

Anticipated acquisition by Whitby Seafoods Limited of Kilhorne Bay Seafoods Limited

Decision on relevant merger situation and substantial lessening of competition

ME/7063/23

[The Competition and Markets Authority's decision on relevant merger situation and substantial lessening of competition under section 33(1) of the Enterprise Act 2002 given on 4 October 2023. Full text of the decision published on [publication date]]

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

SUMMARY

Overview of the CMA's decision

1. The Competition and Markets Authority (**CMA**) has found that the acquisition by Whitby Seafoods Limited (**Whitby**) (via Kilkeel Seafoods Limited) of Kilhorne Bay Seafoods Limited (**Kilhorne Bay**), gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in the supply of breaded scampi to foodservice customers in the UK.
2. Whitby has agreed to acquire Bonumcorpus (No. 52) Limited (**Bonumcorpus**) (which owns the whole of the issued share capital of Kilhorne Bay, the operating company for the business to be transferred) pursuant to a Share Purchase Agreement signed on 2 May 2023. The CMA refers to this acquisition as the **Merger**. Whitby and Kilhorne Bay are together referred to as the **Parties** and, for statements relating to the future, the **Merged Entity**.
3. As the CMA has found that the Merger gives rise to a realistic prospect of an SLC, the Parties have until 11 October 2023 to offer undertakings in lieu of a reference to

phase 2 (**UILs**) to the CMA that will remedy the competition concerns identified. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Enterprise Act 2002 (the **Act**).

Who are the businesses and what products/services do they provide?

4. Whitby supplies breaded scampi and other coated seafood products to retail and foodservice customers in the UK and Europe.
5. Kilhorne Bay supplies breaded and peeled scampi products to foodservice customers in the UK and Europe. In the UK, Kilhorne Bay supplies foodservice customers directly, and via sales to Pacific West, a third-party supplier. In its competitive assessment of the Merger, the CMA has taken into account both the loss of Kilhorne Bay as an independent competitor, as well as the potential impact of the Merger on the competitive constraint currently offered by Pacific West.
6. The Parties overlap in the supply of breaded scampi to foodservice customers in the UK, which has been the focus of the CMA's investigation.

Why did the CMA review this merger?

7. The CMA's primary duty is to seek to promote competition for the benefit of consumers. It has a duty to investigate mergers that could raise competition concerns in the UK, provided it has jurisdiction to do so.
8. Whitby announced in June 2023 that it had agreed to acquire Kilhorne Bay. The CMA has concluded that it has jurisdiction to review this Merger: the CMA believes that it is or may be the case that each of Whitby and Kilhorne Bay is an enterprise and that they will cease to be distinct as a result of the Merger, and that the share of supply test is met.

What evidence has the CMA looked at?

9. In assessing this Merger, the CMA considered a wide range of evidence in the round.
10. The CMA received several submissions and responses to information requests from the Parties. This included information about the nature of the Parties' businesses, their reasons for pursuing the Merger, and data on their sales volumes and revenues across products.

11. The CMA also spoke to and gathered evidence from other market participants, including customers, competitors and suppliers of the Parties, to better understand the competitive landscape and to get their views on the impact of the Merger.

What did the evidence tell the CMA...

...about the effects on competition of the Merger?

12. The CMA found that the Merger raises significant competition concerns as a result of horizontal unilateral effects in the supply of breaded scampi to foodservice customers in the UK. In particular:
 - (a) the Merger will strengthen Whitby's already very strong position in the market. The Merged Entity would be by far the largest supplier of scampi to foodservice customers, with a share of supply in excess of 90%;
 - (b) the evidence indicates that the Parties are close competitors. The Parties have a similar product offering in breaded scampi and serve a similar customer base (the Parties have certain common customers and Whitby competes to maintain and win new customers against Pacific West (which is supplied by Kilhorne Bay));
 - (c) following the Merger, Whitby would face even less competition from other scampi suppliers. In particular, there is considerable uncertainty as to whether Pacific West would be able to maintain its current competitive position (given the limited alternative options for supply). Other competitors, such as Young's, are comparatively small in the foodservice sector, and third-party evidence does not indicate that they are credible alternatives to the Parties. The CMA's investigation also found that Whitby faces limited competition from suppliers of other types of seafood.
 - (d) several third parties raised concerns about the loss of competition that would be brought about by the Merger, particularly within the context of a market that is already highly concentrated.

...about any entry or expansion?

13. The evidence indicates that there are significant barriers to entry and expansion in the supply of breaded scampi in the UK, including access to raw material and the cost of investment in machinery and equipment. The CMA has not received evidence to indicate that any entry or expansion in response to the Merger would be timely, likely and sufficient to prevent the SLC from arising.

What happens next?

14. As a result of these concerns, the CMA believes the merger gives rise to a realistic prospect of SLC in the supply of breaded scampi to foodservice customers in the UK. The Parties have until 11 October 2023 to offer an undertaking to address the SLC. If no such undertaking is offered, or the CMA decides that any undertaking offered is insufficient to remedy its concerns to the phase 1 standard, then the CMA will refer the Merger for an in-depth phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

ASSESSMENT

PARTIES, TRANSACTION AND TRANSACTION RATIONALE

15. Whitby is a manufacturer and supplier of breaded scampi and other coated seafood products to retail and foodservice customers in the UK and Europe.¹ The turnover of Whitby in 2022 was £65,645,000 worldwide and £65,162,000 in the UK.²
16. Kilhorne Bay is a manufacturer and supplier of breaded and peeled scampi products to foodservice customers in the UK and Europe.³ It has one factory in Annalong (Northern Ireland).⁴ The turnover of Kilhorne Bay in 2022 was £[§<]worldwide and £[§<]in the UK.⁵
17. The Merger relates to the purchase by Whitby (via Kilkeel Seafoods Limited) of the whole of the issued share capital of Bonumcorpus. Bonumcorpus is the owner of the whole issued share capital in Kilhorne Bay. Kilhorne Bay is the operating company for the business to be transferred pursuant to the Merger.⁶
18. The CMA understands that initial discussions between the Parties in relation to the Merger first began in late 2018.⁷ A valuation of the Kilhorne Bay business was made in March 2019, but delays (first for strategic and financial reasons, then due to the COVID-19 pandemic) meant that a Share Purchase Agreement was not signed by the Parties until May 2023.⁸
19. Whitby submitted that its main strategic reasons to proceed with the Merger are:
 - (a) to introduce peeled and glazed scampi into its product range (as defined in paragraph 46 below); and
 - (b) to enable its expansion into markets in the European Union.⁹
20. Kilhorne Bay submitted that its rationale for the Merger is to exit the market and realise value (via redevelopment) from the land on which its factory is located.¹⁰

¹ Final Merger Notice submitted to the CMA on 7 August 2023 (**FMN**), paragraph 3.3.

² FMN, paragraph 6.1.

³ FMN, paragraph 3.11.

⁴ FMN, paragraph 3.9.

⁵ FMN, paragraph 6.1.

⁶ FMN, paragraph 2.1.

⁷ Whitby's submission to the CMA, 19 September 2023.

⁸ Whitby's submission to the CMA, 19 September 2023; and FMN, paragraphs 2.4 and 25.25.

⁹ FMN, paragraph 2.6.

¹⁰ FMN, paragraphs 2.23 and 11.2.

PROCEDURE

21. As part of its phase 1 investigation, the CMA gathered a significant volume of evidence from the Parties and other market participants. The Parties also had opportunities to make submissions and comment on our emerging thinking throughout the phase 1 investigation.
22. The Merger was considered at a Case Review Meeting.¹¹

JURISDICTION

23. The CMA believes that the Merger (as described in paragraph 17) gives rise to arrangements in progress or contemplation for the purposes of the Act.¹²
24. Each of Whitby and Kilhorne Bay is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
25. The Parties overlap in the supply of breaded scampi to foodservice customers in the UK, with a combined share of supply of [X] [90-100]% (with an increment of [X] [5-10]% brought about by the Merger) (see Table 1 below). The CMA believes that the share of supply test in section 23 of the Act is met.
26. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
27. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 9 August 2023 and the statutory 40 working day deadline for a decision is therefore 4 October 2023.

COUNTERFACTUAL

28. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of the

¹¹ See [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2 revised\)](#), December 2020, from page 46.

¹² Section 33(1)(a) of the Act.

prevailing conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.¹³

29. The counterfactual assessment will often focus on significant changes affecting competition between the merger firms, such as entry into new markets in competition with each other, significant expansion by the merger firms in markets where they are both present, or exit by one of the merger firms.¹⁴
30. The Parties submitted that the appropriate counterfactual is the winding down of trading by Kilhorne Bay in the short to medium term.¹⁵ This is what the CMA calls an **‘exiting firm’** scenario. In forming a view on an exiting firm scenario, the CMA will use the following framework of cumulative conditions:
- (a) the firm is likely to have exited (**Limb A**); and if so,
 - (b) there would not have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question (**Limb B**).¹⁶
31. For the CMA to accept an exiting firm counterfactual at phase 1, it needs to see compelling evidence that it was inevitable that Limb A and Limb B would be met in the absence of the merger.¹⁷

Would Kilhorne Bay have exited the market (Limb A)?

32. Kilhorne Bay submitted that:
- (a) its two shareholders are [X] and [X];¹⁸
 - (b) its shareholders have long planned to [X], with discussions around exit running simultaneously to [X];¹⁹
 - (c) [X]²⁰ [X];²¹

¹³ See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.12.

¹⁴ [CMA129](#), paragraph 3.8.

¹⁵ FMN, paragraphs. 11.1 and 11.2.

¹⁶ [CMA129](#), paragraph 3.21.

¹⁷ [CMA129](#), paragraph 3.23.

¹⁸ FMN, paragraph 25.32.

¹⁹ Letter to CMA regarding Kilhorne Bay’s Counterfactual Position dated 21 August 2023 (**Counterfactual Letter**), page 1.

²⁰ Kilhorne Bay’s response to the Issues Letter, 14 September, paragraphs 1.1.6 and 2.1.2; and Counterfactual Letter, page 2.

²¹ Kilhorne Bay’s response to the Issues Letter, 14 September, paragraph 1.1.6; and Counterfactual Letter, page 2. Kilhorne Bay estimated that [X].

