

Anticipated acquisition by Arla Foods Ingredients Group P/S of Volac Whey Nutrition Holdings Limited

Decision on relevant merger situation and substantial lessening of competition

ME/7105/24

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 7 November 2024. Full text of the decision published on 10 December 2024.

The Competition and Markets Authority (**CMA**) has excluded from this published version of the decision information which the CMA considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Some numbers have been replaced by a range, which are shown in square brackets.

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SUMMARY

1. On 18 April 2024, Arla Foods Ingredients Group P/S (**AFI**) agreed to acquire Volac Whey Nutrition Holdings Limited (**Volac**) (the **Merger**). AFI is a wholly owned subsidiary of Arla Foods Amba (together referred to as **Arla**). The Competition and Markets Authority (**CMA**) has concluded that it has jurisdiction to review this Merger because a relevant merger situation has been created. Arla and Volac are together referred to as the **Parties** and, for statements relating to the future, the **Merged Entity**.
2. Both Parties manufacture and supply whey protein concentrate (**WPC**) used for sports nutrition and food applications, in particular:
 - (a) WPC with a protein content from 50% to 89% (**WPC50–89**); and
 - (b) Whey protein isolate (**WPI**), which is WPC with a protein content of 90% or more. Within WPI, the Parties both supply:
 - (i) The standard non-clear type of WPI (**regular WPI**); and
 - (ii) A clear type of WPI which does not give a milky texture to drink products (**clear WPI**).
3. The CMA has considered whether the Merger would lead to a substantial lessening of competition (**SLC**) as a result of **horizontal unilateral effects** in the supply of (i) regular WPI for sports nutrition and food applications in Europe and (ii) WPC50–89 for sports nutrition and food applications in Europe. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to profitably raise prices or degrade quality on its own and without needing to coordinate with its rivals.
4. The CMA has found that the Merger does not give rise to a realistic prospect of an SLC within the markets of regular WPI for sports nutrition and food applications in Europe or WPC50–89 for sports nutrition and food applications in Europe.
 - (a) In relation to regular WPI, the CMA has found that while the Merged Entity will have a significant share of supply, a range of other suppliers will continue to exert sufficient competitive constraint on the Merged Entity. These include, in particular, Tirlán Co-operative Society Limited, Royal FrieslandCampina N.V., Sachsenmilch Leppersdorf GmbH (**Sachsenmilch**), Milk Specialties Global and a range of smaller competitors.
 - (b) In relation to WPC50–89, the CMA has found that the Merged Entity will have a moderate market position, the increment as a result of the Merger will be relatively small, the Parties do not compete closely and the Merged Entity will

face sufficient competitive constraint from several other suppliers. These include the market leader, the DMK Group, as well as competitors including Fonterra Cooperative Group Limited, Sachsenmilch and a range of other smaller competitors.

5. In relation to clear WPI, the CMA has found that the aggregate value of the market in the UK is well below £30 million. The CMA also considers that (i) the Merger is not one of a potentially large number of similar mergers that could be replicated across the sector and (ii) the Merger is not in a sector which relates to any CMA priority areas or other areas of potential importance.
6. As a result, the CMA believes that the market(s) concerned is/are not of sufficient importance to justify the making of a reference and has decided to exercise its discretion under section 33(2)(a) of the Enterprise Act 2002 (the **Act**) not to refer the Merger (the '**de minimis**' exception). The CMA did not have to conclude on whether the Merger gives rise to a realistic prospect of an SLC in relation to clear WPI because, even if the duty to refer is met, then the discretion under the 'de minimis' exception would be applied.
7. The Merger will therefore **not be referred** under section 33(1) of the Act.

ASSESSMENT

1. PARTIES, MERGER AND MERGER RATIONALE

1. Arla is an international dairy cooperative active in the processing, production, sale, distribution and marketing of a broad portfolio of dairy products globally. Through its subsidiary AFI, Arla manufactures and supplies whey-based ingredients globally with whey processing sites in Denmark and Argentina.¹ Its customers are active in infant nutrition, medical nutrition, sports nutrition, health foods and other foods and beverages.² The turnover of Arla in 2023 was around £11.9 billion worldwide and around £3 billion in the UK.³
2. Incorporated in late 2023 and previously forming part of Volac International Limited, Volac manufactures and supplies whey-based ingredients globally for the sports nutrition and dairy ingredients sectors and is owned by the Neville family (the **Sellers**).⁴ Its whey processing facility is in Felinfach in Wales.⁵ The turnover of Volac in 2023 was around [§<] worldwide and around [§<] in the UK.⁶
3. The Parties and the Sellers entered into an agreement on 18 April 2024 whereby AFI will acquire the entire issued share capital of Volac from the Sellers for a consideration of [§<].⁷
4. The Parties submitted that the Merger would allow AFI to further expand its whey-based production capabilities and customer base and improve Volac's product offering through the combination with AFI's expertise in the markets of whey protein products.⁸
5. The CMA considers that the Parties' internal documents broadly support the Parties' strategic rationale. For example, AFI's internal documents suggest that the Merger would allow AFI to [§<].⁹ They also suggest that the Merger would allow AFI to make use of Volac's [§<] production capabilities,¹⁰ and that AFI could use its [§<].¹¹

¹ Final Merger Notice submitted to the CMA on 16 September 2024 (FMN), paragraphs 2.3 and 3.4.

² FMN, paragraphs 2.2–2.3.

³ FMN, Table 1. These figures have been converted from EUR to GBP based on the Bank of England's average daily exchange rate for EUR:GBP for the calendar year 2023, GBP 1 = EUR 1.1500.

⁴ FMN, paragraphs 2.1, 2.5–2.7.

⁵ FMN, paragraph 2.6.

⁶ FMN, Table 1.

⁷ FMN, paragraphs 2.9–2.10.

⁸ FMN, paragraph 2.16.

⁹ See for example AFI Internal Document, Annex 007A to the FMN, '[§<]', November 2023, page 2; AFI Internal Document, Annex 007F to the FMN, '[§<]', January 2024, page 9.

¹⁰ See for example AFI Internal Document, Annex 007B to the FMN, '[§<]', February 2024, page 11; AFI Internal Document, Annex 007C to the FMN, '[§<]', March 2024, page 10.

¹¹ AFI Internal Document, Annex 007B to the FMN, '[§<]', February 2024, page 11.

2. PROCEDURE

6. The CMA commenced its phase 1 investigation on 18 September 2024. As part of its phase 1 investigation, the CMA gathered a significant volume of evidence from the Parties and other market participants (such as the Parties' competitors and customers) to better understand the competitive landscape and the impact of the Merger on competition. The CMA also gathered evidence in relation to market definition and UK market size. The evidence the CMA has gathered has been tested rigorously and, where necessary, this evidence has been referred to within this decision.

3. JURISDICTION

7. Each of Arla and Volac is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
8. The Parties overlap in the supply of clear WPI in the UK, with a combined share of supply of [30–40]% (with an increment of [5–10]%) by revenue in 2023.¹² The CMA therefore believes that the share of supply test in section 23 of the Act is met.
9. 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.
10. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 19 September 2024 and the statutory 40 working day deadline for a decision is therefore 13 November 2024.

4. COUNTERFACTUAL

11. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual).¹³
12. In an anticipated merger, the counterfactual may consist of the prevailing conditions of competition, or conditions of competition that involve stronger or weaker competition between the parties to a merger than under the prevailing conditions of competition.¹⁴ In determining the appropriate counterfactual, the CMA will generally focus on potential changes to the prevailing conditions of

¹² CMA analysis using data received from the Parties and third parties.

¹³ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 3.1.

