

BRITISH SALT LIMITED

RESPONSE TO PROVISIONAL FINDINGS REPORT

NON-CONFIDENTIAL VERSION

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RESPONSE TO PROVISIONAL FINDINGS REPORT

This Response sets out the comments of British Salt Limited (“British Salt”) on the Provisional Findings Report published by the Competition Commission (the “CC”) on September 6, 2005 (the “Report”) in connection with British Salt’s completed acquisition of New Cheshire Salt Works Limited (“NCSW”) (the “Transaction”).

British Salt considers that the Report is vitiated by such serious and manifest errors and omissions in both substantive assessment and procedure that its preliminary findings cannot be sustained.

Pricing

- Notwithstanding its finding that an independent NCSW would respond to increased energy and other input costs “*through increases in the prices it charges customers for salt,*”¹ the Report concludes that “*the effect of the merger would be to lead to prices being higher than would otherwise have been the case.*”² That conclusion is reached without any consideration of the relative cost increases faced by NCSW and the merged business, and without any assessment of the relative level of price increase that would be required to recover those costs.
- While accepting that “*there has been some decline in salt prices,*”³ the Report does not seek to examine the reasons for that price decline, noting only that “*prices appear to have risen recently, possibly in response to increasing energy prices.*”⁴ That cursory recognition of historic price trends fails to acknowledge the scale of that decline (equivalent to a real price reduction between 1996 and 2004 of more than 30%) or to consider its significance as an indicator of the competitive dynamic between competing suppliers.
- The Report applies discriminatory legal standards in its assessment of the competitive position of NCSW, salt distributors and imported product. The substantial lessening of competition (“SLC”) that is identified is based on the Report’s core findings that, “*whilst the ability of NCSW to act as a competitive constraint in relation to PDV was to some degree limited by its scale of operation and capacity constraints,*”⁵ NCSW was “*generally price competitive in relation to customers on whom it focused (generally not distributors and not customers requiring the largest volumes).*”⁶ To the extent that the CC’s assessment of rivalry between competing suppliers is based on their ability to supply at competitive rates, that standard must be applied to all suppliers. The Report, however, applies that standard only to its examination of the competitive position

¹ At paragraph 5.28.
² At paragraph 5.119.
³ At paragraph 5.28.
⁴ At paragraph 5.28.
⁵ At paragraph 5.105(g).
⁶ At paragraph 5.103.

of NCSW. Considered against the more usual standard of “*competitive constraint*” that is applied in respect of imported and distributed products,⁷ the Report contains no evidence that NCSW imposes any material constraint on the pricing policies of British Salt.

Counterfactual

- Absent the Transaction, the Report confirms that the NCSW plant would have remained operational “*for only as long as it took to generate sufficient cash to pay off the liabilities of the company ... whilst simultaneously seeking a trade sale to an existing salt producer. In 2003, it was anticipated that it might take two or three years to generate sufficient cash to meet the company’s liabilities and other perceived obligations.*”⁸ The CC concludes from this that “*the appropriate counterfactual for the purposes of our inquiry was that NCSW’s former shareholders would have continued to run the business for the period relevant to our inquiry*”⁹ (emphasis added). The Report does not at any point define that relevant period. The counterfactual would appear, however, to contemplate that the NCSW business could close as early as 2006.
- During this closure period, the Report acknowledges that NCSW would be at an increasing cost disadvantage to competing vacuum salt producers as a result of its smaller operating scale, and its relative production inefficiency.¹⁰ That disadvantage translates into a forecast increase in NCSW input costs from just under £[] million in 2004 to more than £[] million in 2006 (an increase of 31.3%). Considered in the context of a 2004 gross operating profit of £[], British Salt submits that NCSW is not a viable business beyond the short term. The Report, however, concludes that “*NCSW has demonstrated in the past an ability to take advantage of new business opportunities to maintain its profitability,*”¹¹ such that “*the issues faced by NCSW were not such as to so weaken the competitive constraint provided by NCSW.*”¹² British Salt submits that that conclusion is incompatible with the evidence received from British Salt, the former shareholders, customers and competitors, and inconsistent with the declared closure strategy of NCSW.
- The CC’s conclusion is based, moreover, on an entirely static market assessment. The Report contains no assessment of the likely competitive strategy of British Salt absent the Transaction, notwithstanding the Report’s acknowledgement that the announced closure of the Albion Inorganic Chemicals chlor-alkali plant (“Albion”) in November 2005 will result in a 25% reduction in demand for British Salt’s products.¹³ In particular, the Report omits any consideration of the extent to which British Salt might have sought to recover part of this volume loss

⁷ See, for example, paragraphs 5.70 and 5.77.

⁸ At paragraph 5.22.

⁹ At paragraph 5.36.

¹⁰ At paragraph 5.78.

¹¹ At paragraph 5.29.

¹² At paragraph 5.126.

¹³ At paragraph 3.13.

from customers of NCSW, and fails to consider the ability and incentives for NCSW to respond to such a strategy given its closure plans.