(d) [REDACTED];²² and

(e) the decision to exclude, from the Merger, the land on which Kilhorne Bay's factory is currently located is also evidence of the shareholders' intention to realise the value of the land.²³

33. [REDACTED].²⁴ According to the Parties, while BRC accreditation is not a legal requirement for the supply of breaded scampi in the UK, it is often requested by foodservice customers.²⁵ [REDACTED].²⁶ [REDACTED].²⁷

34. The CMA considers, however, that it has not received compelling evidence to conclude that Kilhorne Bay would inevitably have exited the market absent the Merger. [REDACTED].²⁸

(a) there is no evidence that [REDACTED] has had a material impact on its ability to continue trading and generate revenue thus far. Indeed, the evidence available to the CMA indicates that, as of today, Kilhorne Bay is profitable and debt-free,²⁹ and that both turnover and profits have increased over the last year;³⁰

(b) Kilhorne Bay first entered into discussions with Whitby in 2018 (see paragraph 18 above) which suggests that the [REDACTED] may be a consequence of the Merger, and should therefore not be incorporated within the counterfactual in this case.³¹ [REDACTED];³²

²² Counterfactual Letter, page 2.

²³ Counterfactual Letter, page 1.

²⁴ Kilhorne Bay's response to the Issues Letter, 14 September 2023, Appendix 2.

²⁵ Kilhorne Bay's response to the Issues Letter, 14 September 2023, paragraph 1.1.6; Kilhorne Bay's response to the section 109 request dated 29 August 2023, Annex pages 26, 72 and 75; Whitby also provided [REDACTED] (Whitby's response to the Issues Letter, 14 September 2023, Annex ISS 2).

²⁶ Kilhorne Bay's response to the Issues Letter, 14 September 2023, paragraph 1.1.6(d). Kilhorne Bay acknowledged that as BRC is a British accreditation, [REDACTED]. See Kilhorne Bay's response to the Issues Letter, 14 September 2023, paragraph 1.1.6.

²⁷ Whitby's response to the Issues Letter, 14 September 2023, page 1.

²⁸ and Kilhorne's Bay's submission to the CMA, 11 September 2023, pages 1-110; and Kilhorne Bay's response to the Issues Letter, 14 September 2023, Appendix 3.

²⁹ As per the Kilhorne Bay Seafoods Limited [30 April 2022 Annual Report and Accounts](#).

³⁰ FMN, paragraph 6.1 indicates that Kilhorne Bay's revenues increased from approximately £4.4 million in 2021 to £6.3 million in 2022. The CMA also notes from the 'Total exemption full accounts made up to 30 April 2022' that Kilhorne Bay's retained profits in 2022 were £5.6m which is an increase in comparison to the £5m recorded in 2021 (see [30 April 2022 Annual Report and Accounts](#)).

³¹ [CMA129](#), paragraph 3.4.

³² Kilhorne Bay's response to the Issues Meeting, 14 September 2023, paragraph 1.1.1. and Appendix 1.

- (c) [X]. [X], which, as noted above, may be a consequence of the Merger and therefore cannot be incorporated within the counterfactual, for the purpose of the CMA's assessment of the Merger, in this case; and
- (d) more generally, there is limited evidence to indicate that Kilhorne Bay would have inevitably exited, or that its current shareholders would have not been able to continue managing the business in the short to medium term, absent the Merger (eg whilst seeking alternative arrangements).³³

35. In light of the evidence summarised above, the CMA considers that Kilhorne Bay continuing to operate in the short to medium term is a realistic prospect. While the Kilhorne Bay shareholders may be looking to exit the business, there is limited evidence to indicate that exit of the market was inevitable, absent the Merger, and that the business continuing to operate should not be considered a realistic prospect. On this basis, the CMA does not consider Limb A to be met.

Alternative, less anti-competitive purchasers (Limb B)

36. As set out in paragraph 30 above, if the CMA is satisfied that the firm would inevitably have exited absent the Merger (Limb A), then it will also assess whether there would have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question (Limb B). For the reasons set out above, the CMA does not consider that Limb A is met and therefore it is not required to assess Limb B. However, for completeness, the CMA has also considered Limb B in this section.
37. Kilhorne Bay submitted that it has made 'no approaches to any other potential acquirers and no offers have been received'.³⁴ It also submitted that there would be 'no other potential purchasers' of its business.³⁵
38. The fact that no other bids were received for a business may not, by itself, establish the position that there were no alternative purchasers for a firm or its assets.³⁶ When considering the prospects for an alternative purchaser, the CMA will look at available evidence supporting any claims that there was genuinely only one possible

³³ [CMA129](#) provides guidance on the time horizons considered by the CMA in its assessment of the counterfactual, stating that time horizon should be 'consistent' with that used in the CMA's competitive assessment (paragraph 3.15). In light of this, in considering the Parties' submissions regarding the counterfactual, the CMA is particularly focussing on developments in the short-to-medium term (ie approximately two years). For example, when considering potential entry, the CMA has applied a timeframe of approximately two years ([CMA129](#), paragraph 8.33).

³⁴ FMN, paragraph 2.25.

³⁵ Counterfactual Letter, page 2.

³⁶ [CMA129](#), paragraph 3.30.

purchaser. Even if the CMA believes that the firm would have exited, there may be other buyers (who did not have an opportunity in practice to bid for the business) whose acquisition of the firm as a going concern, or of its assets, would produce a better outcome for competition than the merger under consideration.

39. Whilst Kilhorne Bay did not receive any other formal offers for the business (with the possible exception of [X], see paragraph 41 below), the CMA notes that it did not launch a sales process or reach out to any other potential bidders. In this regard, the CMA notes that Kilhorne Bay remains a profitable business, and that (particularly before the [X] which, as noted above, may be a consequence of the Merger) there is no reason to believe that it would not have been attractive to a potential alternative purchaser either already in the market or wishing to enter.
40. The CMA received evidence that another alternative acquirer had been interested in Kilhorne Bay. [X] told the CMA that it would have been willing to purchase Kilhorne Bay in its entirety at that time, even if Kilhorne Bay had sold the land on which its factory is located.³⁷
41. In relation to a potential acquisition by [X], the Parties submitted that:
- (a) in March 2023, [X] had expressed an interest in investing in Kilhorne Bay, but, by this point, Kilhorne Bay was already in negotiations with Whitby and bound by confidentiality and exclusivity agreements;³⁸ and
 - (b) the offer received was not ‘formal’ or a ‘genuine, serious or indeed a viable option’.³⁹
42. The available evidence indicates that no ‘formal’ offer for Kilhorne Bay was ever submitted by [X] and that any discussions were at a very early stage. There is, however, also no evidence to suggest (particularly because this offer was not explored further) that this offer was not ‘serious’ or ‘viable’, or that [X] was not otherwise a plausible alternative purchaser for the business. For example while the Parties also submitted, in relation to viability, that ‘only purchasers with factory facilities would be capable of buying the Kilhorne Bay business’, the CMA notes that [X] does already possess factory facilities.⁴⁰

³⁷ [X]. Note of a call with a third party, July 2023 [[X]]; and submission to the CMA from a third party, August 2023 [[X]].

³⁸ FMN, paragraph 2.24.

³⁹ Kilhorne Bay’s response to the Issues Letter, 14 September 2023, paragraph 1.1.8.

⁴⁰ Kilhorne Bay’s response to the Issues Letter, 14 September 2023, paragraph 1.1.8.

43. On the basis of the evidence summarised above, the CMA considers that there is a realistic prospect of an alternative, less anti-competitive purchaser for the Kilhorne Bay business: either [X], or potentially other purchasers (had a more exhaustive sales process been run). However, as referred to in paragraph 36 above, given the CMA's conclusion that it has not received compelling evidence on Limb A, it is not necessary for the CMA to conclude on Limb B.

Conclusion on the counterfactual

44. For the reasons set out above, the CMA considers the prevailing conditions of competition to be the appropriate counterfactual on the basis that:
- (a) the continued operation of Kilhorne Bay (eg via the current shareholders, or an alternative purchaser) in the short to medium term is a realistic prospect;
 - (b) while the Kilhorne Bay's shareholders may be looking to exit the market, the available evidence is mixed, and does not establish that exit was inevitable in the short to medium term (and therefore that it was not realistic for the business to continue to operate); and
 - (c) for the CMA to accept an exiting firm argument at Phase 1, it would need to see compelling evidence that exit was inevitable, and in this case, the Parties have not met the required threshold to satisfy the CMA.

INDUSTRY BACKGROUND

Scampi products and customers

45. The raw material of scampi is *nephrops norvegicus*, ie a 'Norway lobster' or 'langoustine', which can be fished only around British and Norwegian waters.⁴¹ The wholesale supply of scampi typically involves scampi manufacturers (such as Whitby and Kilhorne Bay) purchasing **raw material** – either 'scampi tails' or 'scampi core' – from fishing boats or intermediaries, and processing this material to produce **breaded scampi**.⁴²

⁴¹ Scampi cannot be labelled as scampi under UK food legislation unless comprised of *nephrops norvegicus*, usually caught by boats mainly in Scotland and Northern Ireland (FMN, paragraph 3.1).

⁴² In this decision, the CMA uses 'raw material' to refer to scampi tails and/or scampi core. Industry sources typically use raw material only to refer to scampi tails (FMN, paragraph 3.1). Once the tail is peeled and frozen, it is known as scampi core. The production of scampi cores therefore involves an additional step of 'processing' the scampi tails. The CMA has distinguished between scampi tails and scampi cores where necessary in its competitive assessment. 'Breaded scampi' is scampi core coated in breadcrumbs or batter (the latter sometimes being referred to as 'coated scampi').