¹⁴ [CMA129](#), paragraph 3.2.

competition only where there are reasons to believe that those changes would make a material difference to its competitive assessment.¹⁵

13. In this case, the CMA has not received submissions (or other evidence) suggesting that the Merger should be assessed against an alternative counterfactual. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

5. COMPETITIVE ASSESSMENT

5.1 Background and nature of competition

14. Historically, whey was regarded as a waste by-product from cheese production which was discarded or used as animal feed.¹⁶ However, the development of industrial methods allowed cheese producers to produce a variety of valuable whey-based ingredients making use of the nutritional value of whey.¹⁷ Whey-based ingredients are now extensively used in the food industry to increase the nutritional value, mostly the protein content, of different food products, or to create specific food products for use in sports, clinical and infant nutrition, as well as dietary supplements.¹⁸

5.1.1 Processing of input whey

15. Cheese producers typically process liquid whey onsite by either (i) filtration or evaporation to reduce the water content and produce whey concentrate, or (ii) ultrafiltration to separate and concentrate the protein content into liquid WPC retentate and the lactose and minerals into liquid permeate.¹⁹
16. Whey concentrate and liquid WPC retentate are both known as **input whey**. Cheese producers supply input whey to whey ingredients manufacturers for further processing.²⁰ While Arla is active in the supply of input whey, Volac is not active in this upper level of the supply chain.²¹

5.1.2 Manufacture and procurement of whey-based ingredients

17. Whey ingredients manufacturers, such as the Parties, manufacture a range of whey-based products including, among other things, WPC and lactose.²²

¹⁵ [CMA129](#), paragraph 3.9.

¹⁶ FMN, paragraph 11.3.

¹⁷ FMN, paragraph 11.5.

¹⁸ FMN, paragraph 11.6.

¹⁹ FMN, paragraph 11.10.

²⁰ FMN, paragraph 11.12.

²¹ FMN, paragraph 18.1.

²² FMN, paragraph 11.15.

18. Customers purchase WPC through formal tenders or informal negotiations, depending on market conditions.²³ Contracts with suppliers may be short term (eg renewed on a quarterly basis) or longer term.²⁴
19. Sourcing strategies depend on the customer. Around half of the customers who responded to the CMA indicated that they currently source WPC and WPI from multiple suppliers.²⁵ For example, one customer told the CMA that it prefers multi-sourcing from at least three to five suppliers,²⁶ although another customer told the CMA that it prefers maintaining a strong relationship only with one or two suppliers.²⁷
20. In the supply of WPC, price and quality are widely considered to be the two most important factors when selecting a supplier.²⁸ Other factors include security or reliability of supply,²⁹ and suppliers' reputation.³⁰ The parameters of competition may also differ across customer segments as described in paragraph 28 below.³¹

5.2 Market definition

21. Where the CMA makes an SLC finding, this must be 'within any market or markets in the United Kingdom for goods or services'. An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market(s) is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.³²
22. Market definition involves identifying the most significant competitive alternatives available to customers of the merger parties and includes the sources of competition to the merger parties that are the immediate determinants of the effects of the merger.
23. While market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger parties' behaviour, captures the competitive dynamics more fully than formal market definition.³³

²³ Note of a call with a third party, July 2024, paragraph 5; note of a call with a third party, August 2024, paragraphs 7–9; note of a call with a third party, August 2024, paragraph 20.

²⁴ Note of a call with a third party, August 2024, paragraph 7; note of a call with a third party, July 2024, paragraph 5.

²⁵ Response to the CMA questionnaire from a number of third parties, September 2024, question 1. See also note of a call with a third party, July 2024, paragraph 4.

²⁶ Note of a call with a third party, July 2024, paragraph 4.

²⁷ Note of a call with a third party, August 2024, paragraphs 11–12.

²⁸ Response to the CMA questionnaire from a number of third parties, September 2024, question 3.

²⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 3.

³⁰ Response to the CMA questionnaire from a number of third parties, September 2024, question 3.

³¹ Note of a call with a third party, August 2024, paragraphs 11–14.

³² [CMA129](#), paragraph 9.1.

³³ [CMA129](#), paragraph 9.2.

5.2.1 Product market

24. The Parties overlap in the supply of WPC of various concentration levels, including:
- (a) **WPC50–89** (WPC with a protein content between 50% and 89%), and
 - (b) **WPI** (WPC with a protein content of 90% or above).³⁴ Within WPI, the Parties overlap in the supply of:
 - (i) **Regular WPI**: Standard non-clear WPI which gives a milky flavour and texture to protein drinks; and
 - (ii) **Clear WPI**: A clear version of WPI which does not give a milky flavour or texture and is therefore used mainly to produce clear drink products, such as fruit flavoured protein drinks.³⁵
25. While AFI supplies WPC50–89 and WPI to customers across multiple sectors including sports nutrition and medical nutrition, Volac only supplies WPC50–89 and WPI to sports nutrition and, to a much lesser extent, food application customers.³⁶ Accordingly, the key customer overlaps between the Parties in WPC50–89 and WPI specifically are in the supply of WPC50–89 and WPI to sports nutrition and food application customers. Clear WPI is only supplied for use in the sports nutrition segment.³⁷
26. The CMA has considered whether it is appropriate to assess the Merger within separate markets based on (i) different end uses/customer segments; (ii) different WPC concentration levels (including WPI); and (iii) whether WPI is regular or clear.

5.2.1.1 WPC for different end uses/customer segments

27. As noted above, clear WPI is only supplied for use in sports nutrition.³⁸ The majority of regular WPI and WPC50–89 are supplied for use in sports nutrition (around 90% and 60% respectively).³⁹ However, as regular WPI and WPC50–89

³⁴ FMN, paragraph 11.20. The Parties also overlap in the supply of WPC<50 and food grade lactose. On the basis of the evidence gathered by the CMA, the CMA considered at an early stage in its investigation that there were no plausible competition concerns in respect of the supply of WPC<50 and food grade lactose as a result of the Merger, including due to the constraint that would continue to be posed by a number of other competitors post-Merger. In relation to lactose in particular, the CMA notes that Volac has a relatively limited market presence in Europe. These overlaps are therefore not discussed further in this decision.

³⁵ FMN, paragraph 12.9(f).

³⁶ Volac submitted that almost all of its WPC products are used by sports nutrition customers and a very small proportion of its WPC products are used in food applications. However, Volac was unable to confirm exactly how many of its volumes are used in food applications. FMN, paragraphs 11.22, 11.25 and 12.9(f).

³⁷ Parties' market share data, Annexes 018 and 019 to the FMN, September 2024; response to the CMA questionnaire from a number of third parties, September 2024, question 2. The CMA notes that outside of Europe, some clear WPI was sold to medical nutrition customers.

³⁸ See paragraph 25 above.

³⁹ Parties' market share data, Annexes 018 and 019 to the FMN, September 2024; response to the CMA questionnaire from a number of third parties, September 2024, question 2.

are supplied to customers in other segments such as infant nutrition and medical nutrition (including by AFI),⁴⁰ the CMA has considered whether the markets for WPC50–89 and regular WPI should include multiple end use cases.

28. On the demand side, third-party evidence received by the CMA shows limited demand-side substitutability between WPC products for infant and medical nutrition customers on one hand, and other customer segments such as sports nutrition and food applications. For example, one customer told the CMA that WPC products for use in the infant and medical nutrition segments are generally charged at higher prices as they are subject to more stringent quality requirements.⁴¹ Similarly, a few competitors told the CMA that the parameters of competition and customer requirements differ across customer segments, in particular, infant and medical nutrition customers are more quality-critical while sports nutrition and food application customers tend to be more price-driven.⁴²
29. On the supply side, third-party evidence received by the CMA indicates that WPC products for sports nutrition and food applications are relatively substitutable, but that there is limited supply-side substitutability from the supply of WPC for sports nutrition and food applications to the supply of WPC for infant and medical nutrition.
- (a) In terms of substitutability between sports nutrition and food applications, a few competitors told the CMA that their production facilities can switch between producing WPC for sports nutrition and for food applications,⁴³ or that both require facilities with similar quality levels.⁴⁴
- (b) Several competitors told the CMA that it is much harder for suppliers to switch from sports nutrition and food applications to infant nutrition than the other way round, due to stricter safety and qualification requirements for infant grade WPC production facilities.⁴⁵ Additionally, one competitor also indicated that switching from sports nutrition to infant or medical nutrition is not usually possible due to regulations or nutritional profile requirements.⁴⁶ One medium-sized competitor said it was only active in sports nutrition as it was not qualified to supply WPC to customers in infant nutrition or medical nutrition.⁴⁷

⁴⁰ Parties' market share data, Annex 018 to the FMN, September 2024.

