

**ANTICIPATED ACQUISITION OF THE BURSTON AND RADSTOCK FEED MILLS
OF
FORFARMERS UK LIMITED
BY
2 AGRICULTURE LIMITED**

ME/7106/24

**RESPONSE TO THE CMA'S DECISION ON RELEVANT MERGER SITUATION AND
SUBSTANTIAL LESSENING OF COMPETITION ("THE DECISION")**

10 DECEMBER 2024

1. **Executive summary**

- 1.1 The CMA's Phase 1 Decision finds that there is a realistic prospect of an SLC as a result of (i) loss of competition in the supply of meat poultry feed to third party customers in certain local areas in East Anglia (i.e. horizontal concerns); and (ii) vertical (input foreclosure) effects in the downstream supply of poultry meat at the national level. As explained in this response, the Decision is flawed in a number of key respects and as a result reaches the wrong conclusion. When the evidence is considered in full, it is clear that an SLC is implausible.

Background (Section 2)

- 1.2 The Decision's SLC finding relates to 2Agriculture's anticipated acquisition of the Burston feed mill (located in Norfolk) from ForFarmers. The Merger involves the transfer of the property and plant located at the Burston Mill to 2Agriculture, together with production-related employees, but without any customer volumes, customer contracts, customer data, goodwill, brands, or other intellectual property rights, which will remain with ForFarmers.
- 1.3 The Transaction has a clear rationale from each party's perspective and constitutes an efficient reallocation of spare capacity:
- (a) 2Agriculture is \mathcal{X} and requires additional feed milling capacity in East Anglia. This is partly as a result of increasing in-house demand for meat poultry feed, but also because Stoke Ferry (one its existing mills in the region) is an ageing mill that must reduce production volumes in order to extend its economic life; and
 - (b) \mathcal{X} ForFarmers currently has significant spare capacity in East Anglia and the Burston mill \mathcal{X} . ForFarmers therefore decided to sell the Burston mill but will remain an active competitor in East Anglia, through its Bury feed mill (located 19 miles from Burston). The merger does not therefore reduce the number of competitors in the area or result in an increment to 2Agriculture's existing share of supply.

The Counterfactual is incomplete (Section 3)

- 1.4 The Decision concludes that the sale of the Burston mill to an alternative purchaser \mathcal{X} is the relevant counterfactual and that it would use a "*small but material proportion of the Burston capacity*" for supply to third parties. The Decision has materially overestimated the amount of capacity available for third party supplies in this counterfactual scenario.
- 1.5 With regard to the Burston mill, the Decision concludes that, in the absence of the Transaction, \mathcal{X} would have acquired the mill and used [50-100]kT of its capacity to supply third parties.¹ However, this conclusion requires further scrutiny by the Inquiry Group. \mathcal{X} is a vertically integrated supplier of \mathcal{X} in the UK and has repeatedly made public statements about its intention \mathcal{X} and it is \mathcal{X} . The Inquiry Group should therefore consider whether:

¹ Paragraph 142 of the Decision.

- (a) 2Agriculture intends to supply third parties in the long term, or whether it simply intends to supply third parties in the short term as it continues to expand its own downstream farming operations;
- (b) 2Agriculture will use its alleged spare capacity to supply pig, layer or meat poultry feed to third parties; and
- (c) 2Agriculture is likely to succeed in supplying third parties, in circumstances where ForFarmers has failed to attract third party customers to the Burston mill.

1.6 With regard to the Stoke Ferry mill, the Decision assumes that 2Agriculture will continue to supply [100-150]kT of meat poultry feed to third parties from the Stoke Ferry mill in the counterfactual, notwithstanding that the Decision also recognises that the mill has a 2Agriculture if it continues to run at these volumes. In this connection, the Decision, fails to take into account the ageing nature and ongoing environmental/health and safety concerns at the mill, which would in all likelihood require 2Agriculture to reduce capacity at Stoke Ferry and 2Agriculture. In reality, if 2Agriculture does not acquire the Burston mill it will be forced to 2Agriculture the volume of meat poultry feed it supplies to third parties in order to address the issues it currently faces at the Stoke Ferry mill.

1.7 With regard to the Snetterton mill, the Decision found that the decision 2Agriculture with constructing the new feed mill 'could' be related to the Merger.² This is incorrect. The construction of the mill has been 2Agriculture (i.e. before the Transaction was considered) as a result of the project being 2Agriculture after an 2Agriculture. The 2Agriculture of the Snetterton mill does not change if 2Agriculture were to acquire the Burston feed mill.

The Decision's post-Merger scenario does not reflect the evidence (Section 4)

1.8 The Decision concludes that post-Transaction, it is 'realistic' that 2Agriculture would close the Stoke Ferry mill and use Burston predominantly for in-house supply, and that it would supply between [0-50]kT and [100-150]kT to third parties. However, this finding fails to take account of 2Agriculture's pre-Transaction investment plans and the context in which they were prepared:

- (a) The March Investment Paper, on which the Decision seeks to rely, is based on 2Agriculture 2Agriculture and producing [300-350]kT of meat poultry feed at Burston (more than the [250-300]kT considered in the Decision), including supplying [50-100]kT to third parties. This document was prepared at a time when the HSE had issued an enforcement notice against Stoke Ferry and its future was 2Agriculture.
- (b) The April Investment Paper, proposes operating both Stoke Ferry and Burston in order to in-source additional in-house volumes and supply [50-100]kT to third parties. There are clear commercial advantages to 2Agriculture in pursuing this strategy. For example, it allows 2Agriculture to increase efficiency by in-sourcing additional volumes, it addresses the ongoing issues at the Stoke Ferry mill by operating at lower volumes, and it allows 2Agriculture to continue to supply third party customers (which

² Paragraph 99 of the Decision.

generates additional margin for the business and provides a supply chain contingency against the potential loss of poultry processing contracts).

1.9 As a result, the Decision understates the level of capacity that is available to third parties in the post-Merger scenario.

The Decision ignores important competitive constraints (Section 5)

1.10 The Decision focusses its analysis on the amount of total and spare capacity available to third parties in the catchment areas around Stoke Ferry, Burston and Bawsey. However, this overly narrow focus results in the Decision ignoring a number of important competitive constraints that will bind 2Agriculture post-Transaction.

1.11 In particular, the Decision:

- (a) ignores the fact that post-Transaction, 2Agriculture will have a low market share (less than [30-40]%) with no increment as a result of the Transaction;
- (b) estimates total and spare capacity available to third parties using 'operational' capacity, which is likely to understate the actual level of capacity at competing mills and how they would respond to market conditions;
- (c) ignores the fact that competitors can expand production relatively easily. This can be done by adding additional shift patterns, producing a more simplified product mix or by adding a new production line;
- (d) estimates the geographic frame of reference by using an '80% catchment area'. This is a static analysis that fails to consider how customers and competitors would respond to a price increase (the relevant question with regard to market definition);
- (e) ignores the competitive constraint imposed by Noble Foods Bilsthorpe and GLW Feeds Shepshed, which are located just outside the Stoke Ferry catchment area but are in the catchment area of a significant proportion of Stoke Ferry customers;
- (f) ignores the unique competitive constraint imposed by AB Agri's Flixborough mill (located just 89 miles from Stoke Ferry). Flixborough is a large and highly efficient poultry mill with lower costs of production that is able to serve customers over a much wider catchment area than other poultry feed mills in the area; and
- (g) ignores the presence of significant buyer power downstream. As previously recognised by the CMA, poultry feed customers (and downstream customers including the leading grocery retailers) have 'outside options' which can be used to negotiate favourable commercial terms.

1.12 Individually, and even more so in combination, these competitive constraints will prevent any SLC from arising and should be taken into account in the CMA's assessment.

TOH 1 is based on assertion and is not linked to customer outcomes (Section 6)

- 1.13 Theory of harm 1 concerns the finding that "*the Merger would lead to a removal of capacity utilised for meat poultry feed supply to third parties*"³. This analysis is flawed and the conclusions are not evidence-based.
- 1.14 First, the SLC revolves around a reduction of capacity (and spare capacity) but makes no attempt to show how a reduction in capacity may lead to worse outcomes for customers. The Decision simply assumes that having more capacity and more spare capacity available is a better outcome for customers. The assumption that the Merger would result in higher prices is also inconsistent with 2Agriculture's Investment Papers, in which \propto irrespective of whether the Stoke Ferry mill \propto .
- 1.15 Secondly, the relevant economic literature is clear that the effects of a reduction of capacity are ambiguous and therefore harm to customers cannot be presumed, The literature also finds that the degree of excess capacity does not lead to any particular conclusion about the likelihood of coordination or unilateral effects arising, and that reductions in spare capacity can be efficiency enhancing. The Decision clearly shows that significant spare capacity will remain in the market post-Merger but does not explain why there is insufficient spare capacity.
- 1.16 Thirdly, the theory of harm is unclear. The SLC finding is that a reduction in capacity could allow Boparan and its competitors to compete less aggressively post-Merger. This is more akin to a coordinated effects theory of harm. However, the Decision makes no attempt properly to assess the likelihood of coordinated effects arising post-Merger. When a coordinated effects theory of harm is properly evaluated, it is clearly not credible. Similarly, the Decision has not conducted a proper assessment as to whether the Merger would give rise to unilateral effects. When the evidence is considered correctly and in the round, it is clear that no such unilateral effects concerns would arise from the Merger.
- 1.17 Fourthly, as explained above, the Decision's findings relating to the counterfactual and 2Agriculture's post-Merger business plans are incorrect. When these deficiencies are accounted for, the Merger does not give rise to a reduction in third party capacity compared to the counterfactual, irrespective of whether the March or April Investment Papers are considered.
- 1.18 Fifthly, the Parties have a number of significant concerns in relation to (i) how the spare capacity analysis has been conducted; and (ii) the inferences and conclusions that the Decision seeks to draw from that analysis. Notwithstanding these issues, the Decision itself confirms there is more than enough spare capacity to accommodate any (and indeed all) of 2Agriculture's third party customers at Stoke Ferry that wanted to switch supplier.
- 1.19 The Decision points to seasonality, operational breakdowns and increasing demand as factors that could further reduce spare capacity that is available to third parties. These factors are significantly overstated and are immaterial to the overall demand for, and supply of, meat poultry feed in East Anglia.

³ Paragraph 124 of the Decision.

The Decision provides no evidence that input foreclosure is a credible TOH (Section 7)

- 1.20 The analysis of input foreclosure in the Decision is highly limited and deviates significantly from the CMA's own merger assessment guidelines.
- 1.21 In relation to the ability to foreclose, the Decision makes no attempt to show that 2Agriculture has market power or is able to harm the competitiveness of its downstream rivals. In fact, 2Agriculture has at most a [30-40]% market share, there is no increment as a result of the Transaction and there are number of other significant competitors.
- 1.22 In relation to the incentive to foreclose, the analysis in the Decision is similarly inadequate, as it makes no attempt to consider the potential benefits to Boparan of foreclosing rivals. When the merger assessment guidelines are properly applied, there is no evidence to support the contention that Boparan would have the incentive to foreclose rivals.
- 1.23 In relation to the effect of foreclosure, the Decision finds that a foreclosure strategy would have an effect on competition despite 97% of the UK poultry market being unaffected (either through vertical integration or being located outside East Anglia).
- 1.24 Moreover, the Decision makes no attempt to consider the effect of the Transaction. Boparan is already active at both levels of the supply chain and supplies third party customers with meat poultry feed. The Decision makes no attempt to explain what will change in this regard as a result of the Merger.