46. The CMA understands that almost all scampi sold in the UK is breaded scampi.⁴³ Both Parties sell breaded scampi in the UK, and Kilhorne Bay also sells small volumes of ‘peeled scampi’ in the UK and Europe.⁴⁴ As the overlap between the Parties in the UK relates only to breaded scampi, the other activities of the Parties are not considered further in this decision.⁴⁵
47. Breaded scampi can be sold to customers either frozen or chilled, although the Parties submitted that the large majority of breaded scampi is frozen, and almost all breaded scampi sold to foodservice customers is frozen.⁴⁶ The CMA also understands that breaded scampi can be differentiated based on the percentage of langoustine meat in the final product, which is seen as an indicator of the product’s quality. In particular, the Parties and third parties have made reference to the following types of breaded scampi products:⁴⁷
- (a) ‘scampi bites’, a low-end product containing scampi and other white fish, with less than 10% langoustine meat overall;
 - (b) ‘formed scampi’, a mid-range product containing broken pieces of scampi, with approximately 35% langoustine meat overall; and
 - (c) ‘wholetail breaded scampi’, a premium product containing one or more wholetail pieces of scampi, with approximately 40-43% langoustine meat overall.⁴⁸
48. Breaded scampi is sold to two types of customers:⁴⁹
- (a) retail customers, such as supermarkets and retail wholesalers; and

⁴³ The CMA’s analysis of Annex 026 to the FMN indicates that over 95% of scampi sold in the UK is breaded scampi. Unless stated otherwise, references to ‘scampi’ in the remainder of this decision relate to breaded scampi.

⁴⁴ Peeled scampi is *nephrops norvegicus* with its outer shell removed and glazed with ice (FMN, paragraph 3.1).

⁴⁵ Only a small percentage ([<]) of Kilhorne Bay’s UK turnover is generated by peeled scampi (Annex 009 to the FMN).

⁴⁶ FMN, paragraph 25.4. Unless stated otherwise, the remainder of this decision does not distinguish between chilled and frozen scampi.

⁴⁷ FMN, paragraph 15.43. Note of a call with a third party, July 2023, paragraph 7 [3]. Response to the CMA questionnaire from a third party, August 2023, question 2 [3]. Note of a call with a third party, July 2023, paragraph 7 [3].

⁴⁸ The remaining part of the product (~60%) is made up of breadcrumbs, and other ingredients such as water, oil and stabilisers.

⁴⁹ FMN, paragraph 17.1.

(b) foodservice customers, such as pubs, restaurants and foodservice wholesalers.⁵⁰

49. Whitby supplies breaded scampi to both retail and foodservice customers, whereas Kilhorne Bay supplies breaded scampi to foodservice customers only.⁵¹ In fact, Kilhorne Bay has [X] UK customers at present: [X] Pacific West, a supplier of seafood products to foodservice wholesalers, which accounts for around [X] of Kilhorne Bay's UK scampi revenues.⁵²
50. The CMA notes that Kilhorne Bay is [X] supplier of breaded scampi to Pacific West, and supplies Pacific West with a finished product that Pacific West, in turn, supplies to foodservice customers.⁵³ The CMA has taken account of the relationship between Kilhorne Bay and Pacific West, and the impact of the Merger on the competitive constraint currently provided by Pacific West, in its competitive assessment of the Merger.

Access to raw material

51. Several third parties told the CMA that access to raw material is an important constraint on the production and supply of breaded scampi in the UK. The factors cited by third parties included the following:
- (a) labour shortages, and a decrease in the number of fishing boats catching the raw material due to retirement and/or pursuit of more lucrative work;⁵⁴
- (b) seasonality (as langoustine can only be caught at certain times of the year);⁵⁵

⁵⁰ The CMA understands that the majority of the Parties' foodservice sales of scampi are to wholesalers. However, Whitby also makes material sales to large foodservice customers such as pubs including [X], which is Whitby's [X] foodservice customer (Annex RF11 26.2 to the FMN). In total, the CMA understands that over 20 million portions (25 million portions in 2021) of breaded scampi are sold to foodservice customers each year (FMN, paragraph 15.17).

⁵¹ FMN, paragraph 13.1.

⁵² FMN, paragraph 25.17; Kilhorne Bay's response to question 26 of RF11.

⁵³ Response to the CMA questionnaire from a third party, August 2023, question 3 [[X]]. The CMA was made aware that a contract was entered between Kilhorne Bay and [X] in 2010, which stipulates [X]. [X] submitted to the CMA that it had no recollection of such a contract, and that its 'relationship with [X] has been conducted as [X]' (Letter to the CMA dated 17 August 2023, paragraphs 6.3 and 6.5). The CMA notes that, in any event, [X] has been [X] to [X] since [X] (response to the CMA questionnaire from a third party, August 2023, question 3. [[X]]).

⁵⁴ Notes of calls with third parties, July 2023, paragraph 25 [[X]]; and paragraph 16 [[X]]. Response to the CMA questionnaire from a third party, August 2023, question 9 [[X]].

⁵⁵ Response to the CMA questionnaires from third parties, August 2023, question 9 [[X]]; and question 5 [[X]], [[X]].

- (c) access to local fishing fleets and relationships with fishing boats or intermediaries;⁵⁶ and
- (d) the existence of fishing quotas which limit the amount of the raw material that can be caught, as well as broader pressures for fishing practices to be sustainable.⁵⁷

52. Several third parties indicated that, as a result of these factors, there is an 'insufficient' or 'tight' supply of raw material in the UK, particularly at certain times in the year.⁵⁸ Several third parties indicated that the challenges in accessing raw material has implications for the competitive landscape in breaded scampi, for example by restricting the number of credible alternatives and acting as a barrier to entry and expansion.⁵⁹ The CMA has taken this into account, to the extent relevant, in its competitive assessment and in its consideration of barriers to entry and expansion (paragraphs 69 to 126 below).

FRAME OF REFERENCE

53. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA takes these factors into account in its competitive assessment.⁶⁰

Product scope

54. The Parties overlap in the supply of breaded scampi to foodservice customers in the UK, and this has been the CMA's starting point when considering the appropriate

⁵⁶ Notes of calls with third parties, July 2023, paragraph 29 [redacted]; paragraph 30 [redacted]; paragraph 18 [redacted]; and response to CMA questionnaire from a third party, August 2023, question 9 [redacted]. Whitby also submitted that there is no formal exclusivity but did express that there are certain ports which are regarded as Youngs' or Whitby's ports (FMN, paragraph 17.3).

⁵⁷ Notes of calls with third parties, July 2023, paragraph 18 [redacted]; paragraph 28 [redacted].

⁵⁸ Note calls with third parties, July 2023, paragraph 15 [redacted]; paragraph 12 [redacted]; paragraph 13 [redacted]. Response to the CMA questionnaire from a third party, August 2023, question 9 [redacted]

⁵⁹ One customer stated that scampi is generally in short supply, so there are not many suppliers which can provide the volume it requires; and another stated that it does not believe it is possible to switch all of its scampi to another supplier at a competitive cost because raw material access is limited (response to CMA questionnaire from third parties, August 2023, question 5 [redacted], [redacted]; and question 9 [redacted] [redacted]).

⁶⁰ [CMA129](#), paragraph 9.4.

frame of reference. The CMA considered the following alternatives, which are addressed in further detail below:

- (a) whether to widen the frame of reference to include other breaded seafood products; and/or
- (b) whether to widen the frame of reference to include both retail and foodservice customers.

55. The CMA also considered whether to narrow the product frame of reference based on: (i) own-label and branded scampi, and/or (ii) different types of scampi product (eg wholetail and formed scampi). However, the available evidence did not support these narrower frames of reference. For example, the vast majority of third parties submitted that own-label and branded breaded scampi are substitutes (and in many instances close substitutes),⁶¹ and the majority of third parties indicated that different scampi products were close substitutes.⁶² The CMA also notes that the Parties did not make representations that these products constitute distinct frames of reference. The CMA has distinguished between these different product attributes where relevant in its competitive assessment.

Other breaded seafood products

56. The Parties submitted that the relevant market is wider than breaded scampi, and includes a range of other breaded seafood products.⁶³ This is on the basis that (i) most customers offer a range of breaded seafood products, including scampi, fishcakes, calamari and prawns;⁶⁴ (ii) price lists and menus usually list scampi within a wider 'coated seafood' category;⁶⁵ (iii) scampi is typically cheaper than other seafood products (eg on pub menus) which demonstrates that scampi prices are

⁶¹ Response to the CMA questionnaire from third parties, August 2023, question 8. [[<]] [[<]], [[<]], [[<]], [[<]], [[<]], [[<]], [[<]]; and question 7 [[<]], [[<]] [[<]], [[<]] and [[<]]

⁶² Response to the CMA questionnaire from third parties, August 2023, question 9 [[<]] [[<]], [[<]]; and question 7 [[<]], [[<]], [[<]], [[<]]

⁶³ Whitby's response to the Issues Letter, 14 September 2023, page 2 and FMN, paragraph 13.5.

⁶⁴ FMN, paragraph 13.6 and 13.8

⁶⁵ FMN, paragraph 13.7; Annex RF11 9.2.1 to the FMN, 'Hopwells Spring 23 product guide', pages 15-18; Annex RF11 9.2.2 to the FMN, 'Brakes price list seafood category', page 1; and Whitby's presentation titled 'Whitby Seafoods Presentation to Competition and Markets Authority' to the CMA at the Issues Meeting on 12 September 2023 (**Whitby's First Issues Meeting Presentation**), slide 4.

constrained by these alternative products;⁶⁶ and (iv) most seafood products can be breaded using the same equipment as scampi, at least for foodservice customers.⁶⁷

57. To support these submissions, the Parties provided some internal documents and data evidencing some switching from scampi to other breaded seafood products.⁶⁸ However, the CMA notes that the examples provided by the Parties were focussed on retail customers, and the Parties have provided limited evidence of any customer switching in the foodservice sector. Although Whitby provided examples of two foodservice customers discussing potential plans to remove scampi, it was not clear whether the customers were proposing to switch to alternative products (or simply remove scampi altogether).⁶⁹ The CMA also notes that these were isolated examples involving relatively small volumes of supply.ⁱ
58. The majority of third parties [[§<]] told the CMA that other seafood products are not a close substitute for breaded scampi, at least for foodservice customers.⁷⁰ Some third parties for example noted that breaded scampi has unique product characteristics, such as taste and texture.⁷¹ This was supported by many customers, with one stating that its customers ‘do not want an alternative’ to scampi,⁷² and another stating that alternative seafood products are ‘too different’ and ‘fulfil a different role on the menu’.⁷³
59. The CMA also notes that supply-side substitution is limited between scampi and other seafood products. For example, Kilhorne Bay supplies scampi only, and although Whitby also supplies some other seafood products, the large majority of its revenues are from scampi.⁷⁴ Further, many of the largest seafood producers (such as Birds Eye) are not active in scampi. Even if such producers have the necessary equipment to process and bread scampi, they would require access to the raw

⁶⁶ Whitby’s response to the Issues Letter, 14 September 2023, page 2. Whitby also stated that consumers’ expectations act as a constraint on how much it will pay for scampi, as consumers will not pay as much for scampi as they would for steak or fish and chips, for example (Whitby’s presentation titled ‘Response to CMA issues letter’ to the CMA at the Issues Meeting on 12 September 2023 (**Whitby’s Second Issues Meeting Presentation**), slide 27).

