.<sup>201</sup>
- (190) This is also consistent with PMI’s internal documents. [...].<sup>202</sup>
- (191) **Third**, the results of the investigation also confirm that if SMD were to stop distributing competing FMC and RYO brands, it would take a significant time for competing manufacturers to find an alternative, which would be more expensive and may not be able to offer the same level of coverage (especially with respect to small retail stores).<sup>203</sup> This in turn would likely result in higher retail prices and could reduce choice in small retail stores (e.g. independent stores, petrol stations) which represent around 25% of the retail market in Sweden.<sup>204</sup> This is consistent with the fact that several retailers expressed concerns in this respect.<sup>205</sup>
- (192) Consequently, the Commission considers that an attempt to partially or totally foreclose rival manufacturers of FMC, RYO or heated tobacco would have a significant impact.

#### 5.3.1.2.3. Conclusion

- (193) In light of the considerations in paragraphs (153) to (192) above, as well as the evidence available to it, the Commission concludes that the Transaction gives rise to serious doubts as to its compatibility with the internal market due to the vertical non-coordinated effects arising from the Transaction in connection with the upstream markets for the wholesale supply of FMC, RYO and heated tobacco in Sweden and the downstream market for the distribution of combustible tobacco, smoke-free, and related products in Sweden.
- (194) The Commission concludes that the Transaction does not give rise to serious doubts as to its compatibility with the internal market due to the vertical non-coordinated effects arising from the Transaction in connection with the upstream markets for the wholesale supply of snus and nicotine pouches in Sweden and the downstream market for the distribution of combustible tobacco, smoke-free, and related products in Sweden.

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<sup>200</sup> Response from a competitor to Phase 1 RFI 1 dated 16 September 2022.

<sup>201</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 11.

<sup>202</sup> See figure 5 above.

<sup>203</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 13.

<sup>204</sup> Minutes of a call with a competitor of 17 August 2022, paragraph 16.

<sup>205</sup> Questionnaire Q2 to customers in Sweden, question 17.1.1; minutes of the call with a customer of 1 July 2022, paragraph 10.

### 5.3.1.3. Input foreclosure

- (195) As explained above, the distribution of combustible tobacco, smoke-free, and related products in Sweden is characterised by significant economies of scale. Accordingly, the size of the addressable market is critical both to attract new entrants and for such entrants to be competitive.
- (196) In this respect, the Commission notes that the merged entity would represent up to [40-50]% of the overall market for the wholesale supply of combustible tobacco, smoke-free, and related products in Sweden with a significant increment ([10-20]%) brought about by PMI. This downward integration of PMI would significantly reduce the addressable market and would make entry both less attractive and more difficult.
- (197) Given the importance of scale in this market, the merged entity would have no incentive to move away from SMD and sponsor new entry, which in turn would further increase barriers to entry.
- (198) Nevertheless, the question whether serious doubts arise in connection with such input foreclosure strategy can be left open as the commitments discussed in Section 7 that are already necessary to remove the serious doubts established in paragraphs (153) to (192) above also remove entirely the vertical link that exists in connection with PMI's activities upstream and SM's activities for the distribution of combustible tobacco, smoke-free, and related products in Sweden.

### 5.3.2. *Manufacture of nicotine powder (upstream) / Wholesale supply of nicotine pouches (downstream)*

- (199) The Transaction also gives rise to vertically affected markets between (i) PMI's activities for the wholesale supply of nicotine powder (through its subsidiary Fertin<sup>206</sup>) in the EEA; and (ii) SM's activities for the wholesale supply of nicotine pouches in Spain, Bulgaria and Romania. The table below provides an overview of the Parties' volume market shares on these vertically affected markets:

**Table 13 – Wholesale supply of nicotine powder and nicotine pouches: overview of the Parties' volume market shares (2021)**

Nicotine powder (upstream)		Nicotine pouches (downstream) <sup>207</sup>	
Geographic market	PMI	Geographic market	SM
EEA	[0-5]%	Spain	[60-70]%
		Bulgaria	[30-40]%
		Romania	[40-50]%

*Source: Form CO, Section 7*

- (200) The table below provides PMI's volume market shares on the upstream market for the wholesale supply of nicotine powder over the past three years:

<sup>206</sup> PMI acquired Fertin in 2021. Fertin is active in the market for the supply of nicotine powder worldwide, including in the EEA.

<sup>207</sup> SM's market shares for the wholesale supply of nicotine pouches in Spain, Bulgaria and Romania are based on SM's best estimates.

**Table 14 – Wholesale supply of nicotine powder**

EEA	PMI
	<i>Vol.</i>
2021	[0-5]%
2020	[0-5]%
2019	[0-5]%

*Source: Form CO, Section 7<sup>208</sup>*

- (201) According to the Notifying Party, it is not possible to identify any other nicotine powder manufacturer that has a market share of at least 5%. As a result, the Parties were unable to provide exact market shares for competitors of PMI on this market.<sup>209</sup> The Notifying Party nevertheless explained that PMI faces several competitors on this market, including Cambrex Corporation, ChemNovatic, CNT, Enorama Pharma and BGP Group.
- (202) As for SM's market share on the downstream market for the wholesale supply of nicotine pouches in Spain, Bulgaria and Romania, the Notifying Party was only able to provide market share estimates for 2021 in volume. In this respect, the Notifying Party explained that it is not possible to provide value market shares as the markets are in their nascent stage and no third party data is available to track these markets. For the same reason, the Notifying Party submitted that it is not possible to identify any specific competitor to SM in those markets with a market share of at least 5%.