2. Background to the transaction

The parties

- 2.1 On 5 April 2024, 2 Agriculture Limited (**2Agriculture**) entered into two separate Asset Purchase Agreements (**APAs**) to acquire the Burston feed mill (located at Burston, Norfolk) and the Radstock feed mill (located at Radstock, Somerset) from ForFarmers UK Limited (**ForFarmers**) (**the Merger**).
- 2.2 The Merger involves the transfer of the property and plant located at the Burston mill and the Radstock mill to 2Agriculture, together with production-related employees, but without any product formulations or recipes, customer volumes, customer contracts, customer data, goodwill or brands, which will remain with ForFarmers.
- 2.3 2Agriculture is a UK-based animal feed milling business specialising in the production of conventional (i.e. non-organic) compound poultry feed. It has five feed mills in the UK, manufacturing approximately 300,000 tonnes of poultry feed per year. 2Agriculture does not sell any of its feed outside the UK.
- 2.4 2Agriculture is part of a group of companies under the common ownership of Mr Ranjit Singh Boparan and Mrs Baljinder Kaur Boparan. Within that group of companies, 2Sisters Food Group (**2SFG**) is active in the processing and supply of chicken in the UK and Europe. 2SFG holds a 50% interest in Hook 2 Sisters Limited (**H2S**), which is a joint venture with PD Hook (Group) Limited (UK). H2S is active in the rearing of broiler chickens.
- 2.5 ForFarmers is an indirect UK subsidiary of ForFarmers N.V., a European animal feed producer which is based at Lochem in the Netherlands and listed on Euronext Amsterdam.⁴ ForFarmers' direct parent is ForFarmers UK Holdings Limited which is, in turn, a direct subsidiary of ForFarmers N.V. The ForFarmers Group (comprising ForFarmers N.V. and its subsidiaries) is active in the Netherlands, Germany, Belgium, Poland and the UK.

The rationale for the transaction

Background to ForFarmers' decision to sell the Burston mill

- 2.6 In January 2023, ForFarmers and AREIL (the parent company of 2Agriculture) abandoned their plans to proceed with a transaction referred to internally as "Project Voeden", which contemplated the establishment of a joint venture that would have combined the parties' respective businesses and operations in the production of animal nutrition products in the UK. From ForFarmers' perspective, the strategic rationale underlying Project Voeden was 300.

⁴ A copy of ForFarmers' organisational structure chart is at Annex 2.009.

- 2.7 In light of the abandonment of Project Voeden, the Executive Board of ForFarmers examined ~~the~~ options to restructure the company's UK operations.⁵ As part of this process, ~~the~~.⁶
- 2.8 ~~the~~. For that reason, ForFarmers identified the Burston and Radstock sites as viable divestment options and focused its efforts on marketing the sites between June and August 2023.⁷
- 2.9 The relevant background to the Burston mill and ForFarmers' rationale for selling the site can be summarised as follows:
- (a) The Burston mill is one of two feed mills operated by ForFarmers in the East Anglia area, which are just 19 miles apart. The neighbouring mill is based in Bury St Edmunds. ForFarmers acquired the Burston mill and Bury mill through the acquisition of BOCM Pauls, an animal feed supplier, in 2012. The Burston mill has a technical capacity of [250-300]kT.
 - (b) The Burston mill predominantly focuses on the production of pig feed ~~at~~ of the site's manufacturing lines are dedicated to the production of pig feed. In 2023, pig feed represented [100-150]kT of the volume sold at Burston (of total animal feed volumes of [150-200]kT).
 - (c) The Burston mill also produces meat poultry feed, the primary customer of which is Banham (a subsidiary of Boparan), which purchased [0-50]kT, more than [80-90]% of the meat poultry feed volumes produced in 2023. The Burston mill generated only [0-50]kT of meat poultry feed sales to other third party customers in 2023, ~~the~~.
 - (d) In recent years, the Burston mill has experienced a ~~the~~ loss of customer volumes, including both a ~~the~~ loss of pig feed volumes ~~the~~.⁸ ~~the~~.
- ~~the~~
- ~~the~~
- (e) As a consequence of the Burston mill losing ~~the~~ customer volumes, the site has ~~the~~ spare capacity ~~the~~.⁹
 - (f) As explained above, the proposed sale of the Burston mill does not include the transfer of any of ForFarmers' customers or customer volumes, which is a critical aspect of the merger's rationale in circumstances where ForFarmers' core business is the supply of animal feed to third party customers, and ForFarmers is not active in any

⁵ The possible options to restructure the company's UK operations, which included alternative divestment options, are summarised at paragraphs 2.30 to 2.33 of the Final Merger Notice and examined further in Rob Kiers' witness statement at paragraphs 36 to 50.

⁶ Paragraphs 51 to 56 of Rob Kiers' witness statement.

⁷ These divestment options and their supporting documents are considered in further detail in Rob Kiers' witness statement provided as Annex 2.010 and 2.011 to the Final Merger Notice.

⁸ ForFarmers 2024 Budget expects to keep just ~~the~~ of the Banham volumes in 2024 (a loss of ~~the~~ on 2023 volumes). In contrast, Banham expects to require just ~~the~~ from ForFarmers in 2024 (a reduction of ~~the~~ on 2023 volumes).

⁹ ForFarmers briefly considered the sale of the ~~the~~ as an alternative to the Burston mill). However, ~~the~~ was eliminated at an early stage, as explained at paragraph 65 of Rob Kiers' witness statement.

vertically related markets. The Transaction does not therefore result in a reduction in the number of competitors (as ForFarmers will continue to compete in East Anglia from its Bury feed mill) and does not result in an increment to 2Agriculture's existing share of supply.

- (g) Against this factual background, the sale of the Burston mill enables ForFarmers to:
- (i) ~~∞~~;
 - (ii) ~~∞~~.¹⁰

Background to 2Agriculture's decision to acquire the Burston Mill

- 2.10 2Agriculture operates animal feed mills in East Anglia at Stoke Ferry (28.6 miles from the Burston mill) and Bawsey (36.3 miles from the Burston mill).¹¹ The Stoke Ferry mill, which is located in the village of Stoke Ferry, has been operational for more than 50 years and is used by 2Agriculture to manufacture in-house meat poultry feed for Boparan, as well as for third-party customers.
- 2.11 As a consequence of local community concerns, environmental, and health and safety issues, as well as the age of the plant and equipment, the operation of the Stoke Ferry mill has been subject to the following factors:
- (a) Since 2018-2019, 2Agriculture has voluntarily restricted traffic movements at the Stoke Ferry mill to address complaints from local community members. These restrictions were formally imposed in 2021 following a public inquiry by the Office of the Traffic Commissioner.
 - (b) In 2019-2020, in response to community concerns, 2Agriculture undertook significant works at the Stoke Ferry mill to reduce noise levels by installing noise reducing barriers.
 - (c) Although dust management controls have improved over the last three years, these issues continue to pose a challenge. In September 2023, following on-site inspections, the Environment Agency raised concerns about the level of dust emissions at the Stoke Ferry mill.
 - (d) In February 2024, the Health and Safety Executive issued an improvement notice to 2Agriculture in relation to fire and explosion risks arising from excess dust, and required the issue to be remedied ~~∞~~. 2Agriculture responded to the notice ~~∞~~, and implemented a number of measures to improve dust levels at the site. These included ~~∞~~.
 - (e) 2Agriculture's ~~∞~~ indicate that the Stoke Ferry mill ~~∞~~ health and safety ~~∞~~:

¹⁰ ForFarmers has also allocated funds from its general capital expenditure budget to make other smaller investments ~~∞~~ (if required). See paragraphs 71 to 74 of Rob Kiers' witness statement.

¹¹ 2Agriculture also operates a feed mill at Billingham, which is outside the [70-80] mile catchment area surrounding Burston.

- (i) [REDACTED]¹²;
- (ii) [REDACTED]; and
- (iii) [REDACTED].¹³

2.12 In light of these challenges, since at least [REDACTED], 2Agriculture has considered the construction of a new mill at Snetterton, a neighbouring village in Norfolk (25 miles from Stoke Ferry), to potentially replace the Stoke Ferry mill. The Snetterton mill would be capable of producing approximately [0-50]kT per week of animal feed ([600-650]kT per annum).

2.13 The construction of the Snetterton mill forms an important part of 2Agriculture's long-term strategy and 2035 business plan. In particular:¹⁴ Boparan's long-term strategy is [REDACTED]. This will necessarily involve the expansion of 2Agriculture's poultry feed milling capability.¹⁵ This strategy will [REDACTED].

2.14 The original [REDACTED]. However, since 2Agriculture received planning permission for the mill in July 2021, construction and financing costs have increased significantly in light of the energy crisis (and associated increases in construction costs) and higher interest rates. In [REDACTED], 2Agriculture decided to [REDACTED].

2.15 [REDACTED] to build the Snetterton mill, [REDACTED]. Accordingly, 2Agriculture has concluded that [REDACTED].¹⁶ 2Agriculture expects that [REDACTED].

2.16 2Agriculture has also considered the following options to expand its capacity in East Anglia:

- (a) As noted above, ForFarmers and Boparan (via AREIL) contemplated a joint venture, referred to as Project Voeden, with the purpose of merging their respective businesses and operations in the production of animal nutrition products. From 2Agriculture's perspective, the strategic rationale underlying Project Voeden was to [REDACTED].
- (b) After Project Voeden was abandoned in January 2023, the parties considered entering into a [REDACTED].
- (c) [REDACTED], ForFarmers contacted 2Agriculture to discuss the potential sale of either the Burston [REDACTED] in East Anglia. [REDACTED].¹⁷ [REDACTED], 2Agriculture and ForFarmers negotiated the sale and purchase of the Burston mill. The APA was signed on 5 April 2024.

¹² [REDACTED].

¹³ Annex 14.003 (Annex RFI 1 Q5.001) "[REDACTED] - 2Agriculture Ltd Board Pack [REDACTED]".

¹⁴ Paragraphs 15 to 16 of Kevin Sketcher's witness statement for a summary of [REDACTED].

¹⁵ Boparan currently relies on [REDACTED] for its poultry feed requirements. This is because [REDACTED].

¹⁶ [REDACTED] planning permission at the Snetterton site [REDACTED].

¹⁷ From 2Agriculture's perspective of producing only meat poultry feed, [REDACTED]. For that reason, the machinery relating to producing these types of animal feed was not optimal for 2Agriculture.

3. The counterfactual is incomplete

3.1 The counterfactual in the Decision addresses the future of: (i) the Burston mill; (ii) the Stoke Ferry mill; and (iii) the Snetterton mill. As explain below, the counterfactual in the Decision is incomplete and overestimates the amount of capacity available to third parties.

The Burston mill counterfactual

3.2 The Decision concludes that the sale of the Burston Mill to "*an alternative purchaser [is]... the relevant counterfactual*",¹⁸ and in particular that:

- (a) X was at an advanced stage of negotiations with ForFarmers for the sale of the Burston Mill¹⁹ and
- (b) X would use a small but material proportion of the Burston capacity for supply to third parties X, notwithstanding that X is not, and never has been, active in the supply of meat poultry feed to third parties in East Anglia.²⁰

3.3 In considering X likely business strategy in relation to its potential purchase of the Burston Mill it is important to bear in mind the following facts:

- (a) X is a vertically integrated producer of X meat and it is investing in growing its farming capabilities.
 - (i) X 2024 Annual Report states that X and that it operates a X.²¹ The Annual Report also states that X.
 - (ii) 2Agriculture understands that X is planning to double its X processing activities to X a week, which is likely to be achieved within X. This would require an additional X a year of meat poultry feed, X of third-party capacity that it is understood X has indicated would be available at Burston.
 - (iii) X latest interim report states that X²² and it also states that X.²³
 - (iv) X latest interim report also states that X.²⁴
 - (v) X has submitted X.²⁵ The volume of feed required to feed these X is likely to be X of the X of third-party capacity that X stated would be available at Burston.