Competitive Constraints

- In addition to its failure, as noted above, to consider the price competitiveness of imported and distributed vacuum salt products, the Report also omits any consideration of the relative nature of the competitive constraint imposed by these and other white salt products, and by NCSW. Notwithstanding that the vast majority of imported salt products are supplied in the U.K. through distributors, the Report contains no assessment of switching between producers and distributors, and no examination of participation by distributors in competitive bidding situations.
- In relation specifically to imported products, the Report recognises that “*all vacuum salt must meet required quality control standards and products are relatively homogeneous,*”¹⁴ such that “*there did not appear to be any significant product differences between PDV and compacted salt in the U.K. and EU.*”¹⁵ It nonetheless rejects the competitive nature of imported products – contrary to the published evidence submitted to the CC by competing manufacturers and distributors – largely on the basis of a customer survey that it acknowledges was “*not fully representative,*”¹⁶ and in light of “*the higher transport costs that [overseas manufacturers] face in order to sell in the U.K.*”¹⁷ In doing so, it fails to contrast this apparent transport cost disadvantage with the potentially greater production cost disadvantage faced by NCSW, and to examine the implications of these varying costs structures in terms of the relative competitive constraint that each provides.
- As regards distributors, the Report concludes that these “*were typically able to match the lead times (and the security of supply) of the U.K. producers even when relying on imported salt,*” and that “*distributors sell to all sizes of customer.*”¹⁸ Having rejected the constraint from distributors of imported product for the reasons outlined above, it proceeds arbitrarily to dismiss the competitive constraint from distributors “*to the extent that distributors purchase salt from the U.K. producers.*”¹⁹ That conclusion is reached without any assessment of price competitiveness, or any attempt to distinguish the white salt market from others (e.g., aggregates, computer hardware) in which manufacturers compete alongside independent distributors at the wholesale and retail level.

¹⁴ At paragraph 4.56.
¹⁵ At paragraph 4.56.
¹⁶ At footnote 3.
¹⁷ At paragraph 4.72.
¹⁸ At paragraph 5.77.
¹⁹ At paragraph 5.77.

Procedure

- The version of the Provisional Findings that has been provided to British Salt contains such a level of redactions that it is impossible to understand the CC's reasoning on a range of issues. By way of example only, the Report (i) excludes explanation of the critical loss assessment that forms the analytical basis for the CC's market definition;²⁰ (ii) omits all comparative pricing information without providing any description of the deleted data;²¹ and (iii) excludes without explanation an entire category of data from its import assessment, notwithstanding its awareness that British Salt itself includes all compacted products within this category.²²
- In addition, the Report identifies an SLC in respect of both PDV and compacted salt products, notwithstanding that the customer switching and competitor bidding information on which it relies in support of that conclusion relates almost exclusively to the supply of PDV salt.
- British Salt submits that, as the addressee of the Provisional Findings, it is entitled to a complete and unredacted version of that Report, and that it is incumbent on the CC in preparing the Report to ensure that it is drafted so as to exclude any specified information that it considers should not be disclosed. It is not open to the CC simply to withhold parts of the Report. British Salt considers that the CC's practice in doing so, and in failing to provide a complete statement of reasons for its conclusions, vitiates the Report in its entirety.

²⁰ At paragraph 4.40.

²¹ At Appendix D.

²² See Appendix F, at paragraphs 4 and 7.

I. PRICING

A. The Report Contains No Comparative Assessment of Market Pricing With or Without The Transaction

The SLC identified by the Report is based on “*the expectation that the effect of the merger would be to lead to prices higher than would otherwise have been the case.*”²³ That conclusion relies on the economic assertion that a highly concentrated market “*is inherently prone to higher prices in the event of a loss of a fringe supplier such as NCSW. This is because the elimination of such a fringe firm appears to the core suppliers in the market to be equivalent to an increase in demand, to which they would be expected to respond by increasing prices.*”²⁴ In seeking to rely on economic assertion in place of factual evidence, the Report makes a number of errors, including the following:

- First, the Report fails to acknowledge that British Salt’s acquisition of NCSW and transfer of the NCSW production volume to its own plant will merely replace the production volume that British Salt will lose as a result of the imminent closure of the Albion chlor-alkali plant, the U.K.’s largest user of vacuum salt. The Transaction will therefore have little or no effect on the supply and demand balance in the U.K., and negligible impact on excess capacity volumes, which will remain.²⁵
- Second, the Report concludes that “*the increase in prices is likely to be greater to the extent that NCSW would not have been completely capacity constrained (and could thus have responded to opportunities to increase sales if British Salt and Salt Union increased their prices).*”²⁶ That finding assumes that NCSW, despite its ongoing closure strategy, could have diverted from its current commercial policy of focusing on higher value-added products and instead targeted new customers for the lower-margin commodity products on which British Salt’s business is focused.²⁷ As discussed below in relation to the appropriate counterfactual, British Salt does not consider this to be a realistic prospect. Moreover, the NCSW price discounting strategy posited by the CC is inconsistent with the Report’s expectation that “*NCSW would be able to recover at least some of its increased energy costs through increases in the prices it charges customers for salt.*”²⁸ The Report seeks to balance two incompatible positions: that NCSW will be able to manage significant cost increases by passing on all or part of those increases to its customers; and that, simultaneously, it might switch the focus of its business away from higher-margin products in favour of adopting an aggressive pricing strategy on lower-value commodity products. That position is not credible.