#### 5.3.2.1. The Notifying Party's arguments

- (203) According to the Notifying Party, the Transaction does not give rise to input foreclosure concerns because the merged entity will continue to face a large number of significant alternative suppliers of nicotine powder.
- (204) Likewise, the Notifying Party submits that the Transaction does not raise customer foreclosure concerns because:
- (a) the upstream market for the supply of nicotine powder is, at least, EEA-wide whereas the downstream market for the supply of nicotine pouches is national in scope;
  - (b) the downstream markets for the supply of nicotine pouches are in their nascent stage and currently entertain very limited overall volumes;

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<sup>208</sup> The Parties do not have market data for the wholesale supply of nicotine powder. As a result, these market shares are based on the Euromonitor market level data which provides estimates of the total market sizes of nicotine pouches at the retail level between 2019 and 2021 for the majority of the EEA countries. The Parties consider that these market sizes for the supply of nicotine pouches are a good proxy for the market shares of the upstream market for the supply of nicotine powder. Even though the market size estimates do not include all EEA countries, these estimates are conservative as the market sizes for the countries where PMI is active are all included (i.e. Sweden and Denmark).

<sup>209</sup> Form CO, para. 559.

- (c) SM does not sell nicotine pouches directly into Spain, Bulgaria or Romania but rather through OTP in Slovenia, which then resells into these countries.

#### 5.3.2.2. The Commission's assessment

- (205) In light of the volume market share of PMI upstream for the wholesale supply of nicotine powder in the EEA which remains below 5% in 2021 ([0-5]%), the Transaction is unlikely to give rise to input foreclosure concerns. This is consistent with the results of the market investigation which did not elicit any concern in this respect.
- (206) As for the risk of customer foreclosure, the Commission notes that the downstream markets for the wholesale supply of nicotine pouches in Spain, Bulgaria and Romania together account for [0-5]% of the market for nicotine pouches in the EEA.<sup>210</sup> As a result, PMI's competitors for the supply of nicotine powder will continue to benefit from significant economic alternatives to sell nicotine powder in the EEA. This is also consistent with the results of the market investigation which did not elicit any concern in this respect.
- (207) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA agreement for the wholesale supply of nicotine powder (upstream) and nicotine pouches (downstream).

### 5.4. Conglomerate effects

#### 5.4.1. *Supply of oral nicotine products (chiefly snus, and nicotine pouches in Sweden) and supply of combustible tobacco products (chiefly FMC) in Sweden and Norway*

- (208) The Transaction leads to conglomerate links between the Parties' manufacturing and supply of oral nicotine products (chiefly snus, and nicotine pouches in Sweden) and combustible tobacco products (chiefly FMC) in Sweden and Norway.

##### 5.4.1.1. The Notifying Party's arguments

- (209) The Notifying Party argues that the merged entity would not have the ability nor incentive to foreclose its competitors vis-à-vis retailers neither in Sweden nor in Norway.
- (210) Regarding Sweden, the Notifying Party argues that:
- (a) **First**, any attempted bundling, tying, or leveraging strategy would be defeated by retailers, who have strong countervailing buyer power, and who know that manufacturers have to sell via their stores to reach end consumers. Further, retailers want to meet consumers' preferences (who are loyal to their brands), and therefore source varied brands and tastes. Retailers would not be willing to sacrifice sales of competing brands.<sup>211</sup>
- (b) **Second**, strategies to leverage the merged entity's position across products to obtain more signage or shelf space is implausible, as manufacturers and

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<sup>210</sup> Response to Phase 1 RFI 8, question 8.

<sup>211</sup> Response to P1 RFI 9, paragraph 1.2.

retailers negotiate shelf space and signage for each category separately. Retailers award the most favourable space to the supplier that provides with the highest total returns to the retailer for a given category.<sup>212</sup>

- (c) **Third**, the merged entity would have similar shares to those enjoyed by larger competitors in other categories, who could engage in similar counterstrategies should the merged entity engage in a foreclosure-type strategy. For example, BAT is the leader in nicotine pouches and JTI in FMC and RYO.<sup>213</sup>
  - (d) **Fourth**, past practices of the Parties, who already had strong shares (e.g. SM had a leading share in snus, and PMI a strong share in FMC and RYO) have shown that they were not able to use their position to foreclose competitors from related categories. For example, notwithstanding SM's position in snus at the time, BAT successfully entered the nicotine pouches market in Sweden, and now leads it. PMI also did not engage in a bundling or tying strategy to promote AG Snus' products.<sup>214</sup>
- (211) Regarding Norway, the Notifying Party argues that similar considerations apply: (i) retailers enjoy similar buyer power; (ii) promotion of nicotine-containing products is prohibited and packaging is uniform, so negotiations focus on the benefits that each product can bring to retailers, not in a broader product range; and (iii) the merged entity does not have market power, with a declining share and strong competitive pressure in the snus market from BAT and JTI.<sup>215</sup>

#### 5.4.1.2. The Commission's assessment

- (212) During the course of the Phase I market investigation, the Commission received complaints from market participants relating to anti-competitive effects arising from the increased market power of the merged entity, which could allegedly leverage its stronger position across product categories and thus foreclose competitors in Sweden and Norway.
- (213) In particular, a market participant submitted that the merged entity would have the ability and incentive to foreclose competitors by pursuing a bundling/tying strategy by linking its strong oral tobacco and nicotine products offering (e.g. snus and nicotine pouches) to its combustible tobacco products (notably, FMC).<sup>216</sup>
- (214) However, these claims were not corroborated by the results of the market investigation for the following reasons.
- (215) **First**, the outcome of the market investigation does not substantiate a risk of tying or bundling between snus and combustible tobacco products, as other competitors apart from the Parties have must-have brands<sup>217</sup> and there is substantial brand

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<sup>212</sup> Response to P1 RFI 9, paragraph 1.3.

<sup>213</sup> Response to P1 RFI 9, paragraph 1.4.

<sup>214</sup> Response to P1 RFI 9, paragraph 15.

<sup>215</sup> Response to P1 RFI 9, paragraphs 1.6, 1.7, and 1.8.

<sup>216</sup> Non-confidential version of the submission of a market participant of 6 October 2022, paragraph 1.3.