¹⁸ Paragraph 101 of the Decision.

¹⁹ Paragraph 77 of the Decision.

²⁰ Paragraph 142 of the Decision, which refers to "*a small but material proportion of the Burston capacity [being] used for supply to third parties*". For the purposes of this submission, X.

²¹ Page 4, X Annual Report & Accounts, X.

²² Page 2, X Interim Results, X.

²³ Page 1, X Interim Results, X.

²⁴ Page 2 X Interim Results, X. The report notes that X.

²⁵ Planning – Application Summary X.

- (b) X.
- (c) In ForFarmers' discussions with X during the Burston sales process, X.
- (d) X.²⁶ X.
- (e) X.

- 3.4 The Decision states that "*the use of capacity at Burston for third-party feed supply would result in X entering the market for the supply of meat poultry feed to third parties*".²⁷ However, having some capacity available for third party supply does not mean that X will be a successful entrant in supplying meat poultry feed to third parties. As explained in the Final Merger Notice and in detail in Rob Kiers' witness statement, ForFarmers decided to sell the Burston mill because there is significant excess capacity in the area relative to third party demand.²⁸ It cannot therefore be assumed that, even if X intended to supply third parties with poultry meat feed from Burston, it would be successful (as it has no reputation, track record or sales force for making third party sales) or that it intends to remain in the market beyond the very short term as it expands its X farming activities.
- 3.5 The evidence referred to in the Decision to support the conclusion that X would enter the market as a supplier of meat poultry feed to third parties in East Anglia is sparse, with only brief references to X response to the CMA's RFI in footnotes 64 and 161 of the Decision. No reasoning is provided to explain how cogent that evidence is, particularly in light of the factors set out at paragraph 2.2(a) – (d) above, which show X strong pursuit of a rapidly expanding vertically integrated business.
- 3.6 If any weight is to be placed on X stated plans to commence the supply of meat poultry feed to third party customers in East Anglia (which it has no previous experience of doing), there should be a detailed assessment of how it plans to enter the market, including the costs of setting up a sales and marketing team, how the third party sales are to be achieved (e.g. through the development of new product formulations), how it proposes to develop and maintain particular client relationships, and its cost and revenue projections over several years. The Parties have doubts as to whether X would supply any third party customers with meat poultry feed from Burston (given its business model and stated intentions). In any event, even if it did, such volumes are likely to be small and transitory in nature with very limited, if any, growth potential as it expands its X farming businesses and focuses on in-sourcing its purchases of X feed from third party suppliers.
- 3.7 In assessing X statements, it is important to bear in mind that as a potential purchaser of the Burston Mill during the sale process conducted by ForFarmers, X has a strong commercial incentive to ensure that the Merger does not proceed, which would give it the opportunity to acquire the Burston Mill at potentially X. Accordingly, it would be important to ensure that X statements are consistent with its internal documents and business plans for the site and, in

²⁶ Paragraphs 71, 73 and 76 of the Decision.

²⁷ Paragraph 71 of the Decision.

²⁸ Paragraph 2.37(b) of the Final Merger Notice; paragraph 15 of Rob Kiers' witness statement.

particular, that any purported capacity that may be available to supply third-parties is for meat poultry feed (as opposed to pig or layer feed) and is not limited to the short term.

- 3.8 Having identified 2Agriculture as a likely alternative purchaser of the Burston mill, the Decision claims that "... *the evidence received supports the existence of [2Agriculture being] a less anti-competitive purchaser [than 2Agriculture]*"²⁹. However, as explained further below, the Decision has failed to apply the correct counterfactual in relation to the Stoke Ferry mill. In the absence of the Merger, 2Agriculture would have reduced output at the Stoke Ferry mill to alleviate the environmental, HSE and aging plant concerns, 2Agriculture of the reduced capacity 2Agriculture, as the Decision recognises, albeit in a different context.³⁰ In that regard, replacing a long-established and highly regarded supplier of meat poultry feed to third parties with one that has no track record of supplying such feed to third parties does not result in better outcomes for customers.

The Stoke Ferry counterfactual is incorrect

- 3.9 The Decision concludes that in the absence of the transaction, "*the Stoke Ferry mill would have been kept operational for as long as possible to ensure the continued supply of feed volumes, in particular for in-house use*" (emphasis added).³¹
- 3.10 The Decision also recognises that "*the continued operation of this mill post-Merger would make a material difference to the competitive assessment (ie in terms of the level of capacity available to third parties in the relevant local areas)*".³²
- 3.11 The Decision assumes that, under the counterfactual, 2Agriculture would continue to produce ([100-150]kT of meat poultry feed for third parties at Stoke Ferry (i.e. the same volume as in 2023).³³ If the Stoke Ferry mill continued to supply 2Agriculture's in-house requirements in addition to these third party volumes, this implies that the Stoke Ferry mill would continue to operate at or very close to its 2023 capacity of [300-350]kT. However, this ignores a number of important points. In particular:
- (a) how 2Agriculture would address the health and safety, environmental, local community, and aging plant concerns at the Stoke Ferry site, and the resulting reduction in volumes that would need to be introduced in the absence of the Merger to address these concerns;
 - (b) how much, if any, of that reduced output would be committed to supplying third parties. In the absence of the Merger, the reduction in volumes at Stoke Ferry is likely

²⁹ Paragraph 77 of the Decision.

³⁰ Paragraph 89(a) to (d) of the Decision. This recognises that Stoke Ferry has a maximum 2Agriculture and cannot continue at its existing output.

³¹ Paragraph 96 of the Decision.

³² Paragraph 81 of the Decision.

³³ Footnote 166 of the Decision.

to result in 2Agriculture \times (for both security of supply and financial reasons) at the expense of third party sales, as the Decision itself seems to accept³⁴; and

- (c) in light of (a) and (b), the correct counterfactual is one where in the medium term:
- (i) production at Stoke Ferry is reduced (to c.[200-250]kT – [250-300]kT); and
 - (ii) 2Agriculture either stops supplying third parties from Stoke Ferry or only supplies very limited third party volumes (i.e. it \times due to its restricted capacity).³⁵

In this regard, the internal feed requirements of the Boparan group at Stoke Ferry in 2023 were [200-250]kT and an additional [50-100]kT were purchased from \times and \times .³⁶ Accordingly, the in-house requirements of the Boparan group ([300-350]kT) are greater than the production at Stoke Ferry in the counterfactual (c[200-250]kT – [250-300]kT), and accordingly, as the Decision recognises, it would have been \times .

3.12 Paragraph 88 of the Decision states that 2Agriculture's internal documents "*consistently indicate that the Stoke Ferry mill would have remained operational in the absence of alternative capacity in East Anglia*", but the Decision does not consider the consequences of continuing to operate the Stoke Ferry mill at its current (2023) level of production. This is surprising as the Decision does consider in detail at paragraph 89 2Agriculture's internal documents³⁷ which refer "*...to the mill as having a maximum \times of \times difficult to maintain \times site to run, [and] inevitable environmental issues....*".

3.13 Having referred to these documents as the basis for rejecting 2Agriculture's April 2024 Investment Paper which planned to keep Stoke Ferry open at a reduced level of production following the Merger, the Decision states at paragraph 93 that "*The CMA considers that, absent the Merger, it is realistic that Boparan would continue to operate Stoke Ferry in the absence of alternative capacity in East Anglia (eg if it does not build a new mill at Snetterton) given the significant volume of poultry feed produced at Stoke Ferry and its importance for internal (and third-party) supply.*" No doubt realising the contradictory nature of these findings, the Decision states at footnote 95 that "*As noted in paragraph 51 above, the appropriate test for the CMA's assessment at Phase 1 is whether a scenario is 'realistic', as opposed to 'likely'*".

3.14 The reality is that in the absence of the Merger it is entirely *unlikely* that the Stoke Ferry mill would continue to operate at its previous level of output for the foreseeable future. In concluding that in the absence of the Merger "*Boparan would continue to operate Stoke Ferry*", the Decision has failed to give proper consideration to the question of: "*at what volume and for how long?*". If the Stoke Ferry mill continued to operate at capacity (as assumed in the Decision's counterfactual), it would have a remaining life of \times due to the

³⁴ Paragraph 96 of the Decision states that Stoke Ferry would have been kept operational to ensure the continued supply of feed volumes, in particular for in-house use.

³⁵ As explained in the response to the Issues Letter, reducing volumes at Stoke Ferry was proposed in \times to preserve the longevity of the site, by addressing health and safety and environmental concerns.

³⁶ [0-50]kT was purchased by \times from \times and [0-50]kT was purchased by \times from \times .

³⁷ Paragraph 89 of the Decision.

location, environmental and health and safety concerns and aging nature of the plant and equipment. In particular:

- (a) the strategy presentation to the 2Agriculture Board/ senior management dated X refers to the X and the estimated maximum X. This statement reflects 2Agriculture's assessment of the longevity of the mill in the context of the health and safety, environmental and aging plant concerns based on the production volumes produced at the mill at that time:³⁸ and
- (b) an email from Kevin Sketcher to Rob Rafferty dated 4 September 2023 states that X and environmental concerns.³⁹

- 3.15 These documents demonstrate that X and the health and safety, environmental and local community concerns. Contrary to the reasoning adopted by the Decision (e.g. at paragraph 140 and footnote 166), the documents X.
- 3.16 The Decision also does not specify the time period over which it considers 2Agriculture would have continued to operate the Stoke Ferry mill X. As the documents referred to above demonstrate, X.
- 3.17 Further, footnote 83 of the Decision states that "*the Parties did not contest that the Stoke Ferry mill would have been kept operational, absent the Merger.*" Again this statement avoids the key question which is not whether the mill would have been "*kept operational*", but for how long and at what volume. In the Final Merger Notice, 2Agriculture stated that: X.⁴⁰
- 3.18 In his witness statement dated 10 October 2024, Kevin Sketcher, the Managing Director of 2Agriculture stated that X.⁴¹ This demonstrates that X.⁴² That operational reality does not change in the absence of the Merger.
- 3.19 In this connection, 2Agriculture has not stated that it X. As Mr Sketcher also explained in his witness statement in the context of a document dated X:
- X.⁴³
- 3.20 Accordingly, the Decision's conclusion that, in the counterfactual, 2Agriculture would have continued to operate the Stoke Ferry mill at its 2023 level of production and supply [100-150]kT of meat poultry feed to third-parties, is inconsistent with: (i) of the thousands of contemporaneous documents that were produced to the CMA during the Phase 1 investigation; and (ii) the documents on which the Decision seeks to rely to conclude that following the acquisition of the Burston Mill, the Stoke Ferry mill would have been closed. The Decision's counterfactual analysis is therefore flawed.

³⁸ Annex 8.003 of Final Merger Notice.

³⁹ 2AG_Annex_003170 - Response to CMA's s109 notice, X.

⁴⁰ Paragraph 14.29 of Final Merger Notice.

⁴¹ Paragraph 59 of Kevin Sketcher's witness statement.