²³ At paragraph 5.120.

²⁴ Summary, at paragraph 13. See also paragraph 5.109.

²⁵ At paragraph 5.40.

²⁶ At paragraph 5.110.

²⁷ At paragraph 5.112.

²⁸ At paragraph 5.28.

- Third, and fundamentally, the validity of the Report's conclusion assumes, at a minimum, that the CC has formed an expectation (i) as to the level of market pricing that would have existed had NCSW remained independent, and (ii) as to the anticipated post-merger price level, such that it has been able to undertake a reasoned comparison of the likely prevailing price level in each scenario. In fact, no such price comparison has been attempted.

B. The Report Does Not Consider Or Explain The Decline in Market Prices Since 1996

In its Main Submission to the CC, British Salt presented detailed evidence of the decline in its average realised prices – in both absolute and real terms – between 1996 and 2004. That evidence established the following:

- **UV Salt.** Between 1996 and 2004, the average price realised by British Salt for UV salt fell from £[] per tonne to £[] per tonne, a decline of 22.3%. In real terms, this is equivalent to a price reduction of 56.6%.
- **PDV Salt.** In the same period, the average realised price of bulk PDV fell by 7.6%, from £[] to £[] per tonne (equivalent to a real price decline of 31.6%). In that same period, the average price per tonne of bagged PDV fell from £[] to £[], a reduction of 13.5% (or 40.5% in real terms).
- **Compacted Salt.** The average price per tonne realised by British Salt fell by 8.7%, from £[] per tonne in 1996 to £[] per tonne in 2004. In real terms, that equates to a price reduction of 33.2%.

That evidence of price erosion is not challenged in the Report, and indeed the Report expressly recognises that “*there has been some decline in salt prices.*”²⁹ However, the Report gives no further consideration to this history of price decline and, in particular, fails to examine to what extent this price decline is indicative of a competitive dynamic between competing salt suppliers. British Salt submits that the history of price erosion in the U.K. white salt market is inconsistent with the Report's conclusion that “*the relevant market, in our view, was one in which competitive forces appeared muted.*”³⁰

C. The Report Applies Discriminatory Legal Standards In Its Assessment Of The Competitive Position of NCSW, Salt Distributors and Imported Product and Reaches Conclusions That Are Not Consistent With The Evidence

The SLC identified in the Report is based on three core conclusions:

- That NCSW “*was generally price competitive in relation to customers on whom it focused (generally not distributors and not customers requiring the largest volumes).*”³¹

²⁹ At paragraph 5.28.

³⁰ At paragraph 5.122.

³¹ At paragraph 5.103.

- That NCSW “*did not entirely withdraw from competing for new customers.*”³²
- That “*British Salt was a competitive constraint on NCSW that was clearly important for NCSW’s customers.*”³³

As regards the first of these findings, British Salt does not dispute that NCSW was price competitive with British Salt in certain instances, just as competing domestic and overseas manufacturers and distributors are price competitive. The issue for consideration is not, however, whether NCSW was able to price on a par with British Salt for certain customer volumes, but whether the presence of NCSW as an independent competitor increased rivalry in the defined economic market such that it imposed a price-disciplining effect on British Salt. No such evidence is presented. To the contrary, in the last three years, the Report identifies just “*11 occasions where NCSW has bid for non-NCSW customers of PDV salt and British Salt has also bid.*”³⁴

The eleven identified episodes of competitive dynamic between NCSW and British Salt relate to just nine customer accounts:

- In 2002, the companies competed directly for four accounts – [] – together representing around 2,500 tonnes of PDV volume (of which [] itself accounted for 88% at 2,200 tonnes), and just 20 tonnes of compacted volume.
- In 2003, the companies similarly competed for four accounts – []. Excluding [], those accounts together represented just 1,615 tonnes of PDV volume.
- In 2004, NCSW competed against British Salt for just three customer accounts – []. Again excluding [], the competed volumes totalled just 183 tonnes of PDV.

Table 1 below details these total competed sales volumes (including []) as a proportion of British Salt’s total domestic sales of PDV and compacted salt products from 2002 to 2004 respectively.

³² At paragraph 5.87.

³³ At paragraph 5.111.

³⁴ Appendix G, at paragraph 23.