<sup>217</sup> For example, for snus, 'Epok' by BAT and 'Skruf' by Imperial Tobacco (Minutes of a call with a customer of 29 June 2022, paragraph 9), in nicotine pouches 'Velo' by BAT and 'Nordic Spirit' by JTI (Minutes of a call with a competitor of 13 July 2022, paragraph 8); and in FMC, 'Lucky Strike' by BAT, and 'Winston' or 'Camel' by JTI.

loyalty both for snus and for combustible tobacco products.<sup>218</sup> Therefore, end-customers could go to a different retail store if a certain store agreed to the merged entity's foreclosure strategy and did not source competing brands.

- (216) This finding is consistent with the Parties' internal documents. For example, an industry report indicates that '[...]'.<sup>219</sup>
- (217) **Second**, the majority of customers in Sweden who expressed an opinion indicated that they have separate negotiations with retailers for each product category.<sup>220</sup> In this line, a customer indicates that they have separate negotiations for FMC, snus and nicotine pouches.<sup>221</sup> Therefore, to leverage a position across categories proves more difficult when negotiations are separate.
- (218) **Third**, stores enter into agreements with category captains, which vary per product (e.g. cigarettes, nicotine pouches, and snus) and who have control over the exposure each brand gets.<sup>222</sup> This is because these category captains provide cabinets for the storage of different tobacco and nicotine products, and therefore decide what exposure each brand gets in the planogram (i.e. to list the brands that will be displayed for sale in the fridge).<sup>223</sup> Therefore, as a competitor pointed out, in Sweden, '*different nicotine products suppliers are the ones stocking stores' shelves*'.<sup>224</sup> This appears to be the case also in Norway.<sup>225</sup> This finding is also reflected in the Parties' internal documents, which list a number of retail chain stores, a number of categories (e.g. cigarettes, snus, nicotine pouches), and the different category captains in each of the chains.<sup>226</sup>
- (219) Therefore, should the Parties try to foreclose competitors, other nicotine product suppliers which are category captains in other retail chains (and who have similar product portfolios to that of the merged entity) could retaliate, by designing a planogram that was detrimental for the Parties' products. Moreover, some of the agreements on planograms supplied by the Notifying Party include a clause [...].<sup>227</sup>

#### 5.4.1.3. Conclusion

- (220) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA agreement regarding conglomerate effects between snus and nicotine pouches on the one hand, and combustible tobacco products (chiefly, FMC) on the other.

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<sup>218</sup> Minutes of a call with a customer of 7 July 2022, paragraph 15; minutes of a call with a competitor of 17 August 2022, paragraph 15; minutes of a call with a customer, 29 June 2022, paragraph 8.

<sup>219</sup> Annex 5.4.3 – 47 to the Form CO – [...].

<sup>220</sup> Questionnaire Q2 for customers in Sweden, question 5.2.

<sup>221</sup> Questionnaire Q2 for customers in Sweden, question 5.2.1.

<sup>222</sup> Minutes of a call with a competitor of 13 July 2022, paragraph 21.

<sup>223</sup> Minutes of a call with a competitor of 13 July 2022, paragraph 21; minutes of a call with a competitor of 30 June 2022, paragraph 20.

<sup>224</sup> Minutes of a call with a competitor of 13 July 2022, paragraph 21.

<sup>225</sup> Minutes of a call with a competitor of 30 June 2022, paragraph 20.

<sup>226</sup> Annex 5.4.3 – 10 to the Form CO, slides 60 and 61.

<sup>227</sup> Annex 11.1 to the Response to Phase 1 RFI 1, clause 4.b.

## 6. EFFICIENCIES

- (221) The Commission's framework for assessing efficiencies resulting from a merger is set out in its Horizontal Merger Guidelines, which provide that the Commission will consider positive effects of efficiencies that benefit consumers as part of its overall assessment of the Transaction, provided the efficiencies are substantiated and satisfy the following three cumulative criteria:<sup>228</sup>
- (a) Efficiencies have to benefit consumers in the sense that they should be substantial and timely and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur;<sup>229</sup>
  - (b) Efficiencies have to be a direct consequence of the concentration and cannot be achieved to a similar extent by less anticompetitive alternatives;<sup>230</sup>
  - (c) Efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers.<sup>231</sup>
- (222) The Horizontal Merger Guidelines further explain that it is for the Parties to provide evidence to substantiate the claim that efficiencies fulfil the above criteria as most of the information is solely in their possession. It is, for example, incumbent upon the Parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised.<sup>232</sup>
- (223) The Commission notes that the Notifying Party has not submitted any substantiated efficiency claims in line with the criteria set out in the Horizontal Merger Guidelines, either in the relevant section of the Form CO (section 9) or in any other part of the Form CO or a separate submission.
- (224) According to Section 9 of the Form CO, the largest efficiency gains and associated benefits or synergies brought about by the Transaction derive from PMI entering the U.S. market with certain smoke-free products. In addition, the Parties explain that the Transaction will result in accelerated growth and expansion of Swedish Match's smoke-free offering internationally, including the in the EEA. As a result, the Notifying Party expects the Transaction to increase output, in particular in relation to nicotine pouches, across the EEA (benefit to consumers). In turn, the Notifying Party argues that the Transaction will give rise to positive externalities for public health and society as a whole since oral smoke-free products present less risk to respiratory organs, according to the Notifying Party.
- (225) The Commission takes the view that the Notifying Party has not made any efficiency claim meeting the applicable cumulative efficiency test of verifiability, merger specificity and benefit to consumers for the following reasons.

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<sup>228</sup> Horizontal Merger Guidelines, paragraphs 77 and 78.

<sup>229</sup> Horizontal Merger Guidelines, paragraph 79.

<sup>230</sup> Horizontal Merger Guidelines, paragraph 85.

<sup>231</sup> Horizontal Merger Guidelines, paragraph 86.

<sup>232</sup> Horizontal Merger Guidelines, paragraph 87.