⁴¹ Note of a call with a third party, July 2024, paragraph 10.

⁴² Note of a call with a third party, August 2024, paragraphs 11–14; response to the CMA questionnaire from a number of third parties, September 2024, question 4(d).

⁴³ Response to the CMA questionnaire from a number of third parties, September 2024, question 4(d).

⁴⁴ Response to the CMA questionnaire from a third party, September 2024, question 4(d).

⁴⁵ Note of a call with a third party, August 2024, paragraph 23; response to the CMA questionnaire from a number of third parties, September 2024, question 4(d).

⁴⁶ Response to the CMA questionnaire from a third party, September 2024, question 4(d).

⁴⁷ Response to the CMA questionnaire from a third party, September 2024, question 4(d).

30. Evidence from the Parties' internal documents also suggests that WPC supplied to infant and medical nutrition customers is subject to stricter quality and regulatory requirements, and that not all suppliers can meet these requirements. For example, one of Volac's internal documents mentions that suppliers usually specialise either in (i) infant and medical nutrition, or (ii) performance and active nutrition and other food applications (with Volac itself specialising primarily in WPC for sports nutrition).⁴⁸ The same document also suggests that there are stricter regulations associated with WPC for infant and medical nutrition uses.⁴⁹
31. Based on the above, the CMA considers that given the stricter quality and regulatory requirements that apply to WPC used for infant and medical nutrition, it is appropriate to assess the impact of the Merger on WPC50–89 and regular WPI used for sports nutrition and food applications only. The CMA has considered, where relevant, the impact of the constraint provided by suppliers of WPC for infant and medical nutrition applications.⁵⁰

5.2.1.2 WPC of different concentrations (including WPI)

32. The Parties submitted that current industry standards divide WPC into the following categories according to their concentration levels: (i) WPC<50, (ii) WPC50–89, and (iii) WPI.⁵¹
33. The Parties also submitted that the appropriate product market is the supply of WPC (including WPI) together, without distinguishing between concentration levels.⁵² They submitted that a chain of demand- and supply-side substitution exists between the range of whey-based products, which results in a broad overall product market.⁵³
34. Although there could be various ways of segmenting WPC and WPI by concentration, the CMA primarily considered, based on the key overlaps between the Parties' activities:
- (a) Whether the product market for WPI should be expanded to include WPC of any lower concentration; and
 - (b) Whether the product market for WPC50–89 should be expanded to include WPC<50.⁵⁴

⁴⁸ Volac Internal Document, Annex 010QQ to the FMN, '[><]', October 2023, page 27.

⁴⁹ Volac Internal Document, Annex 010QQ to the FMN, '[><]', October 2023, page 30.

⁵⁰ See footnotes 123 and 141.

⁵¹ FMN, paragraph 11.15(b).

⁵² FMN, paragraph 12.20.

⁵³ FMN, paragraph 12.5.

⁵⁴ Within the WPC50–89 segment, WPC80 in particular is often referred to by third parties and the Parties' internal documents. However, the CMA has not considered in detail whether WPC80–89 should be assessed as a separate

5.2.1.2.1 Segmentation between WPI and WPC of lower concentrations

35. The relevant product market is identified primarily by reference to demand-side substitution.⁵⁵ Evidence received by the CMA suggests limited demand-side substitutability between WPI and WPC of lower concentrations:
- (a) The majority of customers who responded to the CMA indicated that WPC and WPI of lower concentrations are not substitutable with each other,^{56, i} with some describing these as being completely different products with different qualities and prices.⁵⁷ One customer told the CMA that while WPC of lower concentrations is hypothetically substitutable with WPI, any such switch is never a viable business case.⁵⁸ Two other customers also told the CMA that while it is possible to switch between WPC of lower concentrations and WPI in the production of end food products, this would require R&D and significant reformulation for those customers.⁵⁹
 - (b) The CMA has seen evidence from the Parties' internal documents that some customers may switch between WPC of lower concentrations and WPI, but usually only in response to significant price changes. For example, some of Volac's internal documents suggest that customers may switch from WPC80 to WPI when WPI is [~~]~~, and from WPI to WPC80 when WPI is [~~]~~.⁶⁰ A Volac internal document also suggests that customer behaviour is influenced by the gap between the prices of lower concentration WPC and WPI.⁶¹
36. Evidence received by the CMA also suggests limited supply-side substitutability, particularly from the supply of WPC to the supply of WPI.
- (a) Competitors to the Parties told the CMA that it is easier for suppliers with existing WPI capabilities to switch to the production of WPC of lower concentrations, but it is difficult for suppliers who only have lower concentration WPC capabilities to switch to the production of WPI.⁶² This is because the production of WPI requires additional filtration and membrane treatment processes and equipment,⁶³ and significant investment would be

product market, given around 90% of the volumes sold by the Parties and the competitors that responded to the CMA's questionnaire are from WPC80–89. CMA's analysis using data from 2021–2023 received from the Parties and third parties on WPC used for sports nutrition and food applications.

⁵⁵ [CMA129](#), paragraph 9.7.

⁵⁶ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(b).

⁵⁷ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(b).

⁵⁸ Response to the CMA questionnaire from a third party, September 2024, question 2(b).

⁵⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(b).

⁶⁰ Volac Internal Document, Annex 010GG to the FMN, '[~~]~~', July–September 2023, page 8; Volac Internal Document, Annex 010HH to the FMN, '[~~]~~', October–December 2023, page 3.

⁶¹ See for example Volac Internal Document, Annex 010KK to the FMN, '[~~]~~', July–September 2024, page 8.

⁶² Response to the CMA questionnaire from a number of third parties, September 2024, question 4(b). See also note of a call with a third party, August 2024, paragraph 24.

⁶³ Response to the CMA questionnaire from a number of third parties, September 2024, question 4(b).

required to convert lower concentration WPC production lines into WPI production lines.⁶⁴

- (b) Evidence received by the CMA also suggests that the competitor sets differ across lower concentration WPC and WPI. For example, the CMA's share of supply estimates show different competitor sets for WPC50–89 and WPI, with fewer suppliers of WPI in Europe (including the UK) compared to WPC50–89.⁶⁵

5.2.1.2.2 *Segmentation by WPC concentrations*

37. Third-party evidence also suggests limited demand-side substitution between WPC (excluding WPI) of different concentrations.

- (a) The majority of customers who responded to the CMA indicated that it is difficult to switch between WPC of different concentrations.⁶⁶ A few of these customers told the CMA that their end products are typically sold to customers at a specified protein content and therefore they would not switch between WPC of different concentrations to avoid any change in nutritional value or formulation of their end products.⁶⁷ While a few customers suggested that switching between WPC concentrations is possible, this would require difficult processes of R&D or significant end food product reformulation for those customers.⁶⁸
- (b) Third-party evidence also suggests that it is more difficult to substitute WPC of higher protein concentration with that of lower protein concentration. Two customers indicated that when carrying out any reformulation on their end food products, they must ensure the new formula continues to meet the minimum protein content.⁶⁹ A few customers indicated that they would only consider switching between WPC with a protein content between 70% and 90%.⁷⁰

38. On the supply side, evidence received by the CMA also suggests limited supply-side substitutability from WPC of lower concentrations to WPC of higher concentrations. In particular:

- (a) Competitors told the CMA that the production of WPC of higher concentration (even when WPI is excluded) requires expensive additional filtration processes and equipment, and as such it is easier for suppliers to switch

⁶⁴ Response to the CMA questionnaire from a number of third parties, September 2024, question 4(b).

⁶⁵ See Tables 1 and 2 below.

⁶⁶ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(c).

⁶⁷ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(c).

⁶⁸ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(c).

⁶⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(c).