Table 1: Sales Volumes Competed by NCSW as a Proportion of British Salt's Domestic Sales Volumes, 2002 to 2004

	2002	2003	2004
PDV			
British Salt Volume	[]	[]	[]
NCSW Competed Volume	[]	[]	[]
%	0.9%	1.3%	0.8%
Compacted			
British Salt Volume	[]	[]	[]
NCSW Competed Volume	[]	[]	[]
%	0.07%	0.0%	0.0%

Source: British Salt.

British Salt considers that the only objective conclusion that can be drawn from this evidence is that the competitive constraint from NCSW is negligible. The Report instead makes the following four main observations:

- That NCSW was cheaper on two of the 11 occasions. Appendix G, however, acknowledges that “both these bids were for PDV salt volumes of less than 40 tonnes a year.”³⁵ That equates to less than 0.03% of British Salt’s domestic PDV sales volume in 2004.
- That “there were a limited number of data points in this analysis.”³⁶ Those “data points” are, in fact, the limited instances of competitive dynamic between NCSW and British Salt.
- That “the conclusions of our competition analysis would not have altered if there were separate markets for PDV salt and compacted salt.”³⁷ **Table 1**, however, demonstrates that NCSW did not compete against British Salt for the supply of any compacted volume in 2003 and 2004, and competed in 2002 for just 20 tonnes of compacted product sales (equivalent to 0.07% of British Salt’s domestic sales volume of compacted product in that year).
- That, “even under circumstances where NCSW’s capacity utilisation was at its highest, therefore, it is clear that NCSW did not entirely withdraw from competing for new customers.”³⁸ Rather, “in 2004, when NCSW’s capacity utilization was at its highest, NCSW did bid to supply one new customer with in excess of 2000 tonnes of PDV (and, in 2003, NCSW bid to supply another customer with around 2000 tonnes of PDV).”³⁹ The Report fails to observe that, in both cases, NCSW’s bid was unsuccessful. In any event, if the appropriate test by which to assess the existence of a competitive

³⁵ Appendix G, at paragraph 27.

³⁶ At paragraph 5.93.

³⁷ At paragraph 4.26.

³⁸ At paragraph 5.87.

³⁹ At paragraph 5.87.

constraint is the ability to submit a price competitive bid, then the same standard must equally apply to the assessment of competitive constraint from all alternative suppliers.

The Report also strains to identify an SLC on the basis that “*British Salt was a competitive constraint on NCSW that was clearly important for NCSW’s customers.*”⁴⁰ That finding is similarly unsustainable:

- First, it is not open to the CC, having found insufficient evidence “*to conclude that there are separate customer markets (or segments of markets that need to be considered separately,*”⁴¹ then to adopt a contradictory position by focusing its assessment on individual customer groups. The issue for consideration by the CC is whether the Transaction may be expected to result in a substantial lessening of competition in a defined economic market (*i.e.*, according to the CC’s assessment, in the supply of PDV and compacted salt in Great Britain, or the U.K. and Ireland). Absent a finding that the existence of NCSW as an independent supplier provides substantially increased competitive rivalry, the Report’s SLC finding cannot be sustained.
- Second, far from reaching that finding, the Report confirms that “*we did not conclude on the basis of [the available] price data that NCSW charged generally lower prices than British Salt.*”⁴² To the contrary, the Report concludes from the bidding analysis that “*British Salt bids are cheaper on average by £3.40 per tonne (£4.40 per tonne on a volume-weighted average basis).*”⁴³
- Third, as noted above, the Transaction will not lead to any increase in demand for British Salt’s products, but will merely replace the volume loss that British Salt will suffer following the announced closure in November 2005 of the chlor-alkali plant of Albion. Contrary to the Report’s economic assertion, the elimination of NCSW as an independent supplier will not equate to an increase in demand, but will be demand-neutral. The expectation in these circumstances must be that, post-merger, British Salt will simply apply its own pricing policy to the NCSW customer base with the result that, going forward, these customers will benefit from British Salt’s lower production cost base.

⁴⁰ At paragraph 5.111.

⁴¹ At paragraph 4.50.

⁴² At paragraph 5.103.

⁴³ Appendix G, at paragraph 24.

II. COUNTERFACTUAL

A. NCSW Was Being Wound Down With A View To Closure

According to the Report, the commercial strategy of the NCSW shareholders pre-merger consisted “*of continuing to run the business for as long as it took to discharge their liabilities, as they perceived them, whilst also seeking to sell the business to a trade buyer.*”⁴⁴ At the time that British Salt approached NCSW in 2004 with a view to a possible acquisition, the former shareholders were “*two to three years away from being in a position to wind up the company in a satisfactory manner.*”⁴⁵ The expressed counterfactual situation against which the Transaction must be assessed is therefore that, by 2006/2007, NCSW would have ceased to operate. British Salt assumes that this is “*the period relevant to [the CC] inquiry,*”⁴⁶ although that period is at no point specified in the Report.