- (226) *First*, the Notifying Party did not put forward any tangible evidence to quantify these alleged efficiency gains. The Notifying Party merely stated in general terms that the Transaction would increase output, have positive externalities for public health and society and be beneficial to consumers of smoke-free products.
- (227) *Second*, the Notifying Party did not substantiate why these alleged efficiency gains would be merger specific and in particular, why there would be no less anticompetitive alternatives. In particular, the Notifying Party did not substantiate that the inclusion of SMD in the scope of the Transaction was necessary for these alleged efficiency gains.
- (228) *Third*, as the Notifying Party acknowledges, most of these alleged efficiency gains would benefit consumers in the US. In any event, none of them would benefit consumers of FMC, RYO or heated tobacco, which are the products for which the Commission expressed serious doubts as to the compatibility of the Transaction with the internal market. On the contrary, the Notifying Party even explained that ‘*PMI did not assume any synergies arising as a result of SMD Logistics*’.<sup>233</sup>
- (229) In view of the foregoing, the Commission takes the view that the Notifying Party has not made any efficiency claim meeting the applicable cumulative efficiency test of verifiability, merger specificity and benefit to consumers.

## **7. PROPOSED REMEDIES**

### **7.1. Analytical framework**

- (230) The following principles from the Remedies Notice<sup>234</sup> apply where parties to a merger choose to offer commitments in order to restore effective competition.
- (231) Where, as in this case, a notified concentration raises serious doubts as to its compatibility with the internal market, the Parties may modify the notified concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having it declared compatible with the internal market pursuant to Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.
- (232) The Commission only has the power to accept commitments that are capable of rendering the concentration compatible with the internal market in that they will prevent a significant impediment to effective competition in all relevant markets where competition concerns were identified.<sup>235</sup> To that end, the commitments have to eliminate the competition concerns entirely<sup>236</sup> and have to be comprehensive and effective from all points of view.<sup>237</sup>

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<sup>233</sup> Form CO, para. 628.

<sup>234</sup> Commission’s Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (‘Remedies Notice’), OJ C 267, 22.10.2008, p. 1.

<sup>235</sup> Remedies Notice, paragraph 9.

<sup>236</sup> Case C-202/06 P *Cementbouw Handel & Industrie v Commission* [2007] ECR 2007 I-12129, paragraph 54.

<sup>237</sup> Remedies Notice, paragraphs 9 and 61.



- (233) In assessing whether proposed commitments are likely to eliminate its competition concerns, the Commission considers all relevant factors, including *inter alia* the type, scale and scope of the commitments, judged by reference to the structure and particular characteristics of the market in which those concerns arise, including the position of the parties and other participants on the market.<sup>238</sup> Moreover, commitments must be capable of being implemented effectively within a short period of time.<sup>239</sup>
- (234) Where a proposed concentration threatens to significantly impede effective competition, the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.<sup>240</sup>
- (235) Divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps.<sup>241</sup>

## **7.2. Description of the Commitments of 4 October 2022**

- (236) In order to render the concentration compatible with the internal market, the Notifying Party has modified the notified concentration by entering into the following commitments, which are annexed to this Decision and form an integral part thereof (the ‘Commitments of 4 October 2022’).
- (237) On 4 October 2022, the Notifying Party committed to divest SMD which corresponds to the entire distribution arm of Swedish Match distributing combustible tobacco, smoke-free, and related products in both Sweden and in Norway (the ‘Divestment Business’).
- (238) The tangible assets included in the Divestment Business include SMD’s warehouse in Brunna [...] as well as the whole inventory owned by SMD Logistics in its warehouse and in its distribution network (including [...]). They further include [...].
- (239) The intangible assets part of the Divestment Business include in particular:
- (a) [...];
  - (b) [...];
  - (c) [...]; and
  - (d) [...];
- (240) The following licences, permits and authorisations are also included:
- (a) SMD’s permit for the wholesale of tobacco in Sweden; and
  - (b) SMD’s authorisations as a warehouse keeper and stockist.

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<sup>238</sup> Remedies Notice, paragraph 12.

<sup>239</sup> Remedies Notice, paragraph 9.

<sup>240</sup> Remedies Notice, paragraph 22.

<sup>241</sup> Remedies Notice, paragraph 61.

- (241) The following main contracts, agreements, leases, commitments and undertakings are included:
- (a) SMD's agreements [...]in Sweden;
  - (b) Agreements for the distribution of [...];
  - (c) SMD's agreements with [...];
  - (d) SMD's [...]; and
  - (e) SMD's agreement [...].
- (242) The Divestment Business personnel includes all personnel currently employed by SMD and, at the option of the purchaser, [...]of legal, pay roll and procurement functions who currently spend [...] of their time supporting SMD.
- (243) Further, the Commitments of 4 October 2022 included arrangements for the supply of the following products and services by the Notifying Party to the Divestment Business and the purchaser for a transitional period of up to [...]:
- (a) IT infrastructure services, including [...]
  - (b) IT workstations equipment and end-user support services, such as [...];
  - (c) Application services, such [...];
  - (d) Supply of certain packing materials; and
  - (e) Legal, pay roll, and procurement functions in a materially similar manner as provided to date.
- (244) In addition to the divestment of SMD, the Notifying Party has entered into related commitments, *inter alia* regarding the separation of the Divestment Businesses from their retained businesses, the preservation of the viability, marketability and competitiveness of the Divestment Businesses, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.
- (245) According to the Notifying Party, the Commitments of 4 October 2022 would eliminate the vertical link between PMI's upstream activities for the wholesale supply of FMC, RYO and heated tobacco and SM's downstream activities for the distribution of these products in Sweden. The Notifying Party also submitted that SMD is currently managed as a standalone business which is viable and competitive so a number of suitable purchasers would be interested in its acquisition.