⁶⁷ FMN, paragraphs 3.3 and 5.2(vi).

⁶⁸ FMN, paragraph 13.5, 25.8 and Annex 29 to the FMN, ‘Switching diagram’; Annexes RF11 9.1.2, ‘2019 switching presentation; 12.1.1, ‘Switching in retail’; and 12.4.1, ‘Email from Aldi’, to the FMN.

⁶⁹ Whitby’s response to the Issues Letter, 14 September 2023, Annex ISS 14.

⁷⁰ Five customers [[§<]] and five competitors [[§<]] indicated that scampi and other breaded seafood products are not close substitutes; compared to four customers [[§<]] and one competitor [[§<]] that indicated they are substitutes.

⁷¹ Note of calls with third parties, July 2023, paragraph 10 [[§<]]; and paragraph 20 [[§<]].

⁷² Response to the CMA questionnaire from third parties, August 2023, question 11 [[§<]], [[§<]], [[§<]].

⁷³ Response to the CMA questionnaire from a third party, August 2023, question 11 [[§<]].

⁷⁴ Annex 009 to the FMN. In 2022, approximately 90% of Whitby’s revenues were from scampi.

material, which the CMA understands is a considerable constraint on the supply of scampi (see 51 to 52 paragraphs above).⁷⁵

60. The CMA therefore does not consider that the frame of reference should include other breaded seafood products.⁷⁶

Retail and foodservice customers

61. The Parties submitted that the frame of reference should include both retail and foodservice customers.⁷⁷ This is because, regardless of where the product is consumed, the consumer understands the product to be the same. The Parties also submitted that scampi made for foodservice and retail customers is produced on the same manufacturing line, with the same materials.⁷⁸
62. Whitby also provided one internal document suggesting that the supply of scampi to retail customers can affect the prices of scampi in the foodservice market, as the limited supply of raw material means that an increase in demand in retail will cause prices to increase in foodservice (and vice versa).⁷⁹ Whitby submitted that, as a result of this dynamic, [REDACTED].⁸⁰
63. However, the CMA considers that there are several factors indicating that retail and foodservice supply should be treated as separate frames of reference. On the demand side:
- (a) the CMA understands that foodservice customers typically purchase scampi in larger quantities and packet sizes.⁸¹ A number of foodservice customers submitted that it would be difficult to purchase breaded scampi manufactured for retail customers, as this would result in unnecessary package wastage and cost;⁸²

⁷⁵ Access to raw material is also discussed further in paragraphs 124 to 126 under barriers to entry and expansion (and when discussing potential entrants in the competitive assessment).

⁷⁶ This is also consistent with the approach taken (on a cautious basis) by the CMA in Whitby/Dawnfresh, ME/6598/16 [Whitby Seafoods / Dawnfresh Seafoods \(2016\) – Phase 1 Decision](#), paragraph 34.

⁷⁷ FMN, paragraphs 13.8 and 13.9.

⁷⁸ FMN, paragraph 13.11.

⁷⁹ Whitby's response to the Issues Letter, 14 September 2023, Annex ISS 3.

⁸⁰ Whitby's response to the Issues Letter, 14 September 2023, page 2.

⁸¹ Response to the CMA questionnaire from third parties, August 2023, question 10. [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]

⁸² Response to the CMA questionnaire from third parties, August 2023, question 10 [REDACTED], [REDACTED], [REDACTED], [REDACTED]

- (b) there are different preparation and cooking requirements for foodservice and retail customers (breaded scampi sold to retail customers is oven-ready, whereas scampi sold to foodservice customers is ready to deep-fry);⁸³ and
- (c) breaded scampi for foodservice customers is primarily wholesale, whereas for retail customers it can be lower quality, and therefore cheaper (eg scampi bites).⁸⁴

64. On the supply side, conditions of competition vary materially between the foodservice and retail channels. Most notably, Young's is significantly larger in retail than foodservice (see paragraph 107 below), and Kilhorne Bay is active only in foodservice. Some smaller providers also focus on only one channel, eg [X] is active in foodservice but not retail, and [Y] is active only in retail.⁸⁵ Further, the Parties submitted that the production of breaded scampi for retail customers requires specialist equipment, as well as specialist insurance to cover the potential fire risk that arises from deep frying scampi (which is necessary so that it can be cooked by the end-consumer in an oven).⁸⁶ The Parties stated that Kilhorne Bay does not sell into the retail market due to the lack of this equipment and insurance.⁸⁷
65. The CMA therefore considers that the supply of breaded scampi to foodservice and retail customers constitute distinct frames of reference.⁸⁸

Geographic scope

66. Whitby and Kilhorne Bay both supply scampi products across the UK and their largest customers operate on a national basis. No evidence has been submitted either by the Parties or third parties to suggest that the market should be wider than the UK or based on regions within the UK.
67. The CMA therefore considers that the appropriate geographic frame of reference is national.

⁸³ Response to the CMA questionnaire from a third party, August 2023, question 10 [[X]].

⁸⁴ Response to the CMA questionnaire from a third party, August 2023, question 9 [[X]].

⁸⁵ Response to the CMA questionnaire from third parties, August 2023, question 2 [[X]], [[Y]].

⁸⁶ FMN, paragraphs 13.1 and 13.4.

⁸⁷ FMN, paragraph 13.1 and 13.4.

⁸⁸ This is also consistent with the approach taken (on a cautious basis) by the CMA in Whitby/Dawnfresh, ME/6598/16 [Whitby Seafoods / Dawnfresh Seafoods \(2016\) – Phase 1 Decision](#), paragraph 46.

Conclusion on frame of reference

68. For the reasons set out above, the CMA has assessed the impact of the Merger in the following frame of reference: the supply of breaded scampi to foodservice customers in the UK.

COMPETITIVE ASSESSMENT

Horizontal unilateral effects

69. Horizontal unilateral effects can arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.⁸⁹ The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger.⁹⁰ Horizontal unilateral effects are therefore more likely when the market is concentrated, the merging parties are close competitors and there are few alternative suppliers.
70. In this case, the CMA has assessed whether it is or may be the case that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of breaded scampi to foodservice customers in the UK.
71. For context, the CMA notes that [X] of Kilhorne Bay's scampi sales in the UK are to Pacific West, and that Kilhorne Bay is [X] supplier to Pacific West (see paragraph 50 above). The CMA has taken this relationship into account in its competitive assessment. In particular, in assessing the closeness of competition between Whitby and Kilhorne Bay, the CMA has also considered the closeness of competition between Whitby and Pacific West, given that Pacific West currently supplies much of Kilhorne Bay's output to wholesalers.
72. The CMA recognises, however, that Pacific West could, in principle, continue to operate as an effective competitor post-Merger, for example if it was able to secure alternative sources of supply and had the commercial incentive to do so. The impact of the Merger on Pacific West's competitive position is therefore assessed in paragraphs 96 to 104 below, when considering alternative suppliers to the Parties.
73. In assessing whether the Merger raises competition concerns in the supply of breaded scampi to foodservice customers in the UK, the CMA considered:

⁸⁹ [CMA129](#), paragraph 4.1.

⁹⁰ [CMA129](#), paragraph 4.3.

- (a) shares of supply;
- (b) closeness of competition between the Parties;
- (c) competitive constraints from alternative suppliers; and
- (d) third-party views on the Merger.

Shares of supply

74. The CMA has calculated shares of supply based on information provided by the Parties and by third parties. These are presented in Table 1.

Table 1: Shares of supply for breaded scampi to foodservice customers in the UK.⁹¹

Supplier	Revenue	Share of supply (by revenue)	Volumes (mt)	Share of supply (by volume)
<i>Whitby</i>	£ [X]	[80-90]%	[X]	[80-90]%
<i>Kilhorne Bay (sales to [X])</i>	£[X]	[0-5]%	[X]	[0-5]%
<i>Kilhorne Bay (sales to Pacific West)</i>	£[X]	[5-10]%	[X]	[5-10]%
<i>Parties combined</i>		[X] [90-100]%		[X] [90-100]%
<i>Young's Seafoods</i>	[X]	[0-5]%	[X]	[X] [0-5]%
<i>Piper Seafoods</i>	[X]	[0-5]%	[X]	[X] [0-5]%
<i>Bannerman</i>	[X]	[0-5]%	<i>unknown</i>	<i>unknown</i>

Source: The CMA's analysis of Annex 030 to the FMN, Kilhorne Bay's response to question 26 of RFI1 and responses to the CMA's third-party questionnaires

75. The CMA considers that the Parties' combined shares of supply are high enough to raise prima facie competition concerns. In particular:
- (a) Whitby's already very strong market position will be further strengthened by the addition of Kilhorne Bay, the second largest supplier. The Merged Entity would

⁹¹ The revenue and volume data provided by each of these suppliers covers slightly different dates. Whitby's, Piper's and Bannerman's figures cover the full calendar year of 2022; Young's' figures covers its financial year ending 2023; and Kilhorne Bay's figures cover May 2021 to April 2022. The shares of supply by volume do not include Bannerman, as relevant data was not available.

collectively supply almost all breaded scampi to foodservice customers in the UK, with a combined share of supply (by revenue) of [X] [90-100]%.⁹²

- (b) Although the increment brought about by the Merger is moderate in scale ([X] [5-10]%), the CMA notes, consistent with the position set out in its guidance, that even small increments in market power may give rise to competition concerns where one merger firm has a strong position in the market.⁹²
- (c) The remaining alternative suppliers each have a share of supply well below [X] [0-5]%, and are therefore much smaller than the Merged Entity in the relevant market.