⁷⁰ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(c).

from supplying WPC of higher concentration to those of lower concentration than the other way round.⁷¹

- (b) The CMA also notes that the Parties' own analysis shows that there are many more suppliers of WPC35–50 than suppliers of WPC50–89 worldwide.⁷²

39. As described in footnotes 34 and 54, the Parties have limited overlap in WPC<50 and, within the WPC50–89 segment, 90% of the volumes sold by the Parties and the competitors that responded to the CMA's questionnaire are from WPC80–89. Accordingly, as the inclusion of WPC concentrations of between WPC50–80 to that of WPC80–89 would not make a material difference to the competitive assessment, the CMA has considered the impact of the Merger on WPC50–89 more broadly.

5.2.1.2.3 *Conclusion on segmentation between different WPC concentrations*

40. On the basis of the evidence above, the CMA has considered the impact of the Merger on the supply of (i) WPC50–89 and (ii) WPI separately.

5.2.1.3 *Regular and clear WPI*

41. The Parties submitted that WPI should not be further segmented into regular WPI and clear WPI, as there is a degree of demand-side and supply-side substitutability between regular WPI and clear WPI, and the market dynamics in the supply of regular and clear WPI do not differ.⁷³ The Parties submitted that dividing the two would be taking an artificially narrow approach to defining the appropriate product market.⁷⁴

42. Evidence received by the CMA suggests that regular and clear WPI are distinct products with limited substitutability. On the demand side:

- (a) The majority of customers told the CMA that regular WPI and clear WPI are standalone products that are not interchangeable due to significant differences in functionalities, physical properties and qualities.⁷⁵ In particular, several customers explained that clear WPI is used to produce clear protein drinks, which cannot be produced with regular WPI.⁷⁶

⁷¹ Note of a call with a third party, August 2024, paragraph 24; response to the CMA questionnaire from a number of third parties, September 2024, question 4(c).

⁷² FMN, Table 4.

⁷³ FMN, paragraph 11.23 and footnote 80.

⁷⁴ FMN, paragraph 11.23.

⁷⁵ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(a).

⁷⁶ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(a).

- (b) Although some of Volac’s internal documents mention that customers may switch from regular WPI to clear WPI in response to switches in end user preferences,⁷⁷ the Parties’ internal documents seem to identify regular WPI and clear WPI as distinct variants of WPI that are optimised for different customer subsegments.⁷⁸

43. On the supply side:

- (a) Evidence from competitors suggests that suppliers with existing clear WPI capabilities can easily switch to producing regular WPI, but not vice versa.⁷⁹ This is because the production of clear WPI requires additional processing of regular WPI (such as acidification) which requires additional equipment.⁸⁰ Some competitors noted that there are fewer producers of clear WPI because of its complexity of production,⁸¹ the hardware and expertise required,⁸² and environmental regulations regarding waste disposal.⁸³ One competitor additionally noted that, because of this, clear WPI products tend to have a higher price premium.⁸⁴
- (b) Two of Volac’s internal documents indicate different supply conditions for regular and clear WPI, noting that clear WPI was a distinct segment of the WPI market that was undersupplied.⁸⁵
- (c) The competitor sets are different for regular WPI and clear WPI. In particular, there are many more regular WPI suppliers than clear WPI suppliers in Europe (including the UK). In addition, the relative sizes of suppliers who offer both products differ significantly within each segment.⁸⁶

44. Based on the above evidence, the CMA has assessed the impact of the Merger on regular WPI and clear WPI separately.

5.2.1.4 *Alternative non-whey-based protein products*

45. The CMA also considered whether the relevant product market(s) should include alternative non-whey-based protein sources, such as plant-based protein. The Parties submitted that WPC suppliers face significant competitive constraints from

⁷⁷ Volac Internal Document, Annex 010GG to the FMN, ‘[<]’, July–September 2023, page 8.

⁷⁸ See for example AFI Internal Document, Annex 009O to the FMN, ‘[<]’, June 2022, page 68; Volac Internal Document, Annex 010AA to the FMN, ‘[<]’, October 2023, page 237; Volac Internal Document, Annex 010BBB to the FMN, ‘[<]’, October 2024, page 2.

⁷⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 4(a).

⁸⁰ Response to the CMA questionnaire from a number of third parties, September 2024, question 4(a).

⁸¹ Response to the CMA questionnaire from a third party, September 2024, question 4(a).

⁸² Response to the CMA questionnaire from a third party, September 2024, question 4(a).

⁸³ Response to the CMA questionnaire from a third party, September 2024, question 4(a).

⁸⁴ Response to the CMA questionnaire from a third party, September 2024, question 4(a).

⁸⁵ Volac Internal Document, Annex 010B to the FMN, ‘[<]’, August 2022, page 5; Volac Internal Document, Annex 010JJ to the FMN, ‘[<]’, April–June 2024, page 5.

⁸⁶ Based on the CMA’s analysis using data received from the Parties and third parties.

non-whey-based protein products.⁸⁷ However, third-party evidence suggests limited demand- and supply-side substitutability between WPI/WPC and non-whey-based protein products.⁸⁸ The majority of customers do not consider non-whey-based protein products to be an alternative to WPC due to differences in taste, texture and quality resulting in different end products.⁸⁹ Similarly, Volac's internal documents mention that plant-based proteins are generally less suitable, for example in terms of functionality for performance and active nutrition, due to their lower protein and amino acid content.⁹⁰ The CMA therefore considers that WPC and non-whey-based protein products do not belong to the same product market and further, in light of the evidence set out above, does not consider they pose a significant constraint to WPC suppliers.

5.2.1.5 Conclusion on product market

46. For the above reasons, the CMA has assessed the impact of this Merger on the supply of (i) regular WPI for sports nutrition and food applications, (ii) WPC50–89 for sports nutrition and food applications and (iii) clear WPI.

5.2.2 Geographic market

47. The Parties submitted that the most appropriate geographic market is worldwide,⁹¹ on the basis that they and their competitors sell WPC of all grades globally and compete with each other globally;⁹² and that their customers' buying patterns and behaviour do not differ across regions.⁹³ The Parties noted that there are tariffs imposed on the import of WPC products into Europe and the US, but contended that the level of tariffs is small compared to the value of WPC products, particularly for higher-valued WPI, and therefore they do not significantly hinder global trade.⁹⁴

48. Third-party evidence suggests that the differences between sourcing from the UK and from ex-UK Europe are not significant, but that there are larger differences when sourcing worldwide.

(a) One UK customer told the CMA that there is no significant difference between sourcing from a UK supplier and sourcing from a European supplier

⁸⁷ FMN, paragraph 12.20(d).

⁸⁸ For example, the majority of customers and competitors told the CMA that it is difficult to switch or they would not consider switching between WPC and non-whey-based protein products. Response to the CMA questionnaire from a number of third parties, September 2024, question 4(e); response to the CMA questionnaire from a number of third parties, September 2024, question 2(d). See also Volac Internal Document, Annex 010XX to the FMN, '[§<]', July 2023, page 4.

⁸⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 2(d).

⁹⁰ Volac Internal Document, Annex 010QQ to the FMN, '[§<]', October 2023, page 35; Volac Internal Document, Annex 010XX to the FMN, '[§<]', July 2023, page 4.

⁹¹ FMN, paragraph 12.42.

⁹² FMN, paragraphs 12.43–12.45. The CMA notes, however, that 82% of AFI's sales of WPI, and 61% of Volac's was to Europe and the UK in 2023. See FMN, Diagrams 6 and 7.

⁹³ FMN, paragraph 12.46.