⁴² Paragraph 14.18 of Final Merger Notice; Annex 8.005 of Final Merger Notice, page 2.

⁴³ Paragraph 42(b) of Kevin Sketcher's witness statement.

- 3.21 In light of the above, in Section 6 below, the 2Agriculture has re-worked the counterfactual analysis set out in the Decision by reference to "likely" outcomes based on the evidence. Under these more likely assumptions (i.e. that 2Agriculture would have to reduce output at Stoke Ferry to address the environmental and health and safety concerns and aging plant and therefore \times), the analysis shows that under both the March and April Investment Papers, there is no reduction in third party capacity compared to the counterfactual.
- 3.22 Moreover, if \times were to make less capacity available at Burston to supply third parties with meat poultry feed than is assumed in the Decision (for the reasons explained above), this would further underline that there would be no reduction in third party capacity on the basis of either the March or April Investment Papers compared with the counterfactual.

The Snetterton mill Counterfactual

The decision \times with the construction of the Snetterton mill is not merger-specific

- 3.23 The Decision states that:⁴⁴
- (a) *"the decision \times with the construction of the Snetterton mill, at present, could be related to the Merger" (emphasis added); and*
 - (b) *"the internal documents reviewed by the CMA in relation to the Snetterton mill overlap in timing with the consideration of the Merger, and [...] the Merger was seen as a way to replace the Stoke Ferry mill without requiring Boparan to spend in excess \times to build the Snetterton mill".*
- 3.24 The Decision does not, ultimately, take into account the construction of the proposed Snetterton mill as part of the counterfactual. However, the Decision incorrectly suggests that the estimate of capacity reduction is *"a conservative estimate, as it does not take into account the additional capacity that may have been available for third-party feed supply absent the Merger [...] (e.g. if the new mill at Snetterton were to replace Stoke Ferry)."*⁴⁵
- 3.25 The Snetterton project was first considered in \times and has been in contemplation for nearly \times . As the Decision acknowledges, 2Agriculture's monthly board packs describe the construction of the Snetterton mill as being \times for several years from at least \times .⁴⁶ The Decision presents no evidence to support its contention that 2Agriculture's decision \times with the construction of the Snetterton mill is related to the Merger.
- 3.26 In fact, 2Agriculture's internal documents demonstrate that when 2Agriculture became aware that the Snetterton project was \times within the original timeframe (due to \times), this was an important factor that motivated 2Agriculture to consider alternative options to secure additional capacity in East Anglia. These options included entering into a \times with ForFarmers \times and, ultimately, making an offer to purchase the Burston Mill.⁴⁷

⁴⁴ Paragraph 99 of the Decision.

⁴⁵ Paragraphs 148 and 163(a) of the Decision.

⁴⁶ Paragraph 98 of the Decision.

⁴⁷ Paragraphs 26 to 29 of Kevin Sketcher's witness statement.

3.27 To assist the Inquiry Group, 2Agriculture has prepared a timeline (set out in Annex 1) which summarises the development of the Snetterton project.⁴⁸ As the timeline demonstrates, decisions about the Snetterton mill have been consistently based on ~~the~~ of the project. Importantly, the decision to place the project ~~was~~ was taken before the Merger was contemplated as a consequence of ~~the~~.

2Agriculture's decision to place Snetterton ~~was~~ is independent to the Merger

3.28 The timeline in Annex 1 demonstrates that 2Agriculture's decision to place the Snetterton project ~~was~~ was taken before the decision to purchase the Burston mill. As explained in the Final Merger Notice, it remains the case that the ~~the~~ a new mill are prohibitive for 2Agriculture.⁴⁹

3.29 This is because ~~the~~ at Snetterton ~~was~~. In particular:

- (a) 2Agriculture would have ~~the~~;
- (b) 2Agriculture estimates that ~~the~~;and
- (c) Accordingly, ~~the~~,⁵⁰ ~~the~~.⁵¹ ~~the~~.

3.30 Further, 2Agriculture has ~~the~~.

3.31 Accordingly, 2Agriculture has ~~the~~ and has ~~the~~.

3.32 Accordingly, even on the basis of the Decision's counterfactual (i.e. the Burston mill being acquired by ~~the~~), this would have no impact on 2Agriculture's decision to keep ~~the~~ of the Snetterton mill ~~was~~.

⁴⁸ A summary of the Snetterton project is also set out at paragraphs 21 to 30 of Kevin Sketcher's witness statement.

⁴⁹ Paragraphs 14.59 to 14.64 of Final Merger Notice.

⁵⁰ ~~the~~.

⁵¹ ~~the~~.

4. The CMA's post-Merger scenario does not reflect the evidence

4.1 The Decision finds that: "it is realistic that Boparan (through 2Agriculture) would close the Stoke Ferry mill post-Merger" and "that it would utilise the capacity of the Burston mill predominantly for in-house supply".⁵² In particular, the Decision finds that 2Agriculture would supply between [0-50]kT and [100-150]kT of third party feed at Burston.⁵³

4.2 The analysis set out in the Decision does not fairly reflect:

- (a) 2Agriculture's investment papers, which set out 2Agriculture's rationale for the acquisitions of the Radstock and Burston mills, together with the associated financial projections and returns, which clearly show 2Agriculture's intention to continue to supply third parties; and
- (b) the health and safety and environmental issues that occurred at Stoke Ferry throughout 2023.

2Agriculture's Investment Papers

4.3 As part of its evaluation of the proposed transaction, 2Agriculture prepared two Investment Papers which, as explained in Kevin Sketcher's witness statement, together with earlier papers "X"⁵⁴ :

- (a) An Investment Paper dated X (the **March Investment Paper**);⁵⁵ and
- (b) An Investment Case dated X (the **April Investment Paper**).⁵⁶

The March Investment Paper

4.4 The March Investment Paper "X".⁵⁷

4.5 In relation to the rationale for acquiring the Burston Mill, the Paper states that "X".⁵⁸ On this basis, X.⁵⁹

4.6 A comparison between Stoke Ferry's X output (i.e. pre-Merger) and the March Investment Paper shows that:

⁵² Paragraph 124 of the Decision.

⁵³ Footnote 165 of the Decision states that: "[0-50]kT assumes that Boparan (through 2Agriculture) produces all its in-house Stoke Ferry volumes at Burston and internalises, at Burston, feed purchased from X and X – this leaves it with [0-50]kT of spare capacity which it allocates to supply some of the third-party customers currently served from Stoke Ferry. [100-150]kT assumes that Boparan (through 2Agriculture) supplies all its third-party Stoke Ferry volumes at Burston. Due to the capacity available at Burston, this would require Boparan (through 2Agriculture) to purchase a higher volume of the feed needed for internal use from third parties (ie [50-100]kT)."

⁵⁴ Paragraph 42 of Kevin Sketcher's witness statement.

⁵⁵ Document above provided to the CMA as Annex 8.004 of the Final Merger Notice.

⁵⁶ Document above provided to the CMA as Annex 8.005 of the Final Merger Notice.

⁵⁷ Slide 2 of the March Investment Paper.

⁵⁸ Slide 2 of the March Investment Paper.

⁵⁹ Slide 8 of the March Investment Paper refers to [250-300]kT for Boparan's "internal" requirements and [50-100]kT for Boparan's "external" requirements, of which [0-50]kT relates to supply to X.

- (a) in 2023, 2Agriculture supplied [100-150]kT of third party feed from Stoke Ferry. Therefore, the March Investment paper – which includes [50-100]kT of third party feed - assumes that 2Agriculture would continue to make significant volumes of meat poultry feed available to third parties;
- (b) in 2023, 2Agriculture supplied [200-250]kT of in-house feed from Stoke Ferry, whereas the March Investment Paper allowed for [250-300]kT of in-house volumes reflecting X;
- (c) 2Agriculture would X at Burston X;⁶⁰ and
- (d) In 2023, 2Agriculture produced [0-50]kT tonnes of breeder feed at Stoke Ferry. As Burston does not X, it would have been necessary to X at Burston in order to continue producing breeder feed.

Total production volume at the Burston feed mill

4.7 The volume that would be produced at the Burston mill that is referred to in the March Investment Paper ([300-350]kT) is higher than the current capacity of Burston (and the [250-300]kT capacity figure assumed in the Decision). 2Agriculture expects that it would be able to achieve a higher output at Burston, compared with the level of output achieved by ForFarmers, as a result of producing a simplified product mix and avoiding the downtime associated with switching between different types of pig and poultry feed. This higher level of production at Burston post-Merger is also consistent with the contemporaneous documents:

- (a) A 'teaser' document produced by ForFarmers in March 2023 as part of its sale process for the Burston mill (see Figure 4.1 below), which refers to the possibility of achieving higher output levels if it is used to focus only on broiler feed and/or following minimal levels of capital expenditure; and

Figure 4.1: extract of Burston teaser document⁶¹

X

- (b) Kevin Sketcher's notes following a site visit to the Burston feed mill,⁶² in which Mr Sketcher states that: "X".⁶³

4.8 Accordingly, the March Investment Paper shows 2Agriculture's realistic expectation that the Burston Mill could produce [300-350]kT of meat poultry feed per annum, rather than the [250-300]kT assumed in the Decision.

Ongoing HSE investigation at Stoke Ferry

4.9 Whilst the March Investment Paper referred to the closure of the Stoke Ferry mill and transferring volumes to Burston, this was in the context of potential enforcement action being

⁶⁰ In 2023 Boparan purchased [0-50]kT of feed from X and [0-50]kT of feed from X.

⁶¹ Slide 3 of Annex RFI 1 (Q3.001) "X Teaser Final".

⁶² Kevin Sketcher is the Managing Director of 2Agriculture and undertook a visit of the Burston site on X.

⁶³ Page 2 of 2AGR_000285464.

taken by the Health and Safety Executive (HSE) in February 2024 that could have led to the closure of the Stoke Ferry site.

4.10 The Decision refers to internal documents created between November 2023 to April 2024 and observes that "*while the Parties submitted that the [redacted] investment paper discusses the possibility of [redacted] Stoke Ferry only in the context of HSE enforcement notice, the evidence ... shows that internal documents from at least as far back [redacted], ie before the issuance of the enforcement notice, discuss closure of Stoke Ferry following the Merger*".⁶⁴

4.11 This observation is incorrect, as 2Agriculture had been engaging with the HSE and Environment Authority (**EA**) in respect of the same issues since [redacted]. In particular:

(a) The HSE had issued an Enforcement Notice (HSE Notice) on 22 February 2024 which required 2Agriculture to take action to address health and safety issues associated with flammable dust. However, the HSE Notice itself refers [redacted].

(b) In this connection, [redacted].

4.12 Accordingly [redacted].

4.13 [redacted], which had been considered in an investment Paper [redacted]⁶⁵, which would involve "*Running SF at lower weekly volumes [which] will reduce cap ex requirements and increase its life*"⁶⁶. [redacted].

The April Investment Paper

4.14 The April Investment Paper sets out 2Agriculture's analysis in relation to acquiring the Burston Mill, but also retaining the Stoke Ferry mill which would be operated at lower volumes. An extract of the rationale is show in Figure 4.2 below.

Figure 4.2: extract of the April Investment Paper (slide 2)

[redacted]

4.15 The April Investment Paper proceeds on the basis of 2Agriculture producing [350-400]kT of in-house meat poultry feed and [50-100]kT of third party meat poultry feed across Stoke Ferry and Burston.

4.16 Stoke Ferry [redacted], which would facilitate more effective maintenance and extend the life of the production lines, as well as the feed mill as a whole, whilst permanently addressing the environmental and health and safety issues at the site.