### **7.3. Assessment of the Commitments of 4 October 2022**

- (246) As a preliminary remark, the Commission notes that the Commitments of 4 October 2022 would be subscribed by PMI, to the exclusion of SM, which may raise concerns for the hold-separate obligations during the gap period between the Effective Date and the closing of the acquisition of SM by PMI. Nevertheless, given that the Transaction takes the form of a public offer, PMI committed to keep and procure to keep the Divestment Business separate from the Effective Date until Closing. The other changes made to the standard text of the commitments are clerical and do not appear to give rise to implementation risks.

(247) In this context, the market test was launched on 5 October 2022 and focused on the following topics: (i) whether the Commitments were sufficient to entirely remove the competition concerns caused by the proposed Transaction; (ii) whether SMD constitutes a standalone and viable business; (iii) whether there are any specific conditions that a potential purchaser should fulfil; (iv) whether the Divestment Business is sufficiently attractive to find a suitable purchaser.

### 7.3.1. *Removal of competition concerns*

(248) The divestiture of SMD removes the entire vertical relationship between PMI's upstream activities for the wholesale supply of FMC, RYO and heated tobacco and SM's activities for the distribution of combustible, smoke-free, and related products in Sweden.

(249) The Commission considers that the elimination of these vertical relationships between the Parties' activities will remove the ability and incentive of the merged entity to foreclose upstream competitors.

(250) This was confirmed by the majority of respondents to the market test who expressed a view, according to which the Commitments of 4 October 2022 – subject to certain amendments addressed further below – are suitable and adequate to effectively remove the vertical competition concerns that may result from the Transaction.<sup>242</sup>

### 7.3.2. *Viability of the Divestment Business*

(251) SMD is the distribution arm of SM, which manages all the distribution activities of SM and is run independently of SM. SMD is a profitable business with a significant EBITDA margin ([...]%). Furthermore, the Divestment Business will be transferred to the purchaser with all personnel currently employed by SMD (with an option for the inclusion of shared personnel), with all tangible and intangible assets used by SMD for the purpose of its activities, both in Sweden and in Norway (including the relevant permits, authorizations and licenses) and with the relevant contracts [...]. In view of the above, the Commission considers that the Divestment Business is viable. The responses from the market test confirmed the Commission's assessment, subject however to certain amendments.

(252) **First**, with respect to the contract that will be entered between SM and SMD<sup>243</sup>, a majority of respondents to the market test indicated that the conditions initially foreseen in the Commitments of 4 October 2022 would not be satisfactory to ensure the viability of the Divestment Business.<sup>244</sup>

(253) In particular, several respondents explained that the [...]duration initially foreseen should be extended.<sup>245</sup> One participant explained for instance that '*To secure the competitiveness it could be longer than [...]*'.<sup>246</sup> Likewise, another participant explained that a [...]duration could be sufficient: '*PMI should commit to the*

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<sup>242</sup> Market test questionnaire Q1 for the participants to the market investigation, question B.1.

<sup>243</sup> See para. 241(b) above.

<sup>244</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.D.2.

<sup>245</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.D.2.1.

<sup>246</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.D.2.1.

*distribution of both PMI and Swedish Match products for a duration of [...], at least. Without the benefit of PMI and Swedish Match products, SMD would have reduced scale and would be unlikely to be viable*'.<sup>247</sup>

- (254) **Second**, some participants explained that the duration of the transitional service agreements<sup>248</sup> that will be entered between the merged entity and the Divestment Business may need to be extended to ensure the viability of the business.<sup>249</sup>
- (255) As one participant explained: *'[...]appears to be a relatively limited period for a transitional services agreement*'.<sup>250</sup> Likewise, another participant explained that *'It may be necessary to prolong the transitional period*'.<sup>251</sup> According to another participant, *'SMD is a highly complex and critical operation, whether [...]of IT infrastructure services is enough is difficult to have an opinion on but our experience is that undertakings of this size takes significantly longer*'.<sup>252</sup>
- (256) A majority of participants who expressed a view thus consider that an option to extend the duration of these arrangements should be included.<sup>253</sup> In this respect, several participants considered that an option to extend the arrangements by [...] would be necessary.<sup>254</sup>
- (257) According to one participant: *'In case integration has not been completed, the Purchaser should have the possibility of extending the transitional arrangements with an additional [...]. Such period could be necessary to ensure the lasting viability*'.<sup>255</sup> Likewise, another participant explained that *'an option to extend for further [...]*' would be appropriate in order to enable the integration of the Divestment Business within the purchaser's organization.<sup>256</sup>

### 7.3.3. Purchaser criteria

- (258) According to the Commitments of 4 October 2022, the purchaser has to be independent of PMI, to have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business and the acquisition by the purchaser must not create prima facie competition concerns nor give rise to a risk that the implementation of the commitments will be delayed.
- (259) In this context, the Commission considers that the conditions that the purchaser will have to satisfy in order to be approved guarantee the future viability and competitiveness of the Divestment Business.

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<sup>247</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.D.2.1.

<sup>248</sup> Concerning IT infrastructure services, IT workstation equipment and end-user support services, application services, the supply of certain packaging materials, as well as legal, pay roll and procurement functions.

<sup>249</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.1.

<sup>250</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.1.

<sup>251</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.1.

<sup>252</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.1.

<sup>253</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.2.2.

<sup>254</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.2.2.1.

<sup>255</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.2.2.1.

<sup>256</sup> Market test questionnaire Q1 for the participants to the market investigation, question C.G.1.2.2.1.

(260) Most participants to the market test confirmed that the criteria listed in the Commitments of 4 October 2022 are relevant to identify a suitable purchaser<sup>257</sup> provided that the purchaser is not a competing manufacturer of combustible tobacco, smoke-free, and related products<sup>258</sup> and that it has prior experience in logistics services in general, in Sweden or elsewhere.<sup>259</sup>

(261) As one logistic company explained: *‘If one manufacturer gets the full country distribution, this would create an issue to others’*.<sup>260</sup> Another participant stressed in this respect that: *‘The Purchaser should also not be a Manufacturer’*.<sup>261</sup> Likewise, according to another participant, it is *‘Necessary with an independent buyer. Otherwise it will affect the competition in a negative way’*.<sup>262</sup>

#### 7.3.4. Attractiveness of the Commitments

(262) SMD is a profitable, pre-existing and relatively stand-alone business, with a high EBITDA ([...]%) and generating high margins. The Commission therefore considers that the Divestment Business would be attractive to suitable purchasers.