⁹⁴ FMN, paragraph 12.55.

as the additional transport costs of importing WPC and WPI from Europe to the UK are insignificant.⁹⁵ Another UK customer told the CMA that there is no tariff applicable to the import of WPC or WPI from Europe to the UK, although there are some additional hidden costs of increased paperwork since Brexit.⁹⁶

- (b) Around half of the Europe- and UK-based customers who responded to the CMA indicated that they do not source WPC or WPI from outside Europe (including the UK).⁹⁷ The majority of the other customers that do source more widely rarely source more than 20% of their WPC or WPI from outside Europe (including the UK), with some limited exceptions.⁹⁸
- (c) When asked about the differences between European and US suppliers, customers indicated that tariffs,⁹⁹ longer lead times,¹⁰⁰ transport costs¹⁰¹ and poorer quality¹⁰² are distinguishing factors of sourcing from outside Europe. Some customers also suggested that their sourcing decisions are sometimes influenced by lower prices of US products,¹⁰³ sustainability considerations¹⁰⁴ and the reputation and reliability of European suppliers.¹⁰⁵ Very few customers told the CMA that there is no material difference between suppliers inside and outside Europe (including the UK).¹⁰⁶

49. The majority of the Parties' internal documents largely discuss the market dynamics in the supply of WPC and WPI in Europe and the UK separately from other geographic regions.¹⁰⁷ While some of AFI's internal documents discuss the WPC and WPI markets on a global basis,¹⁰⁸ and some Volac documents analyse competitors in the UK specifically,¹⁰⁹ industry reports from Endupro, GWB, Vesper, ADPI and [redacted] all analyse the demand and supply of WPC and WPI in Europe separately from other regions worldwide.¹¹⁰

⁹⁵ Note of a call with a third party, August 2024, paragraph 16.

⁹⁶ Note of a call with a third party, July 2024, paragraph 9.

⁹⁷ Response to the CMA questionnaire from a number of third parties, September 2024, question 6.

⁹⁸ Response to the CMA questionnaire from a number of third parties, September 2024, question 6. A few customers source higher quantities of WPC or WPI, and in one instance up to 100% of their requirements, from outside Europe and the UK – see response to the CMA questionnaire from a number of third parties, September 2024, question 6.

⁹⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 5.

¹⁰⁰ Response to the CMA questionnaire from a number of third parties, September 2024, question 5.

¹⁰¹ Response to the CMA questionnaire from a third party, September 2024, question 5.

¹⁰² Response to the CMA questionnaire from a number of third parties, September 2024, question 5. See also note of a call with a third party, August 2024, paragraph 13.

¹⁰³ Response to the CMA questionnaire from a third party, September 2024, question 5.

¹⁰⁴ Response to the CMA questionnaire from a third party, September 2024, question 5.

¹⁰⁵ Response to the CMA questionnaire from a third party, September 2024, question 5.

¹⁰⁶ Response to the CMA questionnaire from a number of third parties, September 2024, question 5.

¹⁰⁷ See for example Volac Internal Document, Annex 010A to the FMN, '[redacted]', July 2022, pages 2 and 4; Volac Internal Document, Annex 010FF to the FMN, '[redacted]', April–June 2023, pages 3–4.

¹⁰⁸ See for example AFI Internal Document, Annex 009O to the FMN, '[redacted]', June 2022, page 31.

¹⁰⁹ See for example Volac Internal Document, Annex 010BB to the FMN, '[redacted]', July 2023, page 5; Volac Internal Document, Annex 010KK to the FMN, '[redacted]', July 2024, page 4; Volac Internal Document, Annex 010JJ to the FMN, '[redacted]', April 2024, page 5.

¹¹⁰ See for example Endupro Market Report, Annex 010AA to the FMN, '[redacted]', October 2023, page 60.

50. On the basis of evidence gathered, the CMA considers that the appropriate geographic market is Europe (including the UK) for all types of WPC and WPI.

5.2.3 Conclusion on market definition

51. The CMA has therefore assessed the impact of this Merger on the supply of (i) regular WPI and (ii) WPC50–89, both for sports nutrition and food applications in Europe (including the UK).¹¹¹

52. The CMA has set out its assessment of clear WPI as a market of insufficient importance in section 5.4 below.

5.3 Theories of harm

53. The CMA assesses the potential competitive effects of mergers by reference to theories of harm. Theories of harm provide a framework for assessing the effects of a merger and whether or not it could lead to an SLC relative to the counterfactual.¹¹²

54. In its investigation of this Merger, the CMA has considered the following theories of harm:

(a) horizontal unilateral effects in the supply of regular WPI for sports nutrition and food applications in Europe; and

(b) horizontal unilateral effects in the supply of WPC50–89 for sports nutrition and food applications in Europe.

55. Horizontal unilateral effects may 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.¹¹³ Horizontal unilateral effects are more likely when the parties to a merger are close competitors.¹¹⁴

56. Each of these above-outlined theories of harm is considered below.

¹¹¹ The CMA uses the term 'Europe' to cover, for the avoidance of doubt, the UK in this decision going forward.

¹¹² [CMA129](#), paragraph 2.11.

¹¹³ [CMA129](#), paragraph 4.1.

¹¹⁴ [CMA129](#), paragraph 4.8.

5.3.1 Theory of Harm 1: Horizontal unilateral effects in the supply of regular WPI for sports nutrition and food applications in Europe

57. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in the supply of regular WPI. In particular, the CMA has assessed:

- (a) the Parties' submissions;
- (b) shares of supply;
- (c) internal documents; and
- (d) third-party evidence.

5.3.1.1 Parties' submissions

58. The Parties submitted that to their knowledge there are at least 22 suppliers of WPI (including regular and clear WPI) to customers in Europe, the largest of which include Tirlán Co-operative Society Limited (**Tirlán**), Sachsenmilch, Milk Specialties Global (**Milk Specialties**), Fonterra Cooperative Group Limited (**Fonterra**), Royal FrieslandCampina N.V. (**FrieslandCampina**), and Hilmar Cheese Company, Inc. (**Hilmar**), and that there are a further 11 US suppliers that produce WPI, although it is unknown to the Parties whether they are supplying into Europe.¹¹⁵

59. The Parties submitted that on a European basis considering WPI only, they would also be constrained by a broad range of large, well-established and well-resourced competitors that are expanding, as well as both traders¹¹⁶ and a number of smaller players that collectively account for a significant volume of supply. They also submitted that non-European suppliers not currently supplying European customers and suppliers of WPC50–89 (particularly WPC80) would continue to exert a strong constraint.¹¹⁷

60. Regarding the entry and expansion of their competitors, the Parties noted that the Giract Whey Book¹¹⁸ suggests that WPI production in Europe grew from [X] to [X] between 2017 and 2023.¹¹⁹ They also provided details of recent entrants and expansion plans by competitors including EURIAL (the milk division of the AGRIAL

¹¹⁵ FMN, Tables 12, 12a and 12b, and paragraphs 13.35–13.37.

¹¹⁶ Traders source WPC products from WPC manufacturers and resell them to end customers.

¹¹⁷ FMN, paragraphs 13.5–13.8, 14.3 and 14.9, and Table 4.

¹¹⁸ The Giract Whey Book is a report published by Giract that analyses demand and supply in the whey and lactose ingredients market. See also [Whey Book 2023 Proposal and Subscription Form.pdf](#).

¹¹⁹ FMN, paragraph 20.1.

Cooperative Group), FrieslandCampina, Tirlán, Glanbia plc (**Glanbia**) and Select Milk Producers, Inc.¹²⁰

5.3.1.2 Shares of supply

61. Shares of supply can be useful evidence when assessing closeness of competition, particularly when there is persuasive evidence as to which potential substitutes should be included or excluded or when the degree of differentiation between firms is more limited. In such circumstances, a firm with a higher share of supply is more likely to be a close competitor to its rivals.¹²¹
62. The CMA estimated shares of supply using the volumes provided by the Parties and competitors. These are shown in Table 1 below.¹²²

Table 1: CMA estimates of share of supply for regular WPI provided to sports nutrition and food application customers in Europe in 2023.

	2023
	Share (%)
AFI	[5–10]%
Volac	[20–30]%
Combined	[30–40]%
Tirlán	[20–30]%
Fonterra	[5–10]%
Sachsenmilch	[10–20]%
FrieslandCampina	[10–20]%
Milk Specialties	[5–10]%
Milei GmbH (Milei)	[0–5]%
Leprino Foods Company (Leprino)	[0–5]%
DMK Group (DMK)	[0–5]%
Total	100%

Source: The Parties and their competitors.