4.17 The approach set out in the April Investment Paper had clear advantages for 2Agriculture, as it would allow it to:

⁶⁴ Paragraph 92 of the Decision.

⁶⁵ [redacted] Investment Paper, [redacted].

⁶⁶ Page 21 of [redacted] Investment Paper, [redacted].

- (a) carry on producing its current in-house volumes and in-source [50-100]kT that are currently supplied by X and X. This would give 2Agriculture control of the formulation and production of the feeds that are used by X and allow 2Agriculture to eliminate double marginalisation from the supply chain by producing feed at lower cost than the prices it pays to X;
- (b) carry on supplying third party customers. Third party customers are a profitable part of the 2Agriculture business and generated £X in gross margin in X and contribution to overheads. The supply of feed to third party customers is an important activity for 2Agriculture, as third party sales provide a supply chain contingency which protects 2Agriculture against the risk that its feed production volumes could be negatively impacted if other entities within the Boparan business lose poultry processing contracts;⁶⁷
- (c) avoid the need to invest in a breeder feed line that would be required X (see paragraph 4.6(d) above); and
- (d) generate higher EBITDA. As shown on slide 8 of the April Investment Paper, it is more profitable to keep Stoke Ferry operational. It is important to note that the business plan only models the EBITDA for 2Agriculture and does not quantify the potential benefits to the wider Boparan Group of insourcing feed production in-house.

4.18 As explained above, the rationale set out in the April Investment Paper was initially explored in an investment paper dated X (the "**February Investment Paper**") which contained a slide setting out the benefits of acquiring Burston and keeping Stoke Ferry open (at reduced level of production). Figure 4.3 below shows the relevant extract from the February Investment Paper.

Figure 4.3: extract from February Investment Paper (slide 21)

X

4.19 This extract highlights X:

- (a) X;
- (b) X; and
- (c) X.

The CMA's post-Merger scenario ignores 2Agriculture's Investment Papers

4.20 The Table below compares the pre-Merger situation (2023), with each of the March and April Investment Papers.

⁶⁷ Paragraph 14.28 of the Final Merger Notice.

Table 4.1: comparison of volume, price and margin in Project Australia business plans⁶⁸

	Pre-Merger (2023)	March Investment Paper ⁶⁹	April Investment Paper ⁷⁰
Sites operating	Stoke Ferry	Burston	Burston & Stoke Ferry
Total production	[300-350] kT	[300-350] kT	[450-500] kT
<i>In-house</i>	[200-250] kT	[250-300] kT	[350-400] kT
<i>3rd party</i>	[100-150] kT	[50-100] kT	[50-100] kT
Price per tonne	⌘	⌘	⌘
<i>In-house</i>	⌘	⌘	⌘
<i>3rd party</i>	⌘	⌘	⌘
Margin per tonne	⌘	⌘	⌘

4.21 The Table above shows that

- (a) ⌘ March and April Investment Papers, 2Agriculture would continue to supply significant volumes of meat poultry feed to third party customers ⌘ [0-50]kT and [100-150]kT ⌘.
- (b) 2Agriculture would produce much greater volumes of meat poultry feed under both the March and April Investment Papers ([300-350]kT and [450-500]kT, respectively), compared to the Decision ([250-300]kT); and
- (c) both the March and April Investment Papers show the same level of margin as Stoke Ferry's margin in ⌘. The theory of harm in the Decision asserts that "*a significant reduction in capacity for the supply of meat poultry feed to third parties [(e.g. due to the closure of the Stoke Ferry mill)] could reduce choice and allow Boparan (through 2Agriculture), and its competitors, to compete less aggressively, in turn weakening competition, increasing prices and/or reducing quality or service*".⁷¹ However, this is unfounded and inconsistent with 2Agriculture's business plans as set out in both the March and April Investment Papers, which do not include a price or margin increase.

⁶⁸ Table includes ⌘ as 'in-house'.

⁶⁹ Figures shown for FY2025, the first full year of operation in the business plan , ⌘.

⁷⁰ Figures shown for FY2025, the first full year of operation in the business plan, ⌘.

⁷¹ Paragraph 125(a) of the Decision.

5. The Decision ignores important competitive constraints

5.1 The analytical framework in the Decision focusses on the *"removal of capacity utilised for meat poultry feed supply to third parties"* that could arise as a result of the Merger.⁷² This framework is supported by quantitative analysis that considers just two metrics of competition: (i) the total capacity available to supply third parties; and (ii) the available spare capacity to supply third parties post-merger. As explained in Section 6 below, it is incorrect to presume that a reduction in capacity or spare capacity automatically leads to anticompetitive effects.

5.2 The Decision's failure to consider other metrics of competition leads to it ignoring important competitive constraints on the Parties sites, in particular:

- (a) The Decision fails to recognise that the Parties have a low market share and there is no increment as a result of the Transaction.
- (b) The Decision focusses on the operational capacity at competitor sites which understates the competitive constraint they impose.
- (c) The Decision fails to consider the ability for rivals to easily expand production.
- (d) The catchment area used in the Decision is not related to the relevant geographic market as defined by the SSNIP test.
- (e) The Decision adopts a binary approach of focussing on competitor sites within [70-80] miles.
- (f) The Decision fails to recognise customers have significant buyer power.

5.3 Each of these points is addressed in more detail below.

Market shares are low and there is no increment

5.4 The Decision notes that *"a local market assessment based on shares of customer volumes would not be appropriate in this case"*.⁷³ Agriculture disagree with this approach and consider that market shares based on customer volumes provide important information on competitive dynamics.

5.5 This is consistent with the CMA's Merger Assessment Guidelines (**Guidelines**) which note that:⁷⁴

"Measures of concentration such as shares of supply can be useful evidence when assessing closeness of competition, particularly when there is persuasive evidence on demand- and supply-side substitution as to which potential substitutes should be

⁷² Paragraph 124 of the Decision.

⁷³ Paragraph 125 of the Decision.

⁷⁴ Paragraph 4.14 of the CMA Merger Assessment Guidelines.

included or excluded, and when, although differentiated, the degree of differentiation between firms is more limited."

5.6 Whilst the Guidelines outline some situations where shares of supply may be less informative (including where the boundaries of the market are unclear, where data is not available or where there is a high degree of differentiation), removal of capacity does not feature as one of these situations. In fact, the Guidelines suggest that shares of supply will be a relevant consideration in a firm's incentives to restrict volumes (directly analogous to a decision to remove capacity):⁷⁵

"Some factors may make horizontal unilateral effects more or less likely in the context of an undifferentiated market:

...

***(b) Shares of supply.** The merged entity may have a greater incentive to restrict volumes to the extent it has a large share of supply, as the benefits of a higher price would apply to a greater volume than would be the case for a smaller firm."*

5.7 Shares of supply are therefore clearly relevant and should have been considered in the Decision. As set out in the Final Merger Notice, 2Agriculture has a low market share on all basis and therefore has a low incentive to remove capacity from the market as much of the benefit of such a strategy (in the form of higher prices) would accrue to rivals.

5.8 Market shares based on a [70-80] mile catchment area centred on each of Burston, Stoke Ferry and Bawsey are presented in response to Q13 of the Final Merger Notice. In summary:

- (a) 2Agriculture's market share in the supply of all poultry feed to third parties is less than [30-40]% when centred on each of Burston, Stoke Ferry and Bawsey;
- (b) 2Agriculture's market share in the supply of meat poultry feed to third parties is less than [30-40]% when centred on all sites; and
- (c) there is no increment as a result of the Merger, as it involves the acquisition of the Burston mill and certain assets from ForFarmers, but excludes customer volumes, customer contracts, customer data, goodwill or brands. ForFarmers will transfer all of the volumes currently supplied from Burston to other ForFarmers' sites, ✕. ForFarmers will therefore continue to supply its existing customers and compete for new customers within the local area.

Operational capacity understates the competitive constraint from competing sites

5.9 In assessing total and spare capacity, for competitor sites, the Decision has relied on operational capacity as this *"best represents the capacity available at their [third-party] mills"*. However, when considering capacity at ForFarmers' Burston and Bury mills the Decision

⁷⁵ Paragraph 4.38 of the CMA Merger Assessment Guidelines.

relies on technical capacity instead, as these sites are currently running at reduced capacity.⁷⁶

- 5.10 The distinction between operational and technical capacity is an important one:
- (a) Technical capacity is the output that can be produced at a feed mill using the existing physical resources, without making any significant investments at the site (e.g. in relation to the purchase and installation of additional equipment). A mill operating at 'technical capacity' has sufficient downtime to undertake routine repair and maintenance on the mill's equipment and therefore 'technical capacity' represents a viable and sustainable level of production.
 - (b) Operational capacity reflects the current output at a particular site (with shift patterns matched to current levels of production). Operational capacity can be adjusted at short notice in response to changes in demand by simply adjusting working patterns.
- 5.11 Technical capacity is a more meaningful basis on which to assess capacity as it more accurately reflects how suppliers respond to changes in market conditions. For example, if there is an increase in demand, a supplier operating at below its technical capacity can easily increase its operational capacity to meet demand, for example, by adding an additional shift.
- 5.12 By only considering the operational capacity of competing sites, the Decision has understated the competitive constraint these sites exert and understated the total and spare capacity in the market. It is also inconsistent for the Decision to consider operational capacity for competing sites, but technical capacity for ForFarmers' sites.

Competitors can easily expand production

- 5.13 The Decision has not considered the ease with which competitors can expand production or their future plans to increase production (e.g. in response to an increase in demand for poultry feed). Competitors have a number of options for expanding production short of building a new mill.
- 5.14 First, as noted above, sites that are currently operating at below their technical capacity can readily expand production by adjusting shift patterns, e.g. moving from operating six days a week to seven days a week. This involves minimal upfront investment and changes can be made on an incremental basis to meet demand. The Parties understand that most feed mills in East Anglia (with the possible exception of \times) do not currently operate on a 24/7 basis and therefore have the option to expand production at low cost by adjusting shift patterns.
- 5.15 Second, sites can increase production by producing a simplified feed mix (e.g. producing poultry feed only rather than poultry and pig feed) and therefore avoiding the downtime associated with switching between different types of feed. As noted in Figure 4.1 above, a 'teaser' document produced by ForFarmers in March 2023 estimated production at Burston could be increased from [300-350]kT to [300-350]kT per annum by moving to a simple broiler operation. Moreover, 2Agriculture believes that this is an understatement and that capacity could be increased to [300-350]kT per annum on this basis, as explained in its March

⁷⁶ Paragraph 134 of the Decision.

Investment Paper. Firms that operate multiple feed mills (e.g. 3X) have the option to reallocate production between different mills in order to maximise production.

- 5.16 Third, suppliers have the option to expand production by adding a new production line. Where a mill has unutilised space, a new production line can be added quickly (in less than a year) and at relatively low cost. For example, as noted in Figure 4.1 above, a 'teaser' document produced by ForFarmers in March 2023 estimated that a new production line at Burston could be added for 3X. The same document notes that for approximately 3X, production could be increased to [400-450]kT (i.e. an increase of over [100-150]kT on current capacity).
- 5.17 The Decision makes clear that two suppliers are already considering increasing capacity either through the expansion of existing capacity or the building of a new mill.⁷⁷ Those suppliers that do not currently have plans to expand capacity could easily change their plans if demand increased or feed prices went up.