B. The Cost Increases Faced By NCSW Threatened Its Short-Term Viability

During this closure period, the Report acknowledges that NCSW faced a range of commercial challenges, amongst others:

- As a result of NCSW’s “*small scale, and in part due to the fact that it has a three-effect evaporation plant,*”⁴⁷ NCSW is a relatively inefficient salt producer, using around 46 therms of gas to produce a tonne of vacuum salt compared with British Salt’s 24 therms per tonne. “*We accepted that NCSW used significantly more energy to produce a tonne of vacuum salt than its competitors as a result of the configuration of its plant, and was therefore more vulnerable than its competitors to increases in energy costs.*”⁴⁸
- This relative production inefficiency “*has a significant impact because energy costs are the biggest variable cost in vacuum salt production.*”⁴⁹
- “*In addition to rising energy costs, there were other potential cost increases that might fall on NCSW and not on its competitors (or might fall more heavily on NCSW than on its competitors).*”⁵⁰ These costs included the climate change levy, waste management costs,⁵¹ and increased levy payments to the Cheshire Brine Compensation Board.⁵²

44 At paragraph 5.31.

45 At paragraph 5.23.

46 At paragraph 5.36.

47 At paragraph 5.78.

48 At paragraph 5.28.

49 At paragraph 5.78.

50 At paragraph 5.29.

51 At paragraph 5.28.

52 At footnote 19.

- NCSW also faced “*price deflation and the loss of customers as a result of supplier base rationalization.*”⁵³

Notwithstanding these issues, the Report concludes that “*the issues faced by NCSW were not such as to so weaken the competitive constraint provided by NCSW.*”⁵⁴ That conclusion is based on the fact that “*NCSW had adopted strategies in the past (for example forward buying of gas) to manage this [increased cost] risk,*”⁵⁵ leading the CC to an expectation that NCSW “*would have been able to recover energy cost increases to a sufficient extent so as not to have prevented the former shareholders pursuing their plans.*”⁵⁶ In other words, the counterfactual situation implicitly posited by the Report is one in which NCSW would be seeking substantial price increases. The scale of price increase that NCSW would need to introduce to maintain its short-term viability in the face of these pressures is apparent from the following:

- NCSW’s total costs are expected to rise from just under £[] million in 2004 to more than £[] million in 2006 (an increase of 31.3%).⁵⁷
- This increase in costs must be considered in the context of the gross operating profit of NCSW in 2004 of £[], such that its profitability would be eliminated unless a large part of these cost increases were passed on to its customers.⁵⁸
- The forecast average cost per tonne for NCSW in 2006 is £[]. This may be contrasted with the forecast 2006 cost per tonne for the merged business of £[]. In other words, by 2006, the production cost per tonne of NCSW as a stand-alone business is forecast to be almost 50% higher than that of the combined business.

British Salt submits that, in the context of an ongoing closure strategy that was expected to be complete by 2006 or 2007, the likely response of NCSW’s former shareholders to cost increases on this scale, considered together with the wider environmental and regulatory pressures faced by NCSW, would have been to accelerate their closure plans. The Report, however, adopts the contrary position, observing that “*NCSW has demonstrated in the past an ability to take full advantage of new business opportunities to maintain or increase its profitability,*”⁵⁹ and therefore seeks to establish as the relevant counterfactual the “*possibility*” that NCSW, having spent several years refocusing its business on higher-margin, niche product ranges in order to clear existing liabilities, “*might*” reverse that strategy during its wind-down period in order to increase its exposure to the low-margin

⁵³ At paragraph 5.28.

⁵⁴ At paragraph 5.126.

⁵⁵ At paragraph 5.28.

⁵⁶ At paragraph 5.28.

⁵⁷ A detailed breakdown of NCSW’s costs since 2001, together with forecasts for 2006, are included at **Annex 1**.

⁵⁸ The increases in NCSW’s costs in 2005 are forecast to result in a substantially reduced gross operating profit for the 2005 financial year of £[], including a forecast gross operating profit for the four months from September 2005 of just £[].

⁵⁹ At paragraph 5.29.

commodity product areas on which British Salt's business is currently focused.⁶⁰ That suggestion defies logic, and fails to meet the standard of proof applicable to the CC.

C. The Report Contains No Analysis of the British Salt Counterfactual

On June 22, 2005, Albion, the largest single purchaser of vacuum salt in the U.K., announced the anticipated closure in November 2005 of its chlor-alkali plant at Sandbach. That plant, which is supplied exclusively by British Salt, currently purchases around [] tonnes of undried vacuum salt each year, accounting for []% of total U.K. vacuum salt consumption, and for 24.0% of British Salt's total domestic sales. While the Report notes this fact in summarising the deal rationale,⁶¹ it forms no part of the Report's assessment of the counterfactual situation. In other words, the Report's conclusions are based on the assumption that this loss of volume will have no impact on British Salt's commercial strategy. That assumption is untenable, and the omission from the Report of any assessment of the British Salt counterfactual in relation to PDV and compacted salt vitiates entirely the Report's conclusions.