76. The Parties submitted that limited information is available regarding the foodservice scampi market, and therefore the Parties' shares of supply are likely to be inflated.⁹³ However, the CMA notes that the Parties' own share of supply estimates are very similar to those in Table 1,⁹⁴ and the evidence indicates that the shares attributable to any omitted suppliers are likely to be very small.⁹⁵ Further, several third parties indicated that Whitby has a very high share of supply. For example, one customer stated that the foodservice market is 'very much dominated by Whitby',⁹⁶ and another customer stated that if Whitby acquired Kilhorne Bay it would have 'almost sole control over the supply of scampi into the UK market'.⁹⁷ On this basis, the CMA considers that the shares of supply in Table 1 appear to be broadly consistent with the characterisation of the structure of the market put forward by third parties.

Closeness of competition

77. Closeness of competition is a relative concept. Where there is a degree of differentiation between the merger firms' products, they may nevertheless still be close competitors if there are few rivals. Therefore, the CMA assesses closeness of competition between merger firms in the context of the other constraints that would remain post-merger. This means that the smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors. In such a scenario, the CMA will require persuasive evidence that the merger firms are not close competitors in order to allay any competition concerns.⁹⁸

⁹² [CMA129](#), paragraph 4.12.

⁹³ Whitby's response to the Issues Letter, 14 September 2023, page 1.

⁹⁴ FMN, paragraph 5.2(iv); and Annex 030 to the FMN.

⁹⁵ See paragraphs 96-119 below regarding alternative suppliers and their estimated scale.

⁹⁶ Response to CMA questionnaire from a third party, August 2023 [[X]].

⁹⁷ Response to CMA questionnaire from a third party, August 2023 [[X]].

⁹⁸ [CMA129](#), paragraph 4.10.

78. As mentioned in paragraph 71 above, [X] of Kilhorne Bay's scampi sales in the UK are to Pacific West, and Kilhorne Bay is [X] supplier to Pacific West. Therefore, [X] of Kilhorne Bay's output is currently marketed to downstream foodservice customers through Pacific West, and as such, Kilhorne Bay exercises a competitive constraint on Whitby through its sales to Pacific West. For this reason, in assessing the closeness of competition between Whitby and Kilhorne Bay, the CMA has also considered evidence on the closeness of competition between Whitby and Pacific West.
79. This section first sets out the Parties' main submissions regarding closeness of competition, then considers evidence on the Parties' respective product offerings; evidence from internal documents; evidence on the extent of head-to-head competition between the Parties (based on customer overlaps, tenders and switching); and third-party views regarding closeness of competition.

Parties' submissions

80. The Parties submitted that their main competitive constraint is the strength of their customers and suppliers, and not the constraint that they exercise on each other.⁹⁹ Whitby stated that prices are driven by factors other than competition, such as supply relative to demand or the demand for whole prawns in Europe.¹⁰⁰ Whitby also submitted that it operates in a broader seafood industry, such that its main competitors are other seafood suppliers (such as Birds Eye and Young's).¹⁰¹
81. The Parties submitted that Kilhorne Bay occupies a niche position within the market, [X].¹⁰² [X].¹⁰³ Whitby also stated that it believes that Kilhorne Bay's primary focus is to maximize its sales of peeled and glazed scampi, with breaded scampi being a by-product of that business.¹⁰⁴ In contrast, Kilhorne Bay rated Whitby as its strongest competitor, and explained that this is due to Whitby's size and market share.¹⁰⁵

⁹⁹ FMN, paragraph 15.1.

¹⁰⁰ Whitby's Second Issues Meeting Presentation, slide 3.

¹⁰¹ Whitby's response to the Issues Letter, 14 September 2023, page 2; and Whitby's Second Issues Meeting Presentation, slide 4.

¹⁰² FMN, paragraph 15.1.

¹⁰³ FMN, paragraph 15.17. The Parties also submitted that [X] (Whitby's Second Issues Meeting Presentation, slide 3).

¹⁰⁴ Annex RFI2 4.1 to the FMN. The CMA does not currently consider this reasoning compelling given Kilhorne Bay is the second largest producer of breaded scampi sold to foodservice customers in the UK.

¹⁰⁵ FMN, paragraph 15.9.

Product offerings

82. The evidence indicates that Kilhorne Bay and Whitby supply comparable and substitutable scampi products to foodservice customers:
- (a) Both Parties offer both own-label and branded breaded scampi products.¹⁰⁶ Regarding own-label breaded scampi in particular, Whitby has stated that its products are on 'parity' with Kilhorne Bay's.¹⁰⁷
 - (b) Both Parties supply wholetail scampi, which is the preferred scampi product for foodservice customers. Further, Whitby stated that its bestselling scampi product is a 'wholetail hand-peeled premium breaded scampi', which accounts for approximately [X%] of its foodservice sales.¹⁰⁸ The CMA understands that this product is very similar to that produced by Kilhorne Bay.¹⁰⁹ In particular, Kilhorne Bay submitted that its scampi is a premium product,¹¹⁰ and Pacific West stated that the overall quality of its scampi [X%], which is a point of difference at tenders and contract negotiations.¹¹¹
 - (c) Whitby's foodservice prices are slightly higher than those of Kilhorne Bay: Whitby's foodservice prices are [X%]/kg for formed scampi and [X%]/kg for wholetail scampi whereas Kilhorne Bay's prices are [X%] (all of which is wholetail scampi).¹¹² The price differences between the Parties' products are, however, relatively limited in scale (and could, in theory, reflect a degree of market power given Whitby's existing position), and are not so significant to suggest that the Parties' offerings are materially differentiated.

Internal documents

83. Whitby provided very few internal documents which were relevant to the CMA's competitive assessment. It provided one internal document which assessed a wide range of competitors in 2017.¹¹³ Kilhorne Bay was considered in this assessment along with other food producers.

¹⁰⁶ Whitby's branded scampi is sold under the 'Whitby Seafoods' brand. Kilhorne Bay supplies Pacific West with scampi sold under the brands of 'Aqua Blue', 'Pacific West' and 'Little Fisher'.

¹⁰⁷ Parties' submission to the CMA, 15 August 2023, paragraph 1.21.

¹⁰⁸ Parties' submission to the CMA, 15 August 2023, paragraph 1.20.

¹⁰⁹ Both Parties produce a hand-peeled breaded scampi product which is considered premium in the foodservice sector (FMN, paragraphs 15.6 and 17.8). Furthermore, both Parties produce a wholetail product (FMN, paragraph 15.7; and Parties' submission to the CMA, 15 August 2023, paragraph 1.20).

¹¹⁰ FMN, paragraph 15.6.

¹¹¹ Response to the CMA questionnaire from a third party, August 2023, question 6 [[X%]].

¹¹² Parties' submission to the CMA, 15 August 2023, paragraph 1.19.

¹¹³ Annex 2.11 of Whitby's response to the section 109 notice received by the CMA on 23 June 2023.

84. Kilhorne Bay provided some internal documents which provide evidence of competitive interactions between the Parties (either directly, or through Kilhorne Bay's supply of scampi to Pacific West). These included emails showing customers considering switching from Whitby to Pacific West,¹¹⁴ an email showing a customer of Whitby's asking for a price quote from Kilhorne Bay/Pacific West,¹¹⁵ and an email in which Kilhorne Bay refers to Whitby's price increases as justification for raising its own prices.¹¹⁶ The CMA notes, however, that these documents are several years old, and therefore has placed only limited weight on this evidence.

Customer overlaps, tenders and switching

85. Customer overlaps, tenders and switching are evidence of head-to-head competition between the Parties, and therefore evidence of closeness of competition. As noted in paragraph 50, [X] of Kilhorne Bay's breaded scampi is sold to Pacific West, and since [X], Kilhorne Bay has been Pacific West's [X]. Accordingly, in order to assess the nature of the constraint posed by Kilhorne Bay (and therefore the closeness of competition between Whitby and Kilhorne Bay), the CMA has also considered the evidence available in relation to competitive interactions between Whitby and Pacific West (and vice versa).
86. The CMA understands that the Parties have one overlapping foodservice customer ([X]),¹¹⁷ and Whitby and Pacific West have at least [X] overlapping foodservice customers.¹¹⁸ Another two of Whitby's customers identified Pacific West as an alternative supplier, when responding to the CMA's investigation, but are not currently using them.¹¹⁹ Whitby also provided the CMA with a list of all foodservice wholesalers that have both Pacific West and Whitby scampi products included on their online wholesale brochures or price lists. The list included [X] wholesaler brochures or price lists for which Pacific West and Whitby's scampi products were both listed.¹²⁰

¹¹⁴ See, for example, Kilhorne Bay's response to the section 109 notice received by the CMA on 5 September 2023, pages 558-560, 561-567 and 632.

¹¹⁵ Kilhorne Bay's response to the section 109 notice received by the CMA on 5 September 2023, page 410.

¹¹⁶ See, for example, Kilhorne Bay's response to the section 109 notice received by the CMA on 5 September 2023, pages 166, 180, 338-9 and 352.

¹¹⁷ FMN, paragraph 12.1.

¹¹⁸ Response to the CMA questionnaire from third parties, August 2023, question 3 [[X]] [[X]] [[X]] [[X]]. The CMA has inferred that [X] is a common customer of Pacific West and Whitby from a third party's [[X]] response to the CMA questionnaire and RF11 Annex 26.1 to the FMN.

¹¹⁹ Response to the CMA questionnaire from third parties, August 2023, question 3 [[X]] [[X]].

¹²⁰ Annex RF12 7 to the FMN. The CMA notes that Pacific West and Whitby appear on 22 out of the 55 company websites listed. The 55 companies listed as some of the referenced wholesalers above are wholesaler buying groups (such as Caterforce or Fairway) with smaller wholesalers below them.