Catchment areas are unrelated to the SSNIP test

- 5.18 The Decision relies on a geographic market definition of [70-80] miles radius established in *ForFarmers/Boparan* and only considers competitors that are within this catchment area. The [70-80] mile radius was based on the average 80% catchment area across all ForFarmers and 2Agriculture sites.
- 5.19 Whilst 2Agriculture agrees that adopting an average catchment area is likely to be more reliable than calculating site-specific catchment areas, 2Agriculture considers that adopting this approach ignores the strong competitive constraint imposed by mills that are located a relatively short distance away. In particular, it is based on a static analysis of customers' current purchasing decisions and does not recognise customers' likely responses to a price increase in the context of the SSNIP test.
- 5.20 The fact that catchment areas are likely to lead to geographic markets that are unduly narrow was explicitly recognised in the previous version of the CMA's Merger Assessment Guidelines:⁷⁸

“Catchment areas are a pragmatic approximation for a candidate market to which the hypothetical monopolist test can be applied; the use of catchment areas is not an alternative conceptual approach. However, the geographic market identified using the hypothetical monopolist test will typically be wider than a catchment area.”

- 5.21 In its *Wienerberger Finance Service BV / Baggeridge Brick plc* Phase 2 decision, the Competition Commission recognised that catchment areas would *“increase substantially in response to a 5 per cent price rise in a neighbouring area, as such a price rise would generally cover the additional transport costs of supplying that neighbouring area and therefore increase the area that could be profitably supplied from any given brick plant”*.⁷⁹

⁷⁷ Paragraph 134 of the Decision.

⁷⁸ OFT 1254/CC2, Paragraph 5.2.25 of the Merger Assessment Guidelines.

⁷⁹ *Wienerberger Finance Service BV / Baggeridge Brick plc*, paragraph 5.29 of Phase 2 Decision.

- 5.22 Similar analysis in this case indicates that the actual geographic market is likely to be significantly wider than [70-80] miles. If the price of meat poultry feed increased in one region (e.g. East Anglia), this would incentivise mills in other neighbouring regions (e.g. Lincolnshire) to supply the higher priced region. For example, in 2023 the average price of broiler feed was around £395 per tonne. In the *ForFarmers/Boparan* merger review the parties estimated that the transport costs associated with delivering feed 10 miles further away was approximately £[0-10] per tonne. A 5% to 10% increase in the price of feed (approximately £20 to £40 based on 2023 prices) would therefore cover the cost of transporting feed between 130 and 260 miles further than is currently the case.
- 5.23 It is important that the CMA recognises this inherent limitation of catchment areas and does not adopt a binary approach of including competitors within the catchment area and totally disregarding competitors outside the catchment area. This is particularly important in this case where (as set out below) there are a number of competitors outside the catchment area that clearly present an alternative for a significant proportion of Stoke Ferry's third party customers and therefore exert a significant competitive constraint.
- 5.24 The Decision recognises that mills outside the relevant catchment area *"provide a degree of out-of-market constraint but that this constraint is not so material that it should be given additional weight in the CMA's analysis of the loss of capacity"*.⁸⁰ However, the subsequent analysis in the Decision gives zero weight to these sites, which is clearly inconsistent with them providing a degree of out-of-market constraint.
- 5.25 The Decision has recognised that competitive constraints from outside the catchment area should be taken into account in previous decisions. For example:
- (a) In *Wolseley/Kooltech* the CMA considered *"the constraints from sites located immediately outside the boundaries of a 50-minute drive time [the 80% catchment area] in its competitive assessment"*;⁸¹ and the CMA cleared one local area on the basis that *"the Parties are likely to face a material out of market constraint from suppliers located immediately outside of the Cambridge/Peterborough catchment area"*.⁸²
 - (b) In *Sainsbury's/Asda*, the CMA acknowledged that there may be an additional competitive constraint from stores located outside the 15-minute catchment area. In doing so, the CMA applied a separate out of market weight (of 25%) to the GUPPI analysis in order to account for those customers that would switch to stores located further afield as well as customers that would switch to shopping online or other types of stores.⁸³

⁸⁰ Paragraph 135 of the Decision.

⁸¹ ME/7038/23 - *Wolseley/Kooltech*, paragraph 105 of Phase 1 Decision.

⁸² ME/7038/23 - *Wolseley/Kooltech*, paragraph 130 of Phase 1 Decision.

⁸³ ME/6752-18 - *J Sainsbury plc/Asda Group Ltd*, paragraph 8.211 of Phase 2 Decision.

There are a number of competitors just outside the catchment area

5.26 As explained above, the CMA's analysis at Phase 1 focusses exclusively on competitor sites that are within the [70-80] mile catchment area around each of the Parties sites, disregarding any sites that are further away. This binary in-out approach significantly understates the competitive constraint on the Parties, as there are a number of competing sites just outside the catchment area.

5.27 Table 5.1 below identifies two competing feed mills that are within 80 miles of Stoke Ferry.

Table 5.1: Distance to competing sites located just outside the catchment area

Competing site	Distance to (miles):		
	Burston	Stoke Ferry	Bawsey
Noble Foods Bilsthorpe	103.0	74.7	67.7
GLW Feeds Shepshed	104.9	76.8	74.2

5.28 These sites provide a strong constraint on the Parties sites and have catchment areas that significantly overlap with (and therefore compete for) Stoke Ferry's customers:

- (a) Noble Foods Bilsthorpe (located 74.7 miles from Stoke Ferry) produces poultry feed including both meat and layer poultry feed. A 30 mile catchment area around Bilsthorpe would overlap with [20-30]% of Stoke Ferry's third party customers (by volume). If the catchment area increased to 100 miles (e.g. in response to a SSNIP) the overlap with Stoke Ferry's third party customers would increase to [50-60]%;⁸⁴ and
- (b) GLW Feeds Shepshed (located 76.8 miles from Stoke Ferry) produces ruminant, pig and poultry feed including both meat and layer poultry feed, and exclusively supplies third parties. A [70-80] mile catchment area around Shepshed would overlap with [20-30]% of Stoke Ferry's third party customers (by volume). If the catchment area increased to 100 miles (e.g. in response to a SSNIP) the overlap with Stoke Ferry's third party customers would increase to [50-60]%.

AB Agri Flixborough provides a strong competitive constraint

5.29 As well as disregarding competitor sites just outside the catchment area, the Decision fails to give proper regard to the competitive constraint from AB Agri's 'super mill' in Flixborough, which is located 89 miles from Stoke Ferry. The Parties understand that Flixborough currently has significant spare capacity.

5.30 AB Agri's Flixborough mill was built in the late 1990s and produces only poultry feed. As a result, it is able to produce feed at a significantly lower cost than other feed mills. For example, 2Agriculture understands that Flixborough's production costs were around £30-£35 per tonne in 2023, whereas Stoke Ferry and Bawsey's production costs were around

⁸⁴ Excludes collection only customers.

£[10-20] per tonne in 2023.⁸⁵ The cost of wheat is slightly higher in Lincolnshire (where Flixborough is located), but even when this is accounted for, 2Agriculture estimates that Flixborough is able to produce feed for around £ \times per tonne cheaper than feed mills in East Anglia. As noted above, the Parties have previously estimated that the transport costs associated with delivering feed 10 miles further away was approximately £[0-10] per tonne. Flixborough would therefore be able to serve customers over an additional [10-20] miles compared with other mills at a comparable price.

5.31 As a result, AB Agri Flixborough competes over a much larger area than other feed mills and regularly supplies customers in East Anglia. For example:

- (a) The Parties understand that AB Agri can and does move volume between Bury and Flixborough and in the past Flixborough has supplied up to [0-50]kT of feed to East Anglia per annum.
- (b) 2Agriculture has lost customers in East Anglia to Flixborough or had customers threaten to switch to Flixborough as part of negotiations (including \times).
- (c) The Parties understand that AB Agri uses Flixborough to provide support to its Bury site depending on demand and capacity constraints. For example, after winning significant additional volumes at its Bury site, \times , thereby enabling AB Agri to supply much greater volumes in East Anglia than could be produced at its Bury mill.

5.32 This is consistent with the OFT's decision in AB Agri/JE Porter which concluded that the "80 per cent catchment area for customers of Flixborough Mill was 110–120 miles".⁸⁶

5.33 Flixborough therefore represents a strong competitive constraint on the Parties' sites in East Anglia and is a viable alternative for many of Stoke Ferry's third party customers. For example:

- (a) a [50-100] mile catchment area around Flixborough would overlap with [20-30]% of Stoke Ferry's third party customers (by volume); and
- (b) if the catchment area was expanded to 100 miles (e.g. in response to a SSNIP) the overlap with Stoke Ferry's third party customers would increase to [40-50]%.

There is significant buyer power

5.34 The Decision dismisses any constraint from buyer power on the following grounds:⁸⁷

"The CMA generally considers that forms of buyer power that do not result in new entry – for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent an SLC that would otherwise arise from the elimination of competition. The CMA has not received evidence that customers may

⁸⁵ Production costs include energy (electricity and gas), labour, maintenance and insurance costs, but exclude raw material and transport costs.

⁸⁶ ME/4057/09 - AB Agri/JE Porter , paragraph 44 of Phase 1 Decision.

⁸⁷ Paragraph 196 of the Decision.

respond to the post-Merger reduction in capacity for supply to third parties and limited spare capacity remaining by sponsoring new entry".

- 5.35 However, as noted in the Guidelines the key factor in assessing buyer power is the availability of a good alternative that buyers can switch to,⁸⁸ i.e. the existence of an outside option. In this case there are good alternatives that buyers can switch to at all levels of the supply chain; as a result buyer power represents a strong constraint on the Parties even absent the threat of buyers sponsoring entry.
- 5.36 First, independent growers (i.e. the direct third party customers of feed mills) have the option to switch to growing chickens for integrated poultry suppliers such as Moy Park, Avara and Cranswick, which supply feed to their contracted growers. This option acts as a constraint on 2Agriculture's ability to increase prices, if prices were increased such that independent growers could make higher profits supplying integrated poultry suppliers. Switching from being an independent grower to a vertically integrated grower is a quick and easy process and the vertically integrated poultry suppliers regularly recruit new growers.
- 5.37 Independent growers also have the option to purchase feed from other suppliers in East Anglia (including AB Agri, WL Duffield, ForFarmers and Noble Foods). As explained above, there is no increment as a result of the Transaction and no reduction in the number of feed suppliers in East Anglia and ForFarmers will continue to supply its existing customers and compete for new customers within the local area.
- 5.38 Secondly, downstream of growers, poultry, pig and ruminant processors are large players that operate in highly competitive markets and are put under huge pricing pressure by the major national retailers and other powerful downstream customers, including food manufacturers, wholesalers and caterers. As a result there is significant pressure on processors to keep feed prices in check (given that feed is the major cost driver for ruminant, pig and poultry growers).
- 5.39 Processors use a variety of techniques to ensure they minimise the cost of animal feed, including:
- (a) carrying out joint and / or forward buying of raw materials with feed manufacturers, or using toll-milling arrangements, to help manage raw material price volatility and / or to "lock in" a specific margin.
 - (b) bulk purchasing feed to help reduce the per tonne cost, either (i) by processors buying on behalf of all of their contracted growers and / or own farms in order to achieve economies of scale; or (ii) by intermediaries who do not physically process their own birds but have contracts with one or more processors to supply live birds from several farms.
 - (c) where processors leave growers to negotiate the terms of feed supply, they can specify the suppliers that growers should buy from.

⁸⁸ Paragraph 4.20 of the CMA Merger Assessment Guidelines.