63. In the present case, the CMA considers that there are limitations to these share of supply estimates. While these indicate the relative size of a supplier vis-à-vis the competitors listed in the table, one competitor listed in the Parties' share of supply estimates, Hilmar, and a number of smaller competitors such as the Carbery

¹²⁰ FMN, paragraphs 20.4, 20.6(a), 20.6(c) and 20.7(d). See also [Whey protein isolate | Eurial I&N \(eurial-ingredients.com\)](#); <https://www.frieslandcampina.com/news/frieslandcampina-ingredients-doubles-whey-protein-isolate-and-milk-fat-globule-membrane-production/>; [Glanbia's cheese and whey plant begins production in Michigan - Agriland.co.uk](#) and [MWC Sets New Standard for Cheese and Whey Production | Glanbia](#). FrieslandCampina's website suggests that this will be operational by 2026 – see [FrieslandCampina Ingredients doubles whey protein isolate and milk fat globule membrane production - FrieslandCampina Global - FrieslandCampina](#).

¹²¹ [CMA129](#), paragraph 4.14.

¹²² Parties' market share data, Annexes 018 and 019 to the FMN, September 2024; response to the CMA questionnaire from a number of third parties, September 2024, question 2. Volumes sold to traders, which are some of the Parties' [redacted] customers, were included.

Group (**Carbery**) and Rokiškio sūris AB (**Rokiškio**) cited by third parties as potential alternative suppliers or competitors are not listed in this table.

64. With these limitations in mind, the CMA notes that Table 1 above shows that Volac has, along with a similarly-sized Tirlán, a significant and similar co-leading share of [20–30]% pre-Merger, with a relatively moderate increment of [5–10]% to Volac’s existing market position resulting from the Merger. A number of competitors with larger volumes than AFI would constrain the Merged Entity, including Tirlán, which will continue to have a significant share of [20–30]%, and Sachsenmilch and FrieslandCampina, which have shares of [10–20]% and [10–20]% respectively. In addition, a number of smaller competitors with shares of [5–10]% and [0–5]% will remain post-Merger.¹²³

5.3.1.3 Internal documents

65. The Parties’ internal documents which monitor competitors often do not distinguish between regular and clear WPI.¹²⁴ Given fewer competitors appear to supply clear WPI than regular WPI, this means that there are limitations as to how informative these documents can be on the Parties’ market position for regular WPI specifically.¹²⁵ With this caveat in mind, the CMA notes that the documents indicate that in relation to WPI overall, the Parties monitor one another’s activities, in addition to those of a number of other competitors.
- (a) In documents prepared in the context of the Merger, AFI describes itself and Volac as leading WPI suppliers.¹²⁶ In one such document, AFI describes itself as a global innovation leader while it describes other WPI competitors, including Volac, [X], [X], and [X] as ‘WPI innovation followers’. It also lists [X], [X], [X], [X] and [X] as ‘standard WPI producers’.¹²⁷
- (b) Similarly, an AFI strategy document, which appears to discuss AFI’s competitors more generally (across WPI, WPC and lactose) lists Volac, [X], [X], [X], [X], [X], among others as competitors.¹²⁸
- (c) Some of Volac’s quarterly market analysis reports monitor AFI and a number of other competitors. For example, one document explains that [X], [X] and

¹²³ The CMA notes that the picture presented by these shares of supply would not materially differ if AFI’s and other relevant competitors’ sales volumes for infant and medical nutrition were added, based on its calculation of the Parties’ and their competitors’ sales volumes for 2023.

¹²⁴ The Parties’ internal documents do not always distinguish between WPI for sports nutrition and food applications, and WPI for other purposes. However, as explained in paragraph 25, Volac supplies WPI to sports nutrition and, to a much lesser extent, food application customers. Moreover, the sports nutrition segment accounts for the large majority of all WPI volumes.

¹²⁵ As noted in paragraph 43.

¹²⁶ AFI Internal Document, Annex 007G to the FMN, ‘[X]’, January 2024, page 9; AFI Internal Document, Annex 007B to the FMN, ‘[X]’, January 2024, page 5.

¹²⁷ AFI Internal Document, Annex 007B to the FMN, ‘[X]’, January 2024, page 10.

¹²⁸ AFI Internal Document, Annex 007B to the FMN, ‘[X]’, January 2024, page 10; AFI Internal Document, Annex 009O to the FMN, ‘[X]’, June 2022, pages 36 and 40. AFI documents that discuss competitors appear to relate to all WPI in aggregate, rather than WPI for sports nutrition and food application in particular.

AFI (as well as Volac) are expected to significantly expand their WPI capacity in 2024/5.¹²⁹ Another document identifies AFI and [X] as the most popular WPI suppliers in the Eastern European region specifically.¹³⁰ [X], [X], [X] and [X] are all mentioned in these documents in relation to the UK.¹³¹

5.3.1.4 *Third-party evidence*

66. Around half of the third parties that procure or supply regular WPI expressed varying levels of concern regarding the impact of the Merger on competition. For example, some third parties told the CMA that the Merged Entity would become a dominant or leading player (including by a significant margin), and that accordingly, there would be fewer options in the market, such that the Merged Entity may be able to increase prices.¹³² One third party told the CMA that AFI and Volac produce similar products and are known for their good quality and innovation efforts.¹³³ The CMA notes that some of these third parties also procure or supply clear WPI and that third parties generally did not distinguish in their comments as to whether their observations related to regular WPI, clear WPI or both.
67. However, very few of the customers that currently buy regular WPI from either AFI or Volac for sports nutrition and/or food applications (including those that gave negative views as discussed above) listed the other Party as an alternative regular WPI supplier. The Parties were only specifically mentioned as alternatives in respect of clear WPI.¹³⁴
68. In addition, and consistent with the caveated evidence set out in relation to the CMA's share of supply estimates and the Parties' internal documents, while the Merged Entity would have a strong leading position in the supply of regular WPI, the third-party evidence indicates that there will continue to be several other suppliers prevalent in the market who will continue to constrain the Merged Entity, most of which are European providers.¹³⁵ When asked about their potential suppliers of regular WPI (in the case of customers), or their closest competitors in regular WPI (for competitors), FrieslandCampina, Tirlán, Sachsenmilch, Leprino, Fonterra, Glanbia, Milk Specialties and Hilmar were frequently mentioned

¹²⁹ Volac Internal Document, Annex 010BB to the FMN, '[X]', July 2023, page 12.

¹³⁰ Volac Internal Document, Annex 010HH to the FMN, '[X]', October 2023, page 4.

¹³¹ Volac Internal Document, Annex 010BB to the FMN, '[X]', July 2023, page 5; Volac Internal Document, Annex 010KK to the FMN, '[X]', July 2024, page 4; Volac Internal Document, Annex 010JJ to the FMN, '[X]', April 2024, page 5. When monitoring competitors by region, these often do not include Europe, but only the UK, USA, Asia/China and India. The competitor analyses also often do not specify whether they are referring to WPI or WPC. Although these documents do not specify that they relate to WPI for sports nutrition specifically, this is the segment which Volac predominantly serves, as explained in paragraph 25.

¹³² Response to the CMA questionnaire from a number of third parties, September 2024, question 8; response to the CMA questionnaire from a number of third parties, September 2024, question 7.

¹³³ Response to the CMA questionnaire from a third party, September 2024, question 8.

¹³⁴ Response to the CMA questionnaire from a number of third parties, September 2024, question 4.

¹³⁵ The CMA did not receive strong evidence from third parties showing that non-European suppliers that are not currently active in Europe are seen as a strong alternative to the Parties.

alongside the Parties. Other suppliers mentioned less frequently included DMK, ENTC Dairy Solutions (**ENTC**), Carbery, Rokiškio, Ornuva Co-operative (**Ornuva**), County Milk Products Limited, Milei, Saputo Inc. (**Saputo**), Spomlek Dairy Cooperative (**Spomlek**), Bempresa, the Agropur Dairy Cooperative (**Agropur**), Haverro Hoogwegt B.V. (**Haverro**) and IMCD.^{136, 137}

5.3.1.5 Conclusion on theory of harm 1

69. Based on the evidence above, the CMA considers that the Merged Entity will have a significant share of supply post-Merger. The Parties compete with one another, as well as a range of other suppliers. These suppliers, in particular Tirlán, FrieslandCampina, Sachsenmilch, Milk Specialties and a range of smaller competitors will continue to exert sufficient constraint on the Merged Entity.
70. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of regular WPI for sports nutrition and food applications in Europe.