87. The CMA also understands that Whitby has recently lost tenders to Pacific West. Whitby quoted [X], and Whitby submitted that it believes that these contracts were won by Pacific West.¹²¹ While the value of these two contracts would account for only a small proportion of Whitby's total revenue, the CMA considers that these examples demonstrate Pacific West's ability to successfully compete against Whitby. These tenders are also significant in the wider context in which customers switch supplier only infrequently (see paragraph 89 below), and in which Whitby has provided only limited examples of foodservice tenders (or customers) that it has lost to other competitors.¹²²
88. Additionally, the CMA has received some evidence of switching from Pacific West to Whitby, indicating that Whitby acts a competitive constraint on Pacific West. Pacific West stated that it lost its contract with [X] 'some years ago' and that [X] is currently still supplying this customer.¹²³ Pacific West also stated that it competes with [X] in all instances in which it re-quotes to its existing customers.'¹²⁴
89. Although the CMA has seen some evidence of switching, in general, third parties indicated that it is difficult to switch supplier.¹²⁵ The CMA asked customers how easy or difficult it is to switch scampi supplier, and all customers who answered this question stated it was difficult.¹²⁶ Many customers ([X]) explicitly stated that only one, two or limited providers would be able to supply the volumes they need in their responses.¹²⁷

Third-party views

90. The CMA asked customers to list and rate the main alternatives to each of the Parties and Pacific West. The majority of customers that responded to the question ([X]) considered Whitby to be an alternative to Kilhorne Bay and/or Pacific West,

¹²¹ FMN, paragraph 15.8. It is currently unclear to the CMA whether Whitby previously serviced the contracts and then subsequently lost them to Pacific West, or lost the initial tender.

¹²² Whitby submitted that it is seeing reductions in its volumes sold to [X] and it believes these sales have been lost to [X]; and that [X] customers are purchasing [X] products instead of [X], as [X] are [X] (Whitby's response to the Issues Letter, 14 September 2023, Annex ISS 13). However, Whitby also submitted that written information about the loss of business to other suppliers is typically unavailable, as foodservice business is conducted verbally over the telephone or in-person (Whitby's response to the Issues Letter, 14 September 2023, page 5).

¹²³ Response to the CMA questionnaire from a third party, August 2023, question 8 [X].

¹²⁴ Response to the CMA questionnaire from a third party, August 2023, question 8 [X].

¹²⁵ For example, one third party told the CMA that customers remain loyal to their suppliers as the lack of spare raw material within the industry means that there are no other options (response to the CMA questionnaire from a third party, August 2023, question 7 [X]).

¹²⁶ Responses to the CMA questionnaire from third parties, August 2023, question 5 [X], [X], [X], [X], [X], [X].

¹²⁷ Response to the CMA questionnaire from third parties, August 2023, question 5 [X], [X], [X], [X], [X].

with two customers rating Whitby as a very strong alternative, one rating it as a moderate alternative and one rating it as a very weak alternative.¹²⁸ Three of these customers listed Whitby as the only alternative.¹²⁹

91. Equally, the majority of customers that responded to the question ([redacted]) identified Kilhorne Bay and/or Pacific West as an alternative to Whitby.¹³⁰ Kilhorne Bay and/or Pacific West's average rating was the second strongest alternative after Young's, and Kilhorne Bay/Pacific West were the most frequently listed alternatives except Young's.¹³¹ However, on average, customers considered Kilhorne Bay and/or Pacific West as a very weak alternative to Whitby.¹³²
92. The CMA also asked the Parties' competitors to list and rate each of the Parties' main competitors. Pacific West ranked [redacted] as its closest competitor out of [redacted] named competitors (only [redacted] of which are active in the supply of breaded scampi to foodservice customers).¹³³ However, only one other competitor listed Whitby or Kilhorne Bay (or Pacific West) as an alternative to the other Party.¹³⁴

Competitive constraints

93. As noted in paragraph 69, horizontal unilateral effects are more likely to arise when the market is concentrated, the merging parties are close competitors and there are few alternative suppliers. In this section, the CMA therefore considers evidence regarding the competitive strength of alternative suppliers to the Parties.
94. Whitby submitted that, [redacted], its competitors are: Young's, Bannerman, Thistle Seafoods, Joseph Robertson, Three Oceans, Kilhorne Bay, Piper Seafoods, Birdseye and Iceland Seafood.¹³⁵ Whitby also told the CMA that Seafeast (Pan Euro), Ruskim Seafoods, Amity and Sea Pure currently supply breaded scampi to

¹²⁸ Response to the CMA questionnaire from third parties, August 2023, question 6 [redacted] [redacted] [redacted] and [redacted].

¹²⁹ Responses to the CMA questionnaire from third parties, August 2023, question 6 [redacted] [redacted] [redacted].

¹³⁰ Responses to the CMA questionnaire from third parties, August 2023, question 6 [redacted], [redacted], [redacted], [redacted], [redacted].

¹³¹ Similarly, the ratings of Young's reflected that it is a moderate to weak alternative to Whitby (responses to the CMA questionnaire from third parties, August 2023, question 6 [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]). However, the CMA notes that one of these customers ([redacted]) considered Young's a strong alternative.

¹³² Responses to the CMA questionnaire from third parties, August 2023, question 6 [redacted], [redacted], [redacted], [redacted], and [redacted].

¹³³ Response to the CMA questionnaire from a third party, August 2023, question 5 [redacted]. The CMA notes that [redacted] do not produce breaded scampi.

¹³⁴ Response to the CMA questionnaire from a third party, August 2023, question 6 [redacted].

¹³⁵ Annex RFI2 4.1 to the FMN.

foodservice customers in the UK.¹³⁶ Kilhorne Bay submitted that, in order of most to least competitive, its competitors are Whitby, Young's and Whitelink.¹³⁷

95. In the assessment of alternative suppliers set out below, the CMA first considers Pacific West given its relationship with Kilhorne Bay (and the potential impact of the Merger on its supply position). It then considers the remaining suppliers in Table 1, before considering other active suppliers and a potential entrant.

Pacific West

96. The evidence indicates that Pacific West, as currently supplied by Kilhorne Bay, provides a competitive constraint on Whitby (see paragraphs 78 to 95 above). For example, Pacific West and Whitby supply substitutable products (ie types of breaded scampi), have [redacted] overlapping customers (see paragraph 86 above), and (as submitted by Whitby) Pacific West has recently won tenders against Whitby.¹³⁸ Further, Pacific West is a recognised brand in the seafood industry, with an established foodservice customer base for breaded scampi.¹³⁹
97. The Merger will bring about a material change in Pacific West's position, as its existing supplier of breaded scampi would be acquired by a supplier with a significantly larger market position in the supply of breaded scampi. This gives rise to the risk that Pacific West would lose its current source of supply, or that the terms of supply to Pacific West would be worsened, resulting in a material weakening of Pacific West as a competitive constraint to Whitby.
98. Whitby stated that for an (unspecified) initial period after the Merger, it intends to continue supplying Kilhorne Bay's customers (including Pacific West) as under their current arrangements.¹⁴⁰ Whitby stated that it would approach pricing with Kilhorne Bay's customers in the same way as it does with its own customers, whereby any price changes are dependent on changes in cost or imbalances between supply and demand. Whitby further submitted that the Merger would improve services to Pacific West.¹⁴¹

¹³⁶ Whitby's First Issues Meeting Presentation, slides 6-16. Amity and Ruskim are already accounted for through other competitors as they are supplied by [redacted] and [redacted] respectively (Response to CMA questionnaire from third parties, August 2023, question 2 [redacted], question 7 [redacted]). As such, they are not addressed below.

¹³⁷ FMN, paragraph 15.9.

¹³⁸ See paragraph 87 above.

¹³⁹ Responses to the CMA questionnaire from third parties, August 2023, question 12 [redacted], question 6 [redacted], [redacted], [redacted], and question 7 [redacted].

¹⁴⁰ FMN, paragraph 2.19.

¹⁴¹ Whitby also noted that Whitby is dependent on Pacific West for [redacted] (Whitby's response to the Issues Letter, 14 September 2023, page 3).

99. The CMA notes, however, that under a scenario in which Pacific West is supplied by Whitby, Pacific West would be dependent on one of its main competitors for its supply. This would likely weaken Pacific West's competitive position, eg by limiting its ability to flex its strategy to compete against Whitby (such as adjusting its price or volumes). Further, even if Whitby continued to supply Pacific West on the same terms that it receives from Kilhorne Bay, this would likely result in a lessening of competition, as Whitby would recoup a large proportion of any sales lost to Pacific West (as Whitby would ultimately still be the supplier). In head-to-head competition such as tenders for example, Whitby would no longer be competing against an independent competitor, but against a customer.
100. The CMA also considers that Whitby would have an incentive to worsen the terms of supply to Pacific West, or to stop supplying it completely. In particular, the evidence indicates that the diversion ratio from Pacific West to Whitby would be extremely high, such that Whitby would likely gain from any customers switching away from Pacific West if its scampi products or prices were to worsen.¹⁴² The CMA notes, for example, that Whitby is by far the largest supplier to foodservice customers (Table 1), Pacific West told the CMA that around [3%] of its sales would likely divert to Whitby if Kilhorne Bay stopped supplying it,¹⁴³ and two customers stated that if Pacific West could not supply them with scampi, most of their demand would be replaced by Whitby.¹⁴⁴
101. The CMA has also assessed whether Pacific West could access alternative sources of supply (also taking into account the timeframe and commercial implications of doing so). Whitby submitted that there would be 'nothing stopping' Pacific West building an alternative source of supply during the initial period after the Merger while Whitby is still supplying it.¹⁴⁵ Whitby named various possible alternative suppliers, [redacted].¹⁴⁶
102. In this regard, the CMA notes that:
- (a) The available evidence indicates that it would be very challenging for Pacific West to find an alternative supplier of breaded scampi (ie a supplier of a finished product, as it currently receives from Kilhorne Bay) in the short to medium term. The shares of supply in Table 1 for example show that this is a

¹⁴² Whitby would also capture the full margin on such sales, including any mark-up currently made by Pacific West.

¹⁴³ Note of a call with a third party, July 2023, paragraph 20 [redacted].

¹⁴⁴ The evidence available from third parties suggested that diversion from Pacific West to Whitby would be high (responses to the CMA questionnaire from third parties, August 2023, question 7 [redacted], [redacted]).

¹⁴⁵ Whitby's response to the Issues Letter, 14 September 2023, page 3.