(263) Furthermore, the majority of the participants to the market test who expressed a view confirmed that the Divestment Business would be sufficiently interesting to attract suitable purchasers.<sup>263</sup>

(264) As one logistic company explained: *‘To warehouse and deliver tobacco products (and to have performed these operations for a quite long time without any major incidents known to us) indicate that the Divested Business has a well-organised business and organisation with high security facilities, routines and processes. The business includes most likely big volumes and high-frequency transports to a big number of receivers all over the country. [Confidential] believes it is most likely to be a business that is interesting to a number of potential purchasers’*.<sup>264</sup>

(265) This is consistent with the information provided by the Notifying Party during the investigation showing that at least one potential purchaser already reached out to PMI indicating its initial interest in reviewing the business once the sales process is formally initiated.<sup>265</sup>

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<sup>257</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.1  
<sup>258</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.1.1.  
<sup>259</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.2.  
<sup>260</sup> Market test questionnaire Q2 for logistic companies, question B.D.2.1.  
<sup>261</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.1.1.  
<sup>262</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.1.1.  
<sup>263</sup> Market test questionnaire Q1 for the participants to the market investigation, question D.4; market test questionnaire Q2 for logistic companies, question C.4.  
<sup>264</sup> Market test questionnaire Q2 for logistic companies, question C.4.1.  
<sup>265</sup> Response to Phase 1 RFI 10, question 3.

#### 7.4. Description of the Final Commitments

- (266) To alleviate the concerns above concerning the viability of the Divestment Business and the suitability of potential purchasers, the Parties offered updated commitments on 18 October 2022 (the ‘Final Commitments’). The Final Commitments:
- (a) extend the duration of the contract<sup>266</sup> that will be entered into between SM and SMD from [...] (including for the distribution of SM’s products in Norway, at the option of the purchaser);
  - (b) include an option for a further [...]extension of the transitional service arrangements;
  - (c) specify that the purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business and must not be a category leader in Sweden for the wholesale supply of FMC, RYO, heated tobacco products, snus, or nicotine pouches.

#### 7.5. Assessment of the Final Commitments

- (267) The Commission takes the view that the Final Commitments address all concerns raised by market participants during the market test in connection with the Commitments of 4 October for the following reasons.
- (268) *First*, in light of the results of the investigation, a [...]duration for the contract between SMD and SM is sufficient to ensure the viability and competitiveness of the Divestment Business.
- (269) For the sake of clarity, the Commission notes that the commitments require the transfer of (i) the contracts entered into between [...]and (ii) the transfer of the agreements for the [...].<sup>267</sup> The commitments only require the transfer of these contracts and agreements and do not include further requirements as to their provisions.<sup>268</sup>
- (270) *Second*, an option for a [...]extension of the transitional service arrangements may enable a purchaser to benefit from such transitional service arrangement for an overall period [...], which appears sufficient to ensure the viability of the Divestment Business. In light of the results of the market test, certain purchasers may need less time to fully integrate the Divestment Business so a mere option in this respect appears to be reasonable, also as a way to confine transitional links between the merged entity and the Divestment Business to what is strictly needed to ensure the viability and competitiveness of the Divestment Business.
- (271) *Third*, the clarification that the purchaser must neither be a category leader in the wholesale supply of FMC, RYO, heated tobacco products, snus nor nicotine pouches reduces the non-implementation risk that may arise if one or more non-suitable purchasers were rejected.

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<sup>266</sup> See para. 241(b) above.

<sup>267</sup> In Sweden and, at the option of the Purchaser, in Norway.

<sup>268</sup> Likewise, the commitments also include the transfer of SMD’s agreements [...], without further requirements. In any event, the commitments are not binding on [...].

## **7.6. Conclusion on the assessment of the Final Commitments**

- (272) For the reasons outlined above, the commitments entered into by the undertakings concerned are sufficient to entirely eliminate the serious doubts as to the compatibility of the transaction with the internal market.
- (273) The commitments in section B of the Annex constitute conditions attached to this Decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the Annex constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

## **8. CONCLUSION**

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

*For the Commission*

*(Signed)*  
*Margrethe VESTAGER*  
*Executive Vice-President*

CASE M.10792 – PHILIP MORRIS INTERNATIONAL INC. / SWEDISH MATCH AB

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the "**Merger Regulation**"), Philip Morris International Inc. ("**PMI**") hereby enters into the following Commitments (the "**Commitments**") vis-à-vis the European Commission (the "**Commission**") with a view to rendering the acquisition of Swedish Match AB (the "**Concentration**") compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 6(1)(b) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the "**Decision**"), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "**Remedies Notice**").

**Section A. Definitions**

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

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

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

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

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

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



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

**Divestment Business:** the business as defined in Section B and in the Schedule, which PMI commits to divest.

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

**Effective Date:** the date of adoption of the Decision.

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

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

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

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

**Parties:** PMI and Swedish Match.

**Personnel:** all personnel listed in paragraph 2.6 of the Schedule.

**PMI:** Philip Morris International Inc. with its business address at 120 Park Avenue, New York, NY 10017, United States of America, and Affiliated Undertakings.

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

**Purchaser Criteria:** the criteria laid down in paragraph 15 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

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

**SMD Logistics:** SMD Logistics AB with its main business address at Mätarvägen 41, 1936 37 Kungsängen, Sweden, and its subsidiary, SMD Edge AB.

**Swedish Match:** Swedish Match AB with its corporate headquarters at Sveavägen 44, SE-118 85 Stockholm, Sweden, and Affiliated Undertakings.