Absent its acquisition of NCSW, the closure of Albion would have presented three alternatives for British Salt:

- To reconfigure the British Salt plant to operate at this substantially reduced level of production. This would result in reduced efficiency and an relative increase in energy costs per tonne of salt produced.
- To diversify into the higher-value product segments on which NCSW has increasingly focused in recent years.
- To recover that lost volume by attracting new customers, both domestic and export.

As the Report correctly observes, prior to its acquisition of NCSW, British Salt had under-estimated the potential sales volumes available in the higher-value product segments and, recognising that its plant was designed for high-volume production, had therefore chosen not to enter those product segments.

The likelihood, therefore, would have been that British Salt would have increased its efforts to attract some additional production volume from NCSW, particularly since, according to the CC's analysis, NCSW would at the same time have been looking to impose significant price increases on its existing customer base in order to cover the substantial increases in energy and other input costs that are forecast. In light of the scale of these cost increases – which are forecast to be more than double the level of NCSW's gross operating profit in 2004 – NCSW would have had no ability or incentive to respond to such targeted marketing efforts, such that it would have been expected to accelerate the implementation of its existing strategy to wind-up the business.

⁶⁰ At paragraph 5.112.

⁶¹ At paragraph 3.13.

III. COMPETITIVE CONSTRAINT

Before considering the particular competitive constraints that are imposed on British Salt by competing suppliers of white salt products, it is appropriate to identify three general deficiencies in the Report's assessment that, in themselves, render the Report's conclusions unsustainable:

- First, the SLC that is identified in the Report is based on its core findings that, *“whilst the ability of NCSW to act as a competitive constraint in relation to PDV was to some degree limited by its scale of operation and capacity constraints,”*⁶² NCSW was *“generally price competitive in relation to customers on whom it focused (generally not distributors and not customers requiring the largest volumes).”*⁶³ To the extent that the CC's assessment of rivalry between competing suppliers is based on their ability to supply at competitive rates, that standard must be applied to all suppliers. The Report, however, applies that standard only to its examination of the competitive position of NCSW, and fails to consider the price competitiveness of imported and distributed vacuum salt products.
- Second, the Report omits any consideration of the relative nature of the competitive constraint imposed by these and other white salt products, and by NCSW. Notwithstanding that the vast majority of imported salt products are supplied in the U.K. through distributors, the Report contains no assessment of switching between producers and distributors, and no examination of participation by distributors in competitive bidding situations.
- Third, regardless of the Transaction, the substantial energy and other cost increases faced by U.K. vacuum salt manufacturers have recently resulted, and may in future be expected to result, in price increases. The Report fails, however, to consider the level of this cost inflation, or of any consequential price increases, and omits any consideration of the likely response to these market pressures of overseas manufacturers and U.K. distributors of vacuum, solar or white rock salt.

A. Imports

The Report finds *“imported salt to be a limited competitive constraint”*⁶⁴ on the basis of three main factors:

- *“the high transport costs in the U.K. for what is a bulky, relatively low value product;”*
- *“the low share of the market historically held by imports and the lack of a persistent growth trend in import volumes;”* and

⁶² At paragraph 5.105(g). It is noteworthy that the Report omits any conclusion regarding the competitive position of NCSW in the supply of compacted products.

⁶³ At paragraph 5.103.

⁶⁴ Summary, at paragraph 9(f).

- “customer perceptions that quality and security of supply is higher with U.K. producers and that imported salt is not a realistic alternative.”⁶⁵

Each of these factors is considered below.

- **Transport Costs.** The Report finds that “*the cost of shipping bulk or bagged salt to a U.K. port is £12 to £17 per tonne on a CIF basis.*”⁶⁶ While the Report accepts that it “*may be the case*”⁶⁷ that foreign producers with a long-term commitment to exporting salt to the U.K. are prepared to absorb variations in transport costs in order to develop and maintain relationships with distributors and customers in the U.K., it concludes that “*the higher transport costs that they face in order to sell in the U.K. must inflate their overall cost decisions (and limit their ability) in relation to exporting salt to the U.K.*”⁶⁸ In reaching that conclusion, the CC chooses to ignore the consistent evidence of competitors and distributors confirming the ease of entry into the U.K. market. For example:
 - “*ESCO said there were no real barriers to entry to the U.K. beyond competitiveness and economic factors. Price levels in the U.K. were broadly similar to those in Europe.*”
 - “*Albion said that it would look to source overseas if necessary but it was content with its relationships with British Salt and Salt Union.*”
 - “*Broste said the salt market in the U.K. in the last few years had been the most competitive in Europe. This was because of the large size of the market and the ability of importers to enter the market. Salinity was an example of such a company. It imported salt from Germany and Chile though it was itself based in Sweden.*”
 - “*Broste said that its relationships with European salt producers were of much longer standing and tended to be stronger than those with Salt Union and were a reason why Broste sourced much of its product from Europe.*”
 - “*Peacock said that if the relative movement of prices dictated, it would buy from ESCO or, indeed, other overseas suppliers.*”
 - “*Peacock said it had no difficulty in importing salt from ESCO. Peacock said that Broste and Salinity were also active importers. Peacock said that originally it had imported all its salt. It was only recently that it bought salt from Salt Union and British Salt.*”

The CC therefore chooses to reject the evidence of the leading European producers and U.K. distributors, and to substitute its own assessment for that of market

⁶⁵ Summary, at paragraph 9(f).