5.3.2 Theory of Harm 2: Horizontal unilateral effects in the supply of WPC50–89 for sports nutrition and food applications in Europe

71. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in the supply of WPC50–89 for sports nutrition and food applications in Europe. The CMA has considered evidence from the Parties (including submissions, internal documents and sales data) and from third-party competitors and customers.

5.3.2.1 Parties' submissions

72. Given the small size of each of the Parties in their own share of supply estimates, the Parties submitted that there is no prospect that the Merger could lead to an SLC in the market for WPC50–89 in Europe.¹³⁸
73. The Parties submitted that to their knowledge there are at least 43 suppliers of WPC50–89 to customers in Europe, the largest of which include DMK,

¹³⁶ Haverro and IMCD are traders of regular WPI. The evidence did not support the Parties' contention that traders pose a strong constraint on the Merged Entity. As noted above, the CMA also notes that it did not receive strong evidence from third parties to support the Parties' claims that non-Europe-based suppliers that are currently not active in Europe provide a strong constraint. Of the competitors listed as alternatives by third parties, Hilmar and Agropur are the only non-Europe-based suppliers that the CMA did not receive data about, and so was unable to confirm if they were active in supplying Europe-based customers.

¹³⁷ Response to the CMA questionnaire from a number of third parties, September 2024, question 8; response to the CMA questionnaire from a number of third parties, September 2024, question 7.

¹³⁸ FMN, paragraph 14.7.

FrieslandCampina, Sachsenmilch, Milei, Polmlek Sp. z o. o. (**Polmlek**), Bayerische Milchindustrie eG (**BMI**), Lactalis, and Fonterra.¹³⁹

5.3.2.2 Shares of supply

74. The CMA estimated shares of supply shown in Table 2 below based on the volumes provided by the Parties and their competitors.¹⁴⁰

Table 2: CMA estimates of share of supply for WPC50–89 provided to sports nutrition and food application customers in Europe in 2023.

	2023
	Share (%)
AFI	[10–20]%
Volac	[0–5]%
Combined	[10–20]%
DMK	[20–30]%
Fonterra	[10–20]%
Sachsenmilch	[10–20]%
FrieslandCampina	[5–10]%
Milei	[0–5]%
Milk Specialties	[5–10]%
BMI	[5–10]%
Leprino	[0–5]%
Total	100%

Source: The Parties and their competitors.

75. In the present case, the CMA considers that there are limitations to these share of supply estimates. While these indicate the relative size of a supplier vis-à-vis the competitors listed in the table, two competitors included in the Parties' share of supply estimates, Polmlek and Lactalis, and a number of smaller competitors identified by third party evidence, such as Saputo, the Vilvi Group (**Vilvi**) and ENTC, are not listed in this table.

76. In this context, the CMA notes that Table 2 above shows that AFI is a medium sized supplier and that the increment to AFI's position as a result of the Merger through Volac is relatively small. DMK will continue to be the market leader with a share of [20–30]%. The Merged Entity will also continue to be constrained by similar-sized competitors including Fonterra and Sachsenmilch, as well as smaller competitors such as FrieslandCampina, Milei, Milk Specialties and BMI.¹⁴¹

¹³⁹ FMN, Tables 9 and 9a, and paragraphs 13.23–13.25.

¹⁴⁰ Parties' market share data, Annexes 018 and 019 to the FMN, September 2024; response to the CMA questionnaire from a number of third parties, September 2024, question 2. Volumes sold to traders, which are some of the Parties' [redacted] customers, were included.

¹⁴¹ The CMA notes that the picture presented by these shares of supply would not materially differ if AFI's and other relevant competitors' sales volumes for infant and medical nutrition were added, based on its calculation of the Parties' and their competitors' sales volumes for 2023.

5.3.2.3 *Internal documents*

77. The Parties' internal documents relevant to WPC50–89 largely focus on the supply of WPC80 specifically, which the CMA considers to be reflective of the fact that WPC80 make up the majority of sales in this market.¹⁴² These documents indicate that the Parties are not close competitors and that they face constraints from a number of suppliers:

- (a) In a Volac market analysis document, Volac tracks a range of competitors supplying WPC80 including [redacted], [redacted] and [redacted] (but not AFI).¹⁴³ In a customer review document, Volac highlights the strategic and operational management of its EU competitors for WPC80 mentioning [redacted], [redacted] and [redacted].¹⁴⁴ The CMA did not see any Volac internal documents that identifies AFI as a competitor in relation to WPC80.
- (b) AFI's internal documents indicate that it tracks a range of competitors for WPC. For example in a strategy document focusing on WPC and WPI, AFI tracks [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] in addition to Volac.¹⁴⁵ Another AFI internal document refers to AFI, [redacted] and [redacted] as the top three suppliers of WPC50–89 in 2022, and identifies [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted] as other major WPC50–89 suppliers.¹⁴⁶

5.3.2.4 *Third-party evidence*

78. Third parties did not always distinguish discussion of WPC50–89 between WPC for sports nutrition and food purposes and for other purposes. The CMA's assessment of evidence from third parties therefore relates to WPC50–89 for all purposes unless otherwise specified.

79. Consistent with the relative size of the Parties reflected in the share of supply estimates, third parties indicated that AFI is a prominent supplier of WPC50–89 in Europe, and that Volac is a less prominent supplier.¹⁴⁷ Around half of third parties that procure or supply WPC50–89¹⁴⁸ (many of which also procure WPI) gave negative views about how the Merger may impact competition, as discussed in paragraph 66 above; however, as noted above at paragraph 66 it was not always clear whether these views related to WPI generally, regular/clear WPI and/or

¹⁴² See footnote 54.

¹⁴³ Volac Internal Document, Annex 010GG to the FMN, '[redacted]', April 2024, page 3.

¹⁴⁴ Volac Internal Document, Annex 010J to the FMN, '[redacted]', June 2023, page 3.

¹⁴⁵ AFI Internal Document, Annex 009O to the FMN, '[redacted]', June 2022, page 40.

¹⁴⁶ AFI Internal Document, Annex 009Y to the FMN, '[redacted]', October 2023, page 48.

¹⁴⁷ Response to the CMA questionnaire from a number of third parties, September 2024, question 1; response to the CMA questionnaire from a number of third parties, September 2024, question 5; response to the CMA questionnaire from a third party, September 2024, question 6.

¹⁴⁸ Response to the CMA questionnaire from a number of third parties, September 2024, question 8; response to the CMA questionnaire from a number of third parties, September 2024, question 7.

WPC50–89. None of these responses pointed to competition concerns in WPC50–89 in particular.

80. When asked about their potential suppliers of WPC50–89 (in the case of customers), or their closest competitors in WPC50–89 (for competitors), Fonterra, Leprino, DMK, and Milk Specialties were all frequently mentioned alongside AFI. Other suppliers mentioned less frequently included BMI, Sachsenmilch, Polmlek, FrieslandCampina, Milei, Saputo, Vilvi, ENTC, Hilmar, Ornu, First Milk Limited, Spomlek, Nordmelk B.V. and Agropur. Only one customer listed the Parties as alternative suppliers of WPC50–89.¹⁴⁹

5.3.2.5 Conclusion on theory of harm 2

81. Based on the evidence above, the CMA considers that the Merged Entity will have a moderate market position, and that the increment from the Merger is relatively small, reflecting Volac’s limited market position.
82. The evidence indicates that the Parties do not compete closely, and that the Merged Entity will be constrained by several other suppliers, including the current market leader DMK, as well as suppliers such as Fonterra, Sachsenmilch and a range of smaller competitors.
83. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of WPC50–89 for sports nutrition and food applications in Europe.