- 5.40 As there is no reduction in the number of feed suppliers in East Anglia as a result of the Transaction, processors will continue to have a range of other feed suppliers they can choose from, i.e. there is no substantial lessening of customers' buyer power.
- 5.41 Thirdly, downstream of processors, customers are large sophisticated buyers; they include the national supermarket chains and food wholesalers that have significant buyer power and control over the supply chain. Downstream customers exert significant control over the whole supply chain and often stipulate the identity of the feed supplier that processors (or their growers) should use. As explained in more detail in Section 7, the downstream market is national and therefore downstream customers have the option to purchase chicken from other regions.

6. **Theory of harm 1 is based on assertion and is not linked to customer outcomes**

6.1 The Decision concludes that "*the Merger would lead to a removal of capacity utilised for meat poultry feed supply to third parties*"⁸⁹ on the basis that it is "*realistic that Boparan (through 2Agriculture) would close the Stoke Ferry mill post-Merger and that it would utilise the capacity of the Burston Mill predominantly for in-house supply*".⁹⁰

6.2 The analysis in the Decision to support the SLC finding is based on an assessment of (i) the total capacity; and (ii) the level of spare capacity available for the supply of meat poultry feed to third parties in the areas around Burston, Stoke Ferry and Bawsey. However, the Decision does not provide any evidence in relation to the alleged harm to customers. In particular, the Decision does not explain how changes in capacity and spare capacity are linked to customer outcomes. The Decision simply assumes that:

(a) "*A significant reduction in capacity for supply to third parties could reduce customer choice and allow 2Agriculture, and its competitors, to compete less aggressively, in turn weakening competition, increasing prices and/or reducing quality or service*"⁹¹; and

(b) "*Spare capacity can be a useful indicator to show whether competing suppliers will be able to bid for future upcoming contract opportunities. Where firms have spare capacity, they are better able to compete.*"⁹² (emphasis added)

6.3 There are a number of issues with such simplistic conclusions being drawn.

The economic literature indicates that the effects of capacity are ambiguous

6.4 In an article written by Seth Sacher and Jeremy Sandford (economists at the Federal Trade Commission) on the role of capacity in antitrust analysis, the authors conclude that "*For the most part, the theoretical role of capacity in various aspects of competition analysis is ambiguous and the empirical literature is similarly inconclusive*". The report also concludes that "*given the theoretical and empirical ambiguity regarding the role of excess capacity, or the lack thereof,.. practitioners should not presume any particular impact in the absence of strong case-specific evidence regarding capacity's effects.*"⁹³ In particular, the article states that:

(a) there is "*no clear theoretical or empirical relationship between the amount of excess capacity and the likelihood or degree of coordination*"; and

(b) that "*the degree of excess capacity of merging firms does not lead to any given conclusion about the likelihood of unilateral effects*". (emphasis added).

⁸⁹ Paragraph 124 of the Decision.

⁹⁰ Paragraph 124 of the Decision.

⁹¹ Paragraph 125(a) of the Decision.

⁹² Paragraph 125(b) of the Decision.

⁹³ Seth Sacher and Jeremy Sandford, "*No Shortage of Theories: The Role of Capacity in Antitrust Analysis*", July 2016.

- 6.5 The article notes that measuring excess capacity can be difficult, which the authors suggest provides a further reason to be cautious (e.g. in considering the competitive implications of excess capacity, or the lack thereof). Various issues with the measurement of capacity (and spare capacity) arise in the present case and are set out further below.

The Decision does not consider the impact of changes in capacity on prices

- 6.6 Notwithstanding that the Decision applies an incomplete counterfactual (as explained above), it cannot simply be assumed that a reduction in third party capacity (of any magnitude) is results in adverse outcomes for customers (for example in the same way that a 10 to 9 merger might be assumed, in the abstract, to reduce choice). Similarly, it cannot simply be assumed that changes in spare capacity affect the process of competition. It could lead to more competitive outcomes.
- 6.7 In this regard, the Decision does not consider whether changes in capacity (and changes in spare capacity) would have an impact on prices. It simply assumes that having more capacity and more spare capacity available is a better outcome, without recognising that holding spare capacity leads to inefficiencies and higher costs. It is precisely for this reason that feed mills adjust their operations so that they are not operating with idle capacity standing by. Theory of harm 1 is therefore highly unusual; it is not supported by any evidence, and it is not supported by the economic literature, which warns that the effects of reducing capacity/spare capacity are ambiguous.
- 6.8 As set out in Section 4, there is no basis for assuming that the Merger would result in higher meat poultry feed prices. Both the March and April investment plans show the same margin post-transaction as Stoke Ferry's (pre-transaction) margin in 2023. The assumption that the Merger would result in higher prices is therefore not consistent with 2Agriculture's Investment plans (in which prices were not considered to increase irrespective of whether Stoke Ferry was closed). The contention that the closure of Stoke Ferry would result in higher prices is therefore entirely unfounded.
- 6.9 In the view of both 2Agriculture and ForFarmers, the price of meat poultry feed is similar between regions, with any differences being driven by differences in wheat prices and raw material costs and not by differences in the levels of available capacity. As explained in Section 5, if the price of meat poultry feed were to increase in one region (e.g. East Anglia) by 5-10% (i.e. roughly £20-£40 a tonne), this would present opportunities for mills in other neighbouring regions (such as Lincolnshire) to compete (transport costs associated with delivering feed 10 miles further away are approximately £[0-10] per tonne). There are therefore broader dynamics that ensure that prices are not out of line.
- 6.10 Moreover, as explained in the Final Merger Notice, the Burston Mill had \propto .⁹⁴ The response of ForFarmers was to \propto . The increase in \propto at the Burston Mill did not therefore affect how ForFarmers set its prices.

⁹⁴ Paragraph 9 of the Final Merger Notice.

It is unclear whether the theory of harm is one of coordinated or unilateral effects

- 6.11 It is unclear whether the theory of harm is one of unilateral effects (i.e. 2Agriculture is able to offer higher prices/worse terms post-Merger to its customers) or whether it is one of coordinated effects. Paragraph 125(a) of the Decision seems to confuse the two by stating that (emphasis added) "*a significant reduction in capacity for supply to third parties could reduce customer choice and allow Boparan (through 2Agriculture), and its competitors, to compete less aggressively, in turn weakening competition, increasing prices and/or reducing quality or service*". Paragraph 173 of the Decision also refers to Boparan "*and its rival suppliers of meat poultry feed*" competing less aggressively, which seems to suggest that the CMA is advocating a coordinated effects theory of harm without following its own merger guidelines.
- 6.12 The Decision contains no analysis or evidence of coordinated effects. In particular, the Decision fails to explain why competitors would compete less aggressively post-transaction. The reality is that competitors have incentives to use their capacity to increase sales. The Guidelines specifically acknowledge that: "*If rivals have spare capacity, they may be expected to respond to a reduction in volumes by expanding their own production. This may prevent an increase in price levels*".⁹⁵ In this regard, there are a number of significant competitors in the area, including AB Agri, ForFarmers, Duffield and Noble, and several competitors just outside the catchment area competing aggressively for customers. To assume that they would all change their behaviour and compete less aggressively following a reduction in spare capacity is not supported by any evidence.
- 6.13 The Guidelines explain that "*coordination occurs when firms operating in the same market act on a common understanding to limit their rivalry*".⁹⁶ No evidence is presented in the Decision as to what the common understanding might be. This is not surprising as it is clear that the conditions for coordinated effects (as set out the Guidelines) are not satisfied. In particular:
- (a) there is no evidence of pre-existing coordination in relation to the supply of meat poultry feed in East Anglia;
 - (b) prices, quality and terms of supply are individually negotiated and are not transparent. Similarly, suppliers of meat poultry feed do not have visibility of the capacity and spare capacity of rivals. There are also significant differences between suppliers (e.g. in relation to costs of production, the types of feed produced, capacity levels etc.). Accordingly, there is no basis in which suppliers of meat poultry feed are able to reach "*a common understanding of the terms of coordination*";⁹⁷ and
 - (c) the lack of transparency means that it is not possible to observe the prices, performance and behaviour of rivals and therefore there is no basis on which any coordination could be sustainable.

⁹⁵ Paragraph 4.38(c) of the CMA Merger Assessment Guidelines.

⁹⁶ Paragraph 6.1 of the CMA Merger Assessment Guidelines.

⁹⁷ Paragraph 6.10(a) of the CMA Merger Assessment Guidelines.

- 6.14 Moreover, the Guidelines explain that the conditions for coordination are strengthened "as *the number of firms in the market reduces*".⁹⁸ However, the Merger does not result in a reduction in the number of competitors in the market, as ForFarmers will continue to compete in East Anglia from its Bury feed mill (just 19 miles from Burston), and will continue to have sufficient spare capacity to compete for new customers.
- 6.15 Accordingly, there is no basis to conclude that 2Agriculture and its competitors in the supply of meat poultry feed would compete less aggressively in a coordinated way post-Merger.
- 6.16 Similarly, the Decision has not conducted a proper assessment as to whether the Merger would give rise to unilateral effects. When the evidence is considered correctly and in the round, it is clear that no such unilateral effects concerns would arise from the Merger:
- (a) 2Agriculture's share of supply to third parties is low on all bases. Based on a [70-80]-mile catchment area, 2Agriculture's market share in the supply of all poultry feed to third parties is less than [30-40]% and 2Agriculture's market share in the supply of meat poultry feed to third parties is less than [30-40]% when centred on all sites.⁹⁹ If pig feed is also included in the shares of supply (i.e. on the basis that the Decision has included all third party capacity available within its analysis, irrespective of whether that capacity is for pig feed, meat poultry feed, or layer feed), 2Agriculture's share of supply to third parties is much lower (less than [20-30]%).¹⁰⁰
 - (b) There is no change in the number of competitors in the area. ForFarmers will continue to compete in the local area from its Bury feed mill (19 miles from Burston). This is acknowledged in the Decision.¹⁰¹ ForFarmers will also continue to have sufficient spare capacity to compete for new customers.¹⁰² As explained in Section 3, a counterfactual that results in the sale of the Burston Mill to 2Agriculture would not increase the number of third-party competitors, as it will result in 2Agriculture at Stoke Ferry and Banham.
 - (c) ForFarmers' customers at Burston will be unaffected by the Merger as they will continue to be supplied by ForFarmers from Bury. After taking account of the volumes supplied to Banham (which is within the Boparan Group), 2Agriculture.
 - (d) In relation to 2Agriculture's third party customers at Stoke Ferry, the Issues Letter confirmed the range of options that those customers face (emphasis added): "*When asked to list alternative suppliers they could source from if 2Agriculture no longer supplied them with poultry feed, all Stoke Ferry customers responding listed AB Agri and ForFarmers (with one respondent also listing Noble).*"¹⁰³

⁹⁸ Paragraph 6.23(a) of the CMA Merger Assessment Guidelines.

⁹⁹ See response to Q13 of the Final Merger Notice and slide 18 of the response to the Issues Letter..

¹⁰⁰ For example, footnote 168 of the Decision explains that the feed volumes included in the analysis include "*meat poultry, layer poultry, other poultry and pig*".

¹⁰¹ Paragraph 156 of the Decision.

¹⁰² Paragraphs 14.38 to 14.44 of the Final Merger Notice; paragraphs 72 to 74 of Rob Kiers' witness statement.

¹⁰³ Footnote 128 of the Issues Letter.