⁶⁶ At paragraph 5.67.

⁶⁷ At paragraph 4.72.

⁶⁸ At paragraph 4.72.

participants. In focusing entirely on the transport costs faced by importers, it fails to identify or give any other consideration to the margin generated by these companies on their U.K. import volumes. Moreover, it fails to recognise that the apparent transport cost disadvantage of £12-£17 per tonne that it identifies for these importers is substantially less than the £[] production cost disadvantage that NCSW would face relative to British Salt in 2006. Assuming that the economies of scale available to the overseas manufacturers result in a lower average cost per tonne than that available to British Salt, this would suggest that imported product represents a more significant competitive constraint on British Salt's pricing strategy than does NCSW.

- **Market Share.** As regards the market penetration of imported products, the Report makes three findings:
 - That “*overall demand for vacuum salt was declining in the U.K.*”⁶⁹
 - That “*import volumes from the major European salt producers appeared to have been stable over recent years;*”⁷⁰ and
 - That there has been no persistent growth trend over the last five years, “*either in absolute terms or in terms of the proportion of U.K. demand met by imports.*”⁷¹

Those findings are necessarily contradictory, since the retention of stable supply volumes in a declining market must equate to a relative increase in sales penetration. That increase is apparent from the CC's import analysis, which shows a 5% absolute increase in import penetration between 2003 and 2004, such that imported products in 2004 satisfied 18% of total U.K. demand for white salt.⁷²

The Report, however, does not contain any information or reasoning that would enable British Salt to comment in any further detail on this market share assessment. In particular, it contains no description of imported PDV or compacted sales volumes, even in aggregate; and it makes no attempt to explain how an 18% import penetration level can, in the CC's assessment, translate into a 4% market share.⁷³ Those figures are irreconcilable.

- **Product Quality and Security of Supply.** The Report identifies no issues in relation to the quality of imported products, or as regards security of supply. On the contrary, it reaches the following findings:
 - “*There did not appear to be any significant product differences between PDV and compacted salt in the U.K. and EU. All vacuum salt must meet required quality control standards and products are relatively homogeneous.*”⁷⁴

⁶⁹ At paragraph 5.39.

⁷⁰ At paragraph 4.65.

⁷¹ At paragraph 4.65.

⁷² Appendix F, Table 1.

⁷³ See Appendix F, Table 1 and Appendix C, Table 1.

⁷⁴ At paragraph 4.56.

- *“The major European salt producers met all relevant standards, and ... their vacuum salt products were clearly accepted by end-users in continental Europe for use in the full range of applications.”⁷⁵*
- *“Many U.K. distributors had storage and delivery facilities in the U.K. which enabled them to make deliveries in line with customer requirements.”⁷⁶*
- *“Many of the large U.K. salt distributors operate storage depots and distribution warehouses throughout the U.K. such that they too can offer just-in-time deliveries to customers.”⁷⁷*
- *“We found that several distributors were well-represented in geographic terms, and that there were a range of locations for storage depots for other distributors, collectively giving reasonable coverage of Great Britain. This confirmed British Salt’s view that distributors were typically able to match the lead times (and the security of supply) of the U.K. producers even when relying on imported salt.”⁷⁸*
- *“In some cases a foreign producer may be able to reach a U.K. customer’s port of destination faster and more cost-efficiently than a local U.K. producer.”⁷⁹*
- *“In relation to the new entry of imported salt products into the relevant market via U.K. distributors, we were told by some distributors that they sourced and imported new salt products specifically to meet niche customer needs. It appeared that such new products were often sourced from salt producers who already had a long-term presence in the U.K.”⁸⁰*

The Report dismisses all of the above evidence on the basis of “customer perceptions”⁸¹ – as recorded in the customer survey that the CC considers was “not fully representative”⁸² – that “quality and security of supply is higher with U.K. producers and that imported salt is not a realistic alternative,”⁸³ notwithstanding that “customers may not realize that, in purchasing salt from a U.K. distributor, they may be purchasing imported salt.”⁸⁴

It is noteworthy that the Report relies on the customer survey’s finding that 14% of respondents buying from a supplier considered NCSW as the main alternative to conclude that “NCSW was seen as a viable alternative by a significant number of existing

⁷⁵ At paragraph 4.73.

⁷⁶ At paragraph 4.62.

⁷⁷ At paragraph 4.77.

⁷⁸ At paragraph 5.76.

⁷⁹ Appendix D, at paragraph 14.

⁸⁰ At paragraph 5.58.