¹⁴⁶ Whitby's response to the Issues Letter, 14 September 2023, Annex ISS 7, page 2.

concentrated market, with the Parties collectively accounting for the vast majority of supply. Further, Pacific West told the CMA that [X].¹⁴⁷ [X] rated [X] as a weak alternative, and [X] as very weak alternatives.¹⁴⁸ [X] also told the CMA that they are not able (or intending) to expand their supply of scampi in the UK, and [X] told the CMA that its ability to grow its business is dependent on the supply of raw material, which is ‘tight’.¹⁴⁹

- (b) Pacific West could alternatively attempt to purchase raw material (either scampi tails or scampi core) and manufacture its own breaded scampi. As discussed in paragraph 52 however, several third parties told the CMA that there is insufficient raw material available in the UK, which acts as a significant barrier to entry and expansion. Some suppliers told the CMA that they could in principle increase their supply of raw material [[X]], albeit this would be costly and/or subject to price negotiations, and there is considerable uncertainty as to the scale of any additional volumes.¹⁵⁰ Other evidence (including an internal document and a third-party response) also raises doubt over the ability of these suppliers to provide a reliable supply of raw material at the necessary scale.¹⁵¹

103. There is therefore considerable uncertainty as to whether Pacific West could access sufficient volumes of supply to maintain its current competitive position, the timeframes involved, and whether it would have the commercial incentive to do so. In this regard, the CMA notes that although Pacific West [X], it has been [X] supplied by KHB for [X] and lacks the experience or know-how to manufacture breaded scampi (including relationships with suppliers, and the processing of raw material).
104. As such, the CMA concludes that the competitive constraint from Pacific West would likely be materially weakened as a result of the Merger.

¹⁴⁷ Response to the CMA questionnaire from a third party, August 2023, question 3 [[X]].

¹⁴⁸ Similarly, another third party stated that Youngs did not have enough raw material (note of a call with a third party, July 2023, paragraph 16 [[X]]).

¹⁴⁹ Response to the CMA questionnaire from third parties, August 2023, question 4 [[X]], [[X]]; and submission to the CMA from a third party, August 2023, [[X]]. The CMA also considers that if [X] were to increase its supply of scampi to foodservice customers, it would likely have the incentive to sell directly to end-customers (as it already does) rather than through Pacific West.

¹⁵⁰ Submission to the CMA from a third party, September 2023 [[X]]; note of a call with a third party, July 2023, paragraphs 30-31 [[X]]; and response to the CMA questionnaire from a third party, August 2023, question 3 [[X]].

¹⁵¹ Note of a call with a third party, paragraph 20, July 2023 [[X]]. Annex RF11 18 to the FMN.

Young's

105. Whitby submitted that Young's [redacted]:

- (a) it is the largest brand in the retail scampi market and also sells a range of breaded seafood products (including scampi) to foodservice customers;¹⁵²
- (b) Young's sales of scampi to one of the largest foodservice customers ([redacted]) are [redacted] those of Whitby;¹⁵³ and
- (c) although Young's facilities are geared towards retail, they could easily be used to produce scampi for foodservice customers, and Young's has recently relaunched its foodservice scampi products.¹⁵⁴

106. The CMA considers that Young's has the capacity to source and manufacture relatively large volumes of scampi. Indeed, Whitby and Young's are the two largest suppliers of scampi in the UK (across both foodservice and retail) and are considerably larger than any other supplier on this basis.¹⁵⁵ Further, one of the largest foodservice customers in the UK indicated that Young's has the necessary capacity to supply it with scampi, but that it had 'concern on capacity' for two other producers of scampi.¹⁵⁶

107. However, the evidence clearly indicates that Young's primary focus is on retail customers. This is reflected in the position that it holds within each market, with a material share of supply in the retail market, but a share of less than 5% in the foodservice market.¹⁵⁷ A number of third parties also noted that Young's is focussed on the retail channel.¹⁵⁸ Indeed, Young's stated that in the retail channel there is significant overlap in its customer base with Whitby, but 'much less so for foodservice given Whitby's dominant position'.¹⁵⁹ Further, Young's rated itself as a weak alternative against each of the Parties given its low volumes in the foodservice channel. Regarding potential expansion in foodservice, Young's told the CMA that it is 'always looking to grow its business where any opportunities exist', although this

¹⁵² Whitby's response to the Issues Letter, 14 September 2023, page 2 and Annex ISS 4.

¹⁵³ Whitby's response to the Issues Letter, 14 September 2023, page 2 and Annex ISS 4.

¹⁵⁴ Whitby's response to the Issues Letter, 14 September 2023, page 2; and Annex RF12 4.1 to the FMN. Kilhorne Bay also submitted that, although Young's is focused on retail, it will compete if there are larger foodservice tenders, and can flexibly adjust its customer base when it wants to (FMN, paragraph 15.9)

¹⁵⁵ Annex 030 to the FMN.

¹⁵⁶ Piper and Whitelink (response to the CMA questionnaire from a third party, August 2023 [redacted]).

¹⁵⁷ Annex 030 to the FMN.

¹⁵⁸ For example, [redacted] stated that Young's volumes are primarily sold in the retail sector. Similarly, [redacted] stated that Young's is not a foodservice brand.

¹⁵⁹ Response to the CMA questionnaire from a third party, August 2023, question 4 [redacted].

is subject to the availability of raw material, and Young's did not provide any specific expansion plans.¹⁶⁰

108. As described in paragraphs 90 to 92, the CMA asked the Parties' customers to list and rate the main alternatives to each of the Parties and Pacific West:
- (a) More than half of customers who answered the question ([redacted]) named Young's as an alternative to Whitby, making Young's as frequently named as Kilhorne Bay and/or Pacific West.¹⁶¹ Young's' average rating implied that Young's is a moderate to weak alternative to Whitby.¹⁶²
 - (b) Only one customer ([redacted]) named Young's as an alternative to Kilhorne Bay or Pacific West.¹⁶³ This customer considered Young's to be a very strong alternative, stating it was a similar branded product to Pacific West.
109. Overall, the CMA considers that although Young's competes to some extent with the Parties, and would be the strongest constraint on the Merged Entity, its main focus is on retail, and Young's is a relatively weak competitor in foodservice.

Bannerman

110. [redacted].¹⁶⁴ However, Bannerman's estimated share of supply is less than 5% (Table 1), and Bannerman told the CMA that it does not compete against Whitby and Kilhorne Bay and does not monitor their prices. No other customers or competitors (including Kilhorne Bay) named Bannerman as an alternative to either of the Parties. The CMA therefore considers Bannerman to be a very weak alternative to the Parties.

Piper

111. Whitby named Piper as a competitor, albeit a weak one, and submitted that it had lost sales to Piper in the past due to its ability to sell at lower prices.¹⁶⁵ However, Piper's share of supply is less than 5% (Table 1), and Piper submitted that it is not [redacted], and does not consider itself to be [redacted].¹⁶⁶ Only one third party named Piper as an alternative to the Parties, albeit a weak alternative to Whitby, partly because the

¹⁶⁰ Response to the CMA questionnaire from a third party, August 2023, questions 5, 6 and 8 [redacted]; and submission to the CMA from a third party, September 2023 [redacted].

¹⁶¹ Responses to the CMA questionnaire from a third party, August 2023, question 6 [redacted], [redacted], [redacted], [redacted], [redacted], [redacted].

¹⁶² Responses to the CMA questionnaire from third parties, August 2023, questions 5 and 6 [redacted], [redacted], [redacted], [redacted], [redacted].

¹⁶³ Response to the CMA questionnaire from a third party, August 2023, question 6 [redacted].

¹⁶⁴ Annex RFI2 4.1 to the FMN.

¹⁶⁵ Annex RFI2 4.1 to the FMN.

¹⁶⁶ Response to the CMA questionnaire from a third party, August 2023 [redacted].

customer had concerns about Piper's capacity.¹⁶⁷ The CMA therefore considers Piper to be a very weak alternative to the Parties.

Other suppliers

112. The Parties named a number of other competitors that are not listed in Table 1. These companies include Thistle, Joseph Robertson, Three Oceans, Rockabill, Birdseye, Iceland Seafood, Whitelink, Sea Pure and Seafeast (Pan Euro).¹⁶⁸ Additionally, Whitby provided a short list of four small scale 'regional' foodservice suppliers.¹⁶⁹
113. The CMA does not consider Thistle, Joseph Robertson or Three Oceans to be close competitors to the Parties because they do not supply foodservice customers.¹⁷⁰ Rockabill does not serve UK customers, and Birds Eye and Iceland Seafoods do not supply breaded scampi.¹⁷¹ [REDACTED] also confirmed that [REDACTED].¹⁷² Sea Pure was not named by any third parties (or Kilhorne Bay) as a competitor to the Parties. Further, the CMA understands that the 'regional' suppliers listed by Whitby operate on a considerably smaller scale, and no third-party mentioned them as an alternative to the Parties.
114. Only one customer ([REDACTED]) named Whitelink as a competitor to the Parties, although it rated it as a weak constraint given its production costs and potential lack of capacity.¹⁷³ [REDACTED] also named Whitelink as a scampi supplier, stating that it overlaps with one or two of its customers.¹⁷⁴ However, no other third parties made reference to Whitelink, and the Parties have provided no evidence to indicate the Whitelink is an important competitive constraint (eg internal documents or tenders).¹⁷⁵

¹⁶⁷ Response to the CMA questionnaire from a third party, August 2023, question 6 [[REDACTED]]

¹⁶⁸ Thistle, Joseph Robertson, Three Oceans, Birdseye and Iceland Seafood were named in RF12 Annex 4.1 to the FMN. Whitelink and Rockabill were named in the FMN, paragraph 25.14. Pan Euro and Seafeast were named in FMN, paragraph 25.23. The CMA is not addressing Macduff which is named in the FMN (paragraph 25.14) as a competitor or alternative because it does not produce breaded scampi (FMN, paragraph 14.7). Similarly, Amity, Sea Pure and Ruskim were referenced by the Parties (Whitby's First Issues Meeting Presentation, slides 6-16).

¹⁶⁹ FMN paragraph 15.9.

¹⁷⁰ RF12 Annex 4.1 of the FMN. Further, no third party indicated that they are credible competitors to the Parties.

¹⁷¹ FMN, paragraph 25.14. RF12 Annex 4.1 to the FMN; response to the CMA's questionnaire from a third party, August 2023, question 2 [[REDACTED]]; note of a call with a third party, July 2023, paragraph 3 [[REDACTED]].

¹⁷² Response to the CMA's questionnaire from a third party, August 2023, question 8 [[REDACTED]].

¹⁷³ Response to the CMA's questionnaire from a third party, August 2023, question 6 [[REDACTED]].