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

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

## **Section B. The commitment to divest and the Divestment Business**

### Commitment to divest

2. In order to maintain effective competition, PMI commits to divest, or procure the divestiture of, the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 16 of these Commitments. To carry out the divestiture, PMI commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If PMI has not entered into such an agreement at the end of the First Divestiture Period, PMI shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 29 in the Trustee Divestiture Period.
3. PMI shall be deemed to have complied with this commitment if:
  - (a) by the end of the Trustee Divestiture Period, PMI or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 16; and
  - (b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
4. In order to maintain the structural effect of the Commitments, PMI shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from PMI showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 42 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that

the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Structure and definition of the Divestment Business

5. The Divestment Business consists of the current SMD Logistics business, which distributes combustible tobacco, smoke-free, and related products for the Parties and other manufacturers. The legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business, in particular:
  - (a) all tangible and intangible assets (including intellectual property rights);
  - (b) all licences, permits, and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
  - (c) all contracts, leases, commitments, and customer orders of the Divestment Business; all customer, credit, and other records of the Divestment Business; and the Personnel.
  
6. In addition, the Divestment Business includes the benefit, for a transitional period of [...]after Closing (with the option to extend for up to an additional [...] at the option of the Purchaser) and [...], of all current arrangements under which Swedish Match currently supplies products or services to support SMD Logistics' business operations, as detailed in paragraph 2.8 of the Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from, such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the business unit providing the product or service. This paragraph 6 and paragraph 2.8 of the Schedule do not apply to arrangements for the distribution of the Parties' products through SMD Logistics, which are captured by paragraph 2.4 of the Schedule.

**Section C. Related commitments**

Preservation of viability, marketability, and competitiveness

7. From the Effective Date until Closing, PMI shall preserve or procure the preservation of the economic viability, marketability, and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as

possible any risk of loss of competitive potential of the Divestment Business. In particular, PMI undertakes:

- (a) not to carry out any action that might have a significant adverse impact on the value, management, or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy, or the investment policy of the Divestment Business;
- (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
- (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to PMI's remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, PMI shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. PMI must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

Hold-separate obligations

- 8. PMI commits, from the Effective Date until closing of the Concentration, to procure to keep the Divestment Business separate from the businesses it will be retaining, and from the closing of the Concentration until Closing, to keep the Divestment Business separate from the businesses it is retaining, and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the businesses to be retained by PMI have no involvement in the Divestment Business; and (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business to be retained by PMI and do not report to any individual outside the Divestment Business.
- 9. Until Closing, PMI shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses which PMI is retaining. Immediately after the Effective Date, PMI shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and

competitiveness and its independence from the businesses retained by PMI. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in paragraph 7(c) of these Commitments. The Commission may, after having heard PMI, require PMI to replace the Hold Separate Manager.

Ring-fencing

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

Non-solicitation clause

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

Due diligence

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, PMI shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
  - (a) provide to potential purchasers sufficient information as regards the Divestment Business, including a non-confidential version of these Commitments together with a full confidential version of the Schedule to these Commitments; and
  - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

13. PMI shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). PMI shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five days of their receipt.
14. PMI shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

**Section D. The Purchaser**

15. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
  - (a) The Purchaser shall be independent of and unconnected to PMI and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
  - (b) The Purchaser shall have the financial resources, proven expertise, and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
  - (c) The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business and [...].
16. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval. When PMI has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. PMI must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that

the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

**Section E. Trustee**

I. Appointment procedure

17. PMI shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. PMI commits not to close the Concentration before the appointment of a Monitoring Trustee.
18. If PMI has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by PMI at that time or thereafter, PMI shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
19. The Trustee shall:
  - (a) At the time of appointment, be independent of the Parties and their Affiliated Undertakings;
  - (b) Possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
  - (c) Neither have nor become exposed to a Conflict of Interest.
20. The Trustee shall be remunerated by PMI in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

*Proposal by PMI*

21. No later than two weeks after the Effective Date, PMI shall submit the name or names of one or more natural or legal persons whom PMI proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, PMI shall submit a list of one or more persons whom PMI proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 19 and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
  - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and
  - (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

*Approval or rejection by the Commission*

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

*New proposal by PMI*

23. If all the proposed Trustees are rejected, PMI shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 17 and 22 of these Commitments.



*Trustee nominated by the Commission*

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

II. Functions of the Trustee

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

*Duties and obligations of the Monitoring Trustee*

26. The Monitoring Trustee shall:
- (a) Propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
  - (b) Oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability, and competitiveness and monitor compliance by PMI with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
    - (i) monitor the preservation of the economic viability, marketability, and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 7 and 8 of these Commitments;
    - (ii) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 9 of these Commitments;
    - (iii) with respect to Confidential Information:
      - (A) determine all necessary measures to ensure that PMI does not after the Effective Date obtain any Confidential Information relating to the Divestment Business,
      - (B) in particular strive for the severing of the Divestment Business' participation in a central information technology network to the

extent possible, without compromising the viability of the Divestment Business,

- (C) make sure that any Confidential Information relating to the Divestment Business obtained by PMI before the Effective Date is eliminated and will not be used by PMI, and
  - (D) decide whether such information may be disclosed to or kept by PMI as the disclosure is reasonably necessary to allow PMI to carry out the divestiture or as the disclosure is required by law;
- (iv) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and PMI;
- (c) Propose to PMI such measures as the Monitoring Trustee considers necessary to ensure PMI's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability, or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information.
- (d) Review and assess potential purchasers as well as the progress of the divestiture process and verify that, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
- (i) potential purchasers receive sufficient and correct information relating to the Divestment Business (including a non-confidential version of these Commitments together with a full confidential version of the Schedule to these Commitments) and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process; and
  - (ii) potential purchasers are granted reasonable access to the Personnel;
- (e) Act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments.
- (f) Provide to the Commission, sending PMI a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the

Commitments and the progress of the divestiture process as well as potential purchasers.