5.4 Market of insufficient importance: the supply of clear WPI

84. Under section 33(2)(a) of the Act, the CMA may decide not to refer a merger for an in-depth phase 2 investigation if it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. This exception is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the market(s) concerned.¹⁵⁰
85. There may be merger investigations where it would be quicker and more efficient for the CMA to determine that it would apply its discretion to apply the ‘de minimis’ exception than it would be for the CMA to reach the requisite level of belief that the merger in question does not trigger the duty to refer. In such cases, the CMA may

¹⁴⁹ Response to the CMA questionnaire from a number of third parties, September 2024, question 5; response to the CMA questionnaire from a number of third parties, September 2024, question 4. As with regular WPI, the CMA notes that it did not receive strong evidence from third parties to support the Parties’ claims that non-Europe-based suppliers that are currently not active in Europe provide a strong constraint. Of the competitors listed as alternatives by third parties, Hilmar and Agropur are the only non-Europe-based suppliers that the CMA did not receive data about, and so was unable to confirm if they were active in supplying Europe-based customers.

¹⁵⁰ [Mergers: Exceptions to the duty to refer \(CMA64\)](#), 25 April 2024, paragraph 2.1.

leave open the question of whether its duty to refer is met because, even if the duty to refer is met, the CMA would apply its discretion not to refer.¹⁵¹

86. The CMA's starting point when considering whether to apply the 'de minimis' exception is the size of the market(s) concerned. The CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where the annual value in the UK, in aggregate, of those market(s) is more than £30 million.¹⁵²
87. Where the annual value in the UK of the market(s) concerned is £30 million or less, the CMA will consider a number of factors, in addition to market size, in order to determine whether to exercise its discretion to apply the 'de minimis' exception. These are:¹⁵³
- (a) The extent to which revenues are an appropriate metric to assess market size and whether the market is expanding or contracting;
 - (b) Whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question; and
 - (c) The nature of the potential detriment that may result from the merger, having particular regard to the CMA's objectives and priorities set out in its current Annual Plan.

5.4.1 Market size

88. The CMA estimated the size of the UK market for clear WPI using revenue data obtained from the Parties and their competitors for the period 2021–2023.¹⁵⁴ The CMA found that the UK market size for clear WPI was well below £10 million in 2021, 2022 and 2023.
89. Although clear WPI is a relatively new product and the CMA has heard that demand from some customers is growing,¹⁵⁵ AFI developed clear WPI over 15 years ago,¹⁵⁶ the market revenues over the last three years have been steadily well below £30 million, and the CMA has not seen any evidence that the UK market size is likely to grow to such an extent that it could reach £30 million, at least in the medium term.

¹⁵¹ [CMA64](#), paragraph 2.11.

¹⁵² [CMA64](#), paragraph 2.2.

¹⁵³ [CMA64](#), paragraphs 2.3 and 2.14.

¹⁵⁴ All competitors known to the CMA to be suppliers or potential suppliers of clear WPI responded to the CMA's questionnaire. The CMA therefore considers its estimates of the UK market size to be accurate.

¹⁵⁵ Response to the CMA questionnaire from a third party, September 2024, question 2; note of a call with a third party, August 2024, paragraph 25.

¹⁵⁶ FMN, paragraph 16.10.

5.4.2 Replicability

90. The CMA does not consider that the Merger is one of a potentially large number of similar mergers that could be replicated across the sector in question. It is not, for example, a merger involving local markets in a sector where firms are acquiring multiple small local businesses over time.

5.4.3 Nature of the potential detriment

91. The CMA is less likely to exercise its discretion to apply the ‘de minimis’ exception to mergers in markets which are connected to the key priorities set out in the CMA’s Annual Plan. In some circumstances, the CMA may also consider that it would not be appropriate to apply the ‘de minimis’ exception even in markets that have no direct connection to the priorities set out in the Annual Plan because of the nature of the potential detriment.¹⁵⁷
92. The CMA considers that the supply of clear WPI does not concern an area of priority set out in its 2024–2025 Annual Plan.¹⁵⁸ In particular, the supply of clear WPI does not relate to essential spending, emergent and digital markets or sustainability and climate issues. In addition, it does not relate to other areas where the nature of the potential detriment could be important, taking account of the CMA’s purpose, such as key areas of public expenditure, markets used by people who need help the most or those of systemic importance within the UK.

5.4.4 Conclusion on the application of the ‘de minimis’ exception

93. Taking all the above factors into consideration, the CMA believes that the market for clear WPI is not of sufficient importance to justify the making of a reference. As such, the CMA believes that it is appropriate for it to exercise its discretion to apply the ‘de minimis’ exception in accordance with section 33(2)(a) of the Act. The CMA did not have to conclude whether the Merger gives rise to a realistic prospect of an SLC in the market concerned because, even if the duty to refer is met, then the discretion would be applied.¹⁵⁹

5.5 Third-party views

94. The CMA has addressed third party views with respect to regular WPI and WPC50–89 in the relevant sections above. One third party submitted that the Parties are the two largest purchasers of input whey in the UK, and post-Merger

¹⁵⁷ [CMA64](#), paragraphs 2.26–2.28.

¹⁵⁸ [CMA Annual Plan 2024/25](#), 14 March 2024, sections 5 and 6. The CMA’s key priorities are: (i) acting in areas where customers spend most of their money and time, particularly people that need help the most; (ii) helping emergent sectors, including digital markets, develop into high-growth, innovative and competitive markets; and (iii) ensuring the whole UK economy can grow productively and sustainably and accelerating transition to net zero. The CMA considered both the areas of focus and the medium-term priorities set out in the Annual Plan 2024/25 as part of its assessment.

¹⁵⁹ [CMA64](#), paragraph 2.11.

could worsen the prices they pay cheese producers for input whey, in order to disadvantage Arla's competitors in the supply of cheese.¹⁶⁰ However, AFI's internal documents show that procuring input whey is [redacted] to its growth strategy,¹⁶¹ and that competition to purchase input whey is intensifying, as demand for input whey [redacted] increases in cheese production.¹⁶² The CMA therefore considers that it is unlikely that the Merged Entity would have the incentive to harm upstream cheese producers.¹⁶³

6. ENTRY AND EXPANSION

95. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. The CMA will consider entry and/or expansion plans of rivals who do so in direct response to the merger as a countervailing measure that could prevent an SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁶⁴
96. As the CMA has concluded that the Merger does not give rise to competition concerns in the supply of regular WPI and WPC50–89 for sports nutrition and food applications in Europe, and that the supply of clear WPI is, based on its UK market size, a market of insufficient importance to justify the making of a reference, it is not necessary to consider countervailing factors in this decision.

¹⁶⁰ Note of a call with a third party, July 2024, paragraphs 14–21.

¹⁶¹ AFI Internal Document, Annex 005E to the FMN, '[redacted]', April 2024, page 36; AFI Internal Document, Annex 009T to the FMN, '[redacted]', August 2023, pages 10–11. The CMA further notes that this strategy is consistent with the fact that although Arla is active in the supply of input whey, it nevertheless also sources a material portion of its requirements from third parties.

¹⁶² AFI Internal Document, Annex 009T to the FMN, '[redacted]', August 2023, pages 30–35, 53–57.

¹⁶³ This third party also submitted that the Merged Entity's lower input costs could make it more difficult for competitors to compete against it when selling WPC and WPI. The CMA has considered the impact of the Merger on competition in the supply of whey-based products downstream in the sections above.

¹⁶⁴ [CMA129](#), paragraph 8.31.

DECISION

97. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the UK.
98. The CMA believes that the market of clear WPI is not of sufficient importance to justify the making of a reference, in accordance with section 33(2)(a) of the Act.
99. The Merger will therefore not be referred under section 33 of the Act.

Elie Yoo
Director, Mergers
Competition and Markets Authority
7 November 2024

ⁱ This sentence in paragraph 35(a) should read ‘The majority of customers who responded to the CMA indicated that WPI and WPC of lower concentrations are not substitutable with each other,^{56, i} with some describing these as being completely different products with different qualities and prices.’