¹⁷⁴ Note of a call with a third party, July 2023, paragraph 15 [[REDACTED]].

¹⁷⁵ Kilhorne Bay submitted that Whitelink is a competitor as their operations are similar to Kilhorne Bay's, however on a smaller scale (FMN, paragraph 15.9), but did not provide any additional evidence to support this argument.

115. Whitby submitted that Seafeast is a brand of scampi being supplied by Pan Euro to some UK wholesalers.¹⁷⁶ Whitby provided an internal document which showed that it had reduced a proposed price increase to a customer, because the customer had stated it could have used Seafeast as an alternative supplier.¹⁷⁷ However, Whitby submitted that Seafeast products [§<],¹⁷⁸ and only one customer listed Seafeast (Pan Euro) as an alternative supplier.¹⁷⁹ The CMA therefore does not consider that Seafeast (Pan Euro) provides a material competitive constraint on the Parties.

Potential entrant

116. During its investigation the CMA received evidence regarding a potential entrant into the supply of breaded scampi to foodservice customers in the UK. The CMA has been told that the proposed entry could take one of two forms: either a joint initiative between two businesses currently active in the seafood sector; or one of the two businesses entering alone.¹⁸⁰ To assess the competitive strength of this potential entrant, the CMA has considered its timeliness, likeliness and scale.¹⁸¹
117. With regard to timeliness and likeliness, the relevant entities told the CMA that entry could be possible in the next [§<] years.¹⁸² However, the potential entrants also noted that they are still in the very early stages of exploring the possibility of entry, both jointly and separately, and do not know whether entry will definitely happen or not.¹⁸³ The potential entrants also confirmed that there would be significant investment costs involved in entering the market, and that timings would be contingent on sharing resources adequately and effectively, including ensuring access to raw material.¹⁸⁴
118. In terms of scale, the two entities estimated that, if the entry materialised, they could supply between [§<] tonnes of breaded scampi (and/or scampi tails) per year, and

¹⁷⁶ Whitby's response to the Issues Letter, 14 September 2023, Annex ISS 14; and Annex 15.2.4 to RF11 to the FMN.

¹⁷⁷ FMN, paragraph 25.23; and Whitby's First Issues Meeting Presentation, slide 9.

¹⁷⁸ Whitby clarified that Seafeast produces [§<] (FMN, paragraph 25.23 and Whitby's First Issues Meeting Presentation, slide 9)

¹⁷⁹ Response to the CMA's questionnaire from a third party, August 2023, question 6 [[§<]].

¹⁸⁰ Note of a call with a third party, July 2023, paragraph 22 [[§<]]; note of a call with a third party, September 2023, paragraph 10 [[§<]].

¹⁸¹ As this potential entry would have occurred absent the Merger, the CMA is currently considering it as a potential alternative supplier to the Parties as part of its competitive assessment ([CMA129](#), paragraph 4.16).

¹⁸² Note of a call with a third party, July 2023, paragraph 22 [[§<]]; note of a call with a third party, September 2023, paragraph 10 [[§<]].

¹⁸³ Note of a call with a third party, September 2023, paragraph 10 [[§<]].

¹⁸⁴ Response to the CMA's questionnaire from a third party, August 2023, question 1[[§<]]

would aim to compete for large customers in both retail and foodservice.¹⁸⁵ If such volumes materialised, the potential entrant(s) could therefore become one of the largest suppliers of breaded scampi to foodservice customers (albeit this will depend how it splits its volumes between retail and foodservice). However, the CMA notes that the entrant would still be [redacted] smaller than Whitby, and even with an additional competitor operating at such scale, the market would still be highly concentrated.¹⁸⁶

119. As such, the CMA does not consider that this potential entry is timely, likely or sufficient to meaningfully constrain the Merged Entity.

Third-party views on the Merger

120. Several third parties expressed concern about the effect of the Merger on competition. In particular, the majority of foodservice customers ([redacted] out of [redacted]) that responded to the CMA's questionnaire indicated that the Merger would reduce competition in the market, including views that the Merger could make it easier for the Parties to 'manipulate', 'control' or 'increase' prices.¹⁸⁷ One of these customers told the CMA that if Whitby were to acquire Kilhorne Bay, then it could also remove its main competitor (Pacific West), and prices would inevitably be inflated as there would be nobody to benchmark against.¹⁸⁸
121. Some competitors also expressed similar concerns: one competitor submitted that the Merger would reduce an 'already weak competitor set', and another competitor stated that the Merger would have a 'far-reaching effect on some of the smaller wholesalers'.¹⁸⁹
122. While some other third parties had neutral views on the Merger, no competitors and only one foodservice customer had positive views on the Merger.¹⁹⁰ Of the third parties that expressed neutral views, several indicated that this was only because Whitby had already a very large market share. For example, one customer stated: 'Whitby acquisitions have left limited competition in the market and I do not believe this acquisition will have any further impact on [our] options.'¹⁹¹

¹⁸⁵ The projected volumes cover both foodservice and retail customers. Response to the CMA's questionnaire from a third party, question 1 [redacted]; note of a call with a third party, September 2023, paragraph 6 [redacted].

¹⁸⁶ The CMA estimates that even if the entrant were able to supply its upper estimate and it did so entirely in the foodservice sector, the Merged Entity would still have a share well in excess of 70%.

¹⁸⁷ Response to the CMA questionnaire from third parties, August 2023, question 12 [redacted], [redacted], [redacted] [redacted] [redacted], [redacted], [redacted].

¹⁸⁸ Response to the CMA questionnaire from a third party, August 2023, question 7 [redacted].

¹⁸⁹ Response to the CMA questionnaire from third parties, August 2023, question 10 [redacted], [redacted].

¹⁹⁰ Response to the CMA questionnaire from a third party, August 2023, question 12 [redacted].

¹⁹¹ Response to the CMA questionnaire from a third party, August 2023, question 12 [redacted].

Conclusion on horizontal unilateral effects

123. On the basis of the evidence summarised above, the CMA has found that the Merger raises significant competition concerns as a result of horizontal unilateral effects in the supply of breaded scampi to foodservice customers in the UK. In particular:
- (a) the Merged Entity would be by far the largest supplier of scampi to foodservice customers, with a share of supply in excess of 90%;
 - (b) the evidence indicates that the Parties are close competitors, with a similar product offering and serving a similar customer base (in particular, Whitby competes to maintain and win new customers against Pacific West, which is supplied by Kilhorne Bay);
 - (c) following the Merger, Whitby would face even less competition from other scampi suppliers. In particular, there is considerable uncertainty as to whether Pacific West would be able to maintain its current competitive position, given the limited alternative options for supply. Other competitors, such as Young's, are comparatively small in the foodservice sector, and third-party evidence does not indicate that they are credible alternatives to the Parties; and
 - (d) several third parties raised concerns about the loss of competition that would be brought about by the Merger, particularly within the context of a market that is already highly concentrated.

BARRIERS TO ENTRY AND EXPANSION

124. Entry, or expansion of existing firms, can mitigate the initial effect of the acquisition on competition, and in some cases may mean that there is no SLC. The CMA will assess whether such entry or expansion would be timely, likely and sufficient to prevent an SLC.¹⁹²
125. In its competitive assessment, the CMA has considered the entry and expansion plans of current and potential competitors (see eg paragraphs 107 and 118-121). Further, according to the available evidence, no third parties indicated that they are considering entering or expanding in the supply of breaded scampi to foodservice customers in the UK in response to the Merger. Indeed, the CMA understands there are two main barriers to entry and expansion in this market:

¹⁹² [CMA129](#), paragraph 8.31.

- (a) access to raw material. Although the Parties submitted that getting the raw material is straightforward and that the boats would sell to anyone based on price,¹⁹³ the CMA understands that access to raw material acts as a considerable constraint on the production and supply of breaded scampi in the UK, with some third parties describing the access to raw material as 'significant' and the 'main' barrier to entry and expansion in this market;¹⁹⁴ and
- (b) investment in equipment. Some third parties stated that the investment cost of processing and breasting equipment is a barrier to entry in this market.¹⁹⁵

126. On the basis of the evidence summarised above, the CMA does not consider that entry or expansion will be timely, likely or sufficient to mitigate any SLC arising in the supply of breaded scampi to foodservice customers in the UK.

CONCLUSION ON SUBSTANTIAL LESSENING OF COMPETITION

127. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of breaded scampi to foodservice customers in the UK.

¹⁹³ FMN, paragraph 21.2. Whitby submitted that there is no barrier to purchasing raw material and that any sourcing issues are similar to those faced for other seafood products (Whitby's response to the Issues Letter, 14 September 2023, page 3 and Annex ISS 8 to Whitby's response to the Issues Letter, 14 September 2023). Further, Whitby submitted that raw material is available to purchase on the open market and stored in the summer for the winter (Whitby's First Issues Meeting Presentation, slide 5). Kilhorne Bay also stated that any business can purchase raw material, have it processed in Asia and shipped back as scampi core for breasting and that problems in securing supply relate to price (Kilhorne Bay's response to the Issues Letter, 14 September 2023, paragraph 1.1.9(b)).

¹⁹⁴ Response to CMA questionnaire from third parties, August 2023, question 9 [redacted]. See also paragraphs 51 to 52 above.

¹⁹⁵ Notes of calls with third parties, July 2023, paragraphs 27 and 28 [redacted]; paragraph 32 [redacted]; paragraph 32 [redacted]. Recording of a call with a third party, September 2023 [redacted].

DECISION

128. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.
129. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.¹⁹⁶ The Parties have until 11 October 2023¹⁹⁷ to offer an undertaking to the CMA.¹⁹⁸ The CMA will refer the Merger for a phase 2 investigation¹⁹⁹ if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides²⁰⁰ by 18 October 2023 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

Colin Raftery
Senior Director, Mergers
Competition and Markets Authority
4 October 2023

ⁱ The last sentence of paragraph 57 should be read as follows: 'The CMA notes that these examples related to two of Whitby's largest foodservice customers.'

¹⁹⁶ Section 33(3)(b) of the Act.

¹⁹⁷ Section 73A(1) of the Act.

¹⁹⁸ Section 73(2) of the Act.

¹⁹⁹ Sections 33(1) and 34ZA(2) of the Act.

²⁰⁰ Section 73A(2) of the Act.