- (g) Promptly report in writing to the Commission, sending PMI a non-confidential copy at the same time, if it concludes on reasonable grounds that PMI is failing to comply with these Commitments.
  - (h) Within one week after receipt of the documented proposal referred to in paragraph 16 of these Commitments, submit to the Commission, sending PMI a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.
  - (i) Assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
27. If the Monitoring and Divestiture Trustee are not the same legal or natural person, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

*Duties and obligations of the Divestiture Trustee*

28. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 15 and 16 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of PMI, subject to PMI's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
29. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report

written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to PMI.

III. Duties and obligations of the Parties

30. PMI shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of PMI's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites, and technical information necessary for fulfilling its duties under the Commitments and PMI and the Divestment Business shall provide the Trustee upon request with copies of any document. PMI and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
31. PMI shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. PMI shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. PMI shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
32. PMI shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing, and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, PMI shall cause the documents required for effecting the sale and the Closing to be duly executed.
33. PMI shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to PMI for, any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that

such liabilities result from the wilful default, recklessness, gross negligence, or bad faith of the Trustee, its employees, agents, or advisors.

34. At the expense of PMI, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to PMI's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should PMI refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard PMI. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 33 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served PMI during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
  35. PMI agrees that the Commission may share Confidential Information proprietary to PMI with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*.
  36. PMI agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
  37. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.
- IV. Replacement, discharge and reappointment of the Trustee
38. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
    - (a) the Commission may, after hearing the Trustee and PMI, require PMI to replace the Trustee; or
    - (b) PMI may, with the prior approval of the Commission, replace the Trustee.
  39. If the Trustee is removed according to paragraph 38 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall

be appointed in accordance with the procedure referred to in paragraphs 17-24 of these Commitments.

40. Unless removed according to paragraph 38 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section F. The review clause**

41. The Commission may extend the time periods foreseen in the Commitments in response to a request from PMI or, in appropriate cases, on its own initiative. Where PMI requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to PMI. Only in exceptional circumstances shall PMI be entitled to request an extension within the last month of any period.
42. The Commission may further, in response to a reasoned request from PMI showing good cause, waive, modify, or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to PMI. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

**Section G. Entry into force**

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

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**Duly authorised for and on behalf of  
PHILIP MORRIS INTERNATIONAL INC.**

**Signature: (Signed)**

**Name and position:**

**Date:**

**SCHEDULE 1**  
**DESCRIPTION OF THE DIVESTMENT BUSINESS**

1. The Divestment Business has, to date, been operationally separate to Swedish Match under its subsidiary, SMD Logistics AB. The divestiture of the Divestment Business will be carried out by way of share transfer in SMD Logistics AB, which will transfer the complete business as operated to date to the Purchaser, including its expertise in its business operations and compliance with relevant regulatory obligations, including track and trace.
2. The Divestment Business includes, but is not limited to, the following:
  - 2.1 the following main tangible assets:
    - (a) SMD Logistics' warehouse in Brunna (at Mätarvägen 41, 1936 37 Kungsängen, Sweden) [...]
    - (b) The whole inventory owned by SMD Logistics in its warehouse and in its distribution network (including [...]); and
    - (c) SMD Logistics' [...].
  - 2.2 the following main intangible assets, including, but not limited to:
    - (a) [...];
    - (b) [...];
    - (c) [...]; and
    - (d) [...].
  - 2.3 the following main licences, permits and authorisations:
    - (a) SMD Logistics' permit for the wholesale of tobacco in Sweden; and
    - (b) SMD Logistics' authorisations as a warehouse keeper and stockist.
  - 2.4 the following main contracts, agreements, leases, commitments, and understandings:
    - (a) SMD Logistics' [...];<sup>1</sup>
    - (b) Agreements for the distribution of [...];
    - (c) SMD Logistics' [...];

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<sup>1</sup> [...].



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- (d) SMD Logistics' [...]; and
  - (e) SMD Logistics' [...].
- 2.5 the following customer, credit, and other records:
- (a) SMD Logistics' current customer register and records; and
  - (b) SMD Logistics' current customer contracts.
- 2.6 the following Personnel:
- (a) All personnel currently employed by SMD Logistics; and
  - (b) At the option of the Purchaser, [...]in each of legal, pay roll, and procurement functions who currently spend [...] of their time supporting SMD Logistics.
- 2.7 the following Key Personnel:
- (a) the Hold Separate Manager – [...], Managing Director; and
  - (b) other members of SMD Logistics' management team, namely:
    - (i) [...], Manager IT & Business Development;
    - (ii) [...], Business Control Manager;
    - (iii) [...], Warehouse Operations Manager; and
    - (iv) [...], Key Account Manager.
- 2.8 at the option of the Purchaser, the arrangements for the supply of the following products or services by PMI or Affiliated Undertakings for a transitional period of [...]after Closing with the option to extend for up to an additional [...]if requested by the Purchaser on a timely basis and approved by the Monitoring Trustee and Commission, depending on the specific service:
- (a) IT infrastructure services, including [...];
  - (b) IT workstation equipment and end-user support services, such as [...];
  - (c) Application services, such as [...];
  - (d) Supply of certain packing materials; and
  - (e) Legal, pay roll, and procurement functions in a materially similar manner as provided to date.

3. The Divestment Business shall not include:
  - (a) Any asset, interests, customer records or contracts, rights, or property (including intellectual property, know-how, or trademarks) of Swedish Match which is not part of the Divestment Business as described above; and
  - (b) Any assets, interests, rights, or property (including any intellectual property, know-how, or trademarks) of PMI other than assets, interests, rights, or property that PMI acquires from Swedish Match pursuant to the Proposed Transaction.
4. If there is any asset or personnel which is not covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or personnel, or adequate substitute, will be offered to the potential purchasers.