⁸¹ At paragraph 5.68.

⁸² At footnote 3.

⁸³ At paragraph 5.68.

⁸⁴ At paragraph 4.68.

customers.”⁸⁵ Yet the survey’s finding that 37% of respondents already use imported salt, or considered it very realistic or quite realistic to switch to imported products, is dismissed, notwithstanding the Report’s acknowledgement that “*this analysis and the customer survey results may understate the number of customers switching to imported salt supplied via distributors.*”⁸⁶

B. Distributors

The Report relies on the above analysis in respect of imported product to reject the competitive constraint from distributors in so far as they are selling imported product. No analysis is conducted of the price competitiveness of distributors when selling imported product, and no assessment of switching to or from distributors of imported product, or of the participation of such distributors in bidding competitions, is attempted.

In respect of distributor sales of domestic product, the Report observes that “*the ultimate constraint on distributors is the price at which they purchase salt.*”⁸⁷ Based solely on the fact, and without further reasoning, the Report concludes that, “*to the extent that distributors purchase salt from the U.K. salt producers, we did not consider that they offered an additional competitive constraint in the relevant market.*” The Report thereby rejects the contradictory evidence of U.K. distributors noted above. In doing so, it fails to identify those characteristics of the U.K. white salt market that lead it to conclude that distributors are unable to compete with manufacturers, or otherwise to distinguish the white salt market from many others (*e.g.*, aggregates, computer hardware) in which distributors compete head-on with manufacturers, notwithstanding that the manufacturer is their raw material supplier.

C. Other Salt Types

While concluding that the relevant market for the purpose of the CC’s assessment should exclude solar and white rock salt products, the Report nonetheless recognises the actual and potential substitutability of these products in a range of applications:

- “*Several parties told us that white rock salt was a substitute for vacuum salt in animal feed production, preparation of hides and skins and water conditioning, and gave us specific examples of customers making these substitutions.*”⁸⁸
- “*Broste Limited told us that it had invested in handling facilities to allow it to import salt for food use. It also pointed out that white rock salt and solar/sea salt appear to be used in reasonable volumes in the food industry across Europe.*”⁸⁹
- “*We were also given examples of customers changing from compacted vacuum salt to compacted solar/sea salt for water softening.*”⁹⁰

⁸⁵ At paragraph 5.91.

⁸⁶ At paragraph 4.68.

⁸⁷ At paragraph 5.77.

⁸⁸ At paragraph 4.31.

⁸⁹ At paragraph 4.32. This investment appears inconsistent with Broste’s reported suggestion there are some applications (such as food production) where it felt it was difficult to envisage increased use in the U.K.

- *“We did not find that there were many switching costs for customers in changing between vacuum salt and solar/sea salt or white rock salt, apart from the potential need to change production processes slightly to accommodate different grain sizes or chemical compositions and additional due diligence costs for end-uses where traceability was important (for example, the food industry).”⁹¹*

Having recognised this actual and potential substitutability as part of its market definition assessment, the Report then fails to give any consideration to the competitive constraint that these alternative white salt products may impose from outside the relevant market.

IV. PROCEDURE

The version of the Provisional Findings that has been provided to British Salt contains such a level of redactions that it is impossible to understand the CC’s reasoning on a range of issues. By way of example only, the Report (i) excludes explanation of the critical loss assessment that forms the analytical basis for the CC’s market definition;⁹² (ii) omits all comparative pricing information without providing any description of the deleted data;⁹³ and (iii) excludes without explanation an entire category of data from its import assessment, notwithstanding its awareness that British Salt itself includes all compacted products within this category.⁹⁴

In addition, the Report identifies an SLC in respect of both PDV and compacted salt products, notwithstanding that the customer switching and competitor bidding information on which it relies in support of that conclusion relates almost exclusively to the supply of PDV salt.

British Salt submits that, as the addressee of the Provisional Findings, it is entitled to a complete and unredacted version of that Report, and that it is incumbent on the CC in preparing the Report to ensure that it is drafted so as to exclude any specified information that it considers should not be disclosed. It is not open to the CC simply to withhold parts of the Report. British Salt considers that the CC’s practice in doing so, and in failing to provide a complete statement of reasons for its conclusions, vitiates the Report in its entirety.

V. CONCLUSION

British Salt submits that the Report fails to discharge the burden, incumbent on the CC, to prove on a balance of probabilities that the Transaction may be expected to result in an SLC.

⁹⁰ At paragraph 4.33.

⁹¹ At paragraph 4.36.

⁹² At paragraph 4.40.

⁹³ At Appendix D.

⁹⁴ See Appendix F, at paragraphs 4 and 7.

The provisional conclusions that are set out in the Report are based on a defective factual and economic analysis, and on assertions and evidential interpretations that run counter to any reasonable and objective assessment.

British Salt considers that the Report is vitiated by such serious and manifest errors and omissions in both substantive assessment and procedure that its preliminary findings cannot be sustained.