- (e) There are a number of mills operated by competitors in the catchment area. For example, the closest three mills to Burston are (i) WL Duffield (9.9 miles); (ii) ForFarmers Bury (19.4 miles); and (iii) AB Agri Bury (20.6 miles). Similarly, at Stoke Ferry there are four competing mills within 32 miles of the site. There are also a number of competitors located just outside the catchment area. Any third party customers looking to switch supplier therefore have a range of options nearby.
- (f) Whilst 2Agriculture is unable to comment in detail on the analysis of spare capacity in the Decision due to the redactions that have been applied, there is more than enough spare capacity available to accommodate any (and indeed all) of 2Agriculture's third party customers at Stoke Ferry that wanted to switch supplier. This is discussed further in paragraph 6.30 below.
- (g) As explained in Section 5, there are a number of other significant competitive constraints on 2Agriculture, including the supply responses of competitors, that should be taken into account.

6.17 Accordingly, the Decision does not provide any evidence to explain how changes in capacity and spare capacity are linked to adverse customer outcomes. It cannot be presumed that a reduction in spare capacity would lead to customer harm, when the economic literature shows that the effects are ambiguous, and 2Agriculture's Investment plans clearly show that the Merger is not expected to lead to higher prices.

Re-worked analysis shows no reduction of total third party capacity

6.18 As explained above, 2Agriculture disagrees with the conclusion in the Decision that "*the Merger results in between [50-100]kT to [100-150]kT of capacity for supply to third parties being removed in the Burston, Stoke Ferry and Bawsey catchments*".¹⁰⁴ This conclusion is based on erroneous assumptions in relation to the counterfactual and it does not reflect the contents of either the March or April Investment Papers.

6.19 In light of the above, 2Agriculture has re-worked the counterfactual analysis set out in the Decision by reference to "likely" outcomes based on the evidence. Under these more likely assumptions (i.e. that 2Agriculture would have to reduce output at Stoke Ferry to address the environmental, health and safety and aging asset concerns which would cause it to do so), the analysis shows that under both the March and April Investment Papers, there is no reduction in third party capacity compared to the counterfactual.

6.20 The following tables provide a comparison of the factual versus counterfactual under three different scenarios, all of which assume that 2Agriculture acquires the Burston Mill in the counterfactual and supplies 100kT of meat poultry feed to third parties:

- (a) Table 6.1 is based on the factual and counterfactual scenarios in the Decision:
 - (i) in the counterfactual, 2Agriculture acquires Burston and supplies 100kT of meat poultry feed to third parties, and 2Agriculture continues to supply [100-150]kT of meat

¹⁰⁴ Paragraph 147 of the Decision.

poultry feed to third parties from Stoke Ferry which, as explained in Section 3 above, applies an incorrect Stoke Ferry counterfactual; and

- (ii) in the factual post-transaction scenario, the table assumes that the Stoke Ferry mill is closed and that [0-50] – [100-150]kT of third party volumes are produced at Burston (as set out in paragraph 144 of the Decision).¹⁰⁵
- (b) Table 6.2 is based on:
- (i) a counterfactual scenario where 2Agriculture has to reduce volumes at Stoke Ferry to address the environmental, health and safety and aging plant concerns and ✕ (i.e. Stoke Ferry ✕ of the Boparan Group); and
 - (ii) the factual post-transaction scenario is the same as in (a), i.e. it assumes that the Stoke Ferry mill is closed. This scenario also considers the third party volumes set out in the March Investment Paper to be produced at Burston (i.e. [50-100]kT in the factual post-transaction scenario, which has been overlooked in the Decision.
- (c) Table 6.3 is based on :
- (i) the same counterfactual as in (b) (i.e. Stoke Ferry ✕ required to address the environmental, health and safety and aging plant concerns ✕); and
 - (ii) the factual post-transaction scenario is based on 2Agriculture's April Investment Paper (i.e. the Stoke Ferry mill remains open and continues to supply third party customers).

Table 6.1: Comparison of the factual vs counterfactual in the Decision

	Counterfactual	Factual
Burston	✕	[0-50] – [100-150]kT (2Ag) ⁽¹⁾
Stoke Ferry	[100-150]kT (2Ag)	0kT (SF is closed) ⁽²⁾
Third party supplies (Burston + Stoke Ferry)	✕	[0-50] – [100-150]kT
Conclusion	The Decision concludes that there is a shortfall of 60-149kT in the factual post-transaction scenario compared to the counterfactual ⁽³⁾	

¹⁰⁵ See footnote 166 of the Decision.

Sources: (1) paragraph 144 of the Decision; (2) paragraph 101 of the Decision; and (3) paragraph 147 of the Decision

Table 6.2: Comparison if Stoke Ferry has to reduce volumes in the counterfactual and Stoke Ferry is closed in the factual (March Investment Paper)

	Counterfactual	Factual
Burston	∞	[0-50] – [100-150]kT (2Ag) ⁽¹⁾
Stoke Ferry	[0-50]kT (2Ag ∞)	0kT (SF is closed) ⁽²⁾
Third party supplies (Burston + Stoke Ferry)	∞	[0-50] – [100-150]kT (based on the Decision) [50-100]kT (March Investment Paper)
Conclusion	<p>If 2Agriculture produces ∞ for supply to third parties at Burston, the factual post-transaction scenario results in at least as much third party supply as in the counterfactual.</p> <p>As set out in Section 4 above, the March Investment Paper refers to 2Agriculture supplying [50-100]kT to third parties under this scenario (and increasing overall output at Burston to [300-350]kT). Accordingly, on the basis of the volumes set out in the March Investment Paper, there is no reduction in capacity to third parties compared to the counterfactual.</p>	

Sources: (1) paragraph 144 of the Decision; (2) paragraph 101 of the Decision.

Table 6.3: Comparison if Stoke Ferry has to reduce volumes in the counterfactual and Stoke Ferry remains open in the factual (April Investment Paper)

	Counterfactual	Factual
Burston	∞	[0-50]kT (∞) ⁽¹⁾
Stoke Ferry	[0-50]kT (2Ag ∞)	[100-150]kT ⁽²⁾
Third party supplies (Burston + Stoke Ferry)	∞	[100-150]kT
Conclusion	<p>Under the April Investment Paper (which involves [100-150]kT of capacity being available at Stoke Ferry for supply to third parties), the factual results in far greater capacity for third parties than the counterfactual.</p>	

Sources: (1) paragraph 14.73(a) of the Final Merger Notice; and (2) paragraph 83(b) of the Decision.

- 6.21 The above Tables show that, once the correct counterfactual is applied, there is no reduction in third party capacity irrespective of whether the March Investment Paper (which includes a reference to X) or the April Investment Paper (which includes a reference to X) is applied.
- 6.22 Clearly, if under the counterfactual, X were not to make any capacity available at Burston to supply third parties (because it is a vertically integrated business with ambitious growth plans), this would further demonstrate that there would be no reduction in third party capacity post-transaction on the basis of either the March or April Investment Papers.¹⁰⁶ As explained in Section 3, any such third party volumes supplied by X are likely to be small and transitory in nature as it intends significantly to grow its X farming businesses in East Anglia and focus on in-sourcing its purchases of X feed from third party suppliers.
- 6.23 The Parties disagree with the statement in the Decision that the estimated reduction in capacity is a "conservative estimate" as "...additional capacity ... may have been available..." for third parties (e.g. from the building of Snetterton).¹⁰⁷ As explained in Section 3, the decision to postpone the building of Snetterton dates back to at least X (well before the acquisition of the Burston mill was contemplated) and was therefore entirely unrelated to the Merger. The X of building a new mill at Snetterton would not change if the acquisition of Burston were not to proceed (i.e. there is no reasonable basis to assume that the construction of the Snetterton mill would go ahead in the counterfactual).

The analysis of spare capacity and the inferences drawn from it are flawed

- 6.24 The Decision also considered the level of *spare* capacity for the supply of meat poultry feed to third parties and the amount that would allegedly be removed as a result of the Merger. The Decision concludes that:
- (a) The Merger results in a reduction in spare capacity for supply to third parties, which compared to the counterfactual is [70-80]% in the Bawsey catchment area, and [80-90]% in the Burston and Stoke Ferry catchment areas.¹⁰⁸
 - (b) Each catchment would have a high rate of capacity utilisation; post-Merger – approximately [80-90]% in the catchment of Burston, Stoke Ferry and Bawsey, and therefore the level of spare capacity available post-Merger is limited.¹⁰⁹
 - (c) Spare capacity can be a useful indicator to show whether competing suppliers will be able to bid for future upcoming contract opportunities. Where firms have spare capacity, they are better able to compete.¹¹⁰
- 6.25 The Parties have a number of significant concerns in relation to (i) how the spare capacity analysis has been conducted; and (ii) the inferences and conclusions that the Decision seeks to draw from that analysis.

¹⁰⁶ As the "Third Party supplies" line in the counterfactual would be 0kT.

¹⁰⁷ Paragraph 149 of the Decision.

¹⁰⁸ Paragraph 154 of the Decision.

¹⁰⁹ Paragraph 154 of the Decision.

¹¹⁰ Paragraph 125(b) of the Decision.

- 6.26 In relation to (i), the Parties are unable to provide detailed comments on the spare capacity analysis set out in the Decision, as it is heavily redacted. The Parties will make further representations once a confidentiality ring is established and the Parties' advisers have access to the underlying data. However, even in the absence of access to the data, the Parties are concerned with how the level of spare capacity for meat poultry feed has been measured.
- 6.27 It is clear that there are a number of significant measurement issues in trying to carry out this type of analysis in this case:
- (a) What measure of capacity to adopt? As set out in Section 5, the Decision focusses on the operational capacity at competitor sites, but when considering capacity at ForFarmers' Burston and Bury mills it relies on technical capacity instead, as these sites are currently running at reduced capacity. This is an inconsistency in approach, which understates the constraint of competitors.
 - (b) The Decision suffers from the binary fallacy.¹¹¹ It refers to spare capacity within the catchment area only, and ignores capacity from suppliers outside the catchment area, even though those suppliers are competing for and supplying customers within the catchment area (in particular AB Agri Flixborough and Noble Bilsthorpe). These competing mills provide an alternative source of supply for a large proportion of the third party customer volumes within the catchment area.
 - (c) Under the counterfactual, the Decision assumes that an alternative purchaser of Burston (i.e. X) would have [50-100kT] of spare capacity, which is included in Tables 1-3. If this is "spare capacity" then it implies that X will not be successful in supplying any third party customers.
 - (d) The analysis presents a static snapshot at a point in time and ignores dynamic factors. In particular, it fails to consider how costly and inefficient it is for suppliers to maintain idle capacity, or that suppliers adjust operational capacity to reflect expected demand (as ForFarmers has done at Burston and Bury). The Decision does not consider what would happen to the levels of spare capacity at competitors' sites if they were to lose volumes as a result of X insourcing its feed requirements. In these circumstances, in the counterfactual the level of operational capacity would likely be reduced in order to reduce costs – this a further reason why it is more appropriate to focus on technical rather than operational capacity.
 - (e) The analysis of the post-merger situation assumes that "*the closure of Stoke Ferry will lead to some of its volumes having to be served by 2Agriculture's competitors*".¹¹² Tables 1-3 in the Decision therefore make an adjustment to Stoke Ferry's volumes of [50–100]kT (which reduces the available spare capacity in the post-merger scenario by that amount). However, this ignores the fact that under the March Investment

¹¹¹ In the CAT's judgment in *Pfizer/Flynn* (7 June 2018), the CAT stated at paragraph 119 that "*This relates to the need to avoid the so-called "zero:one" or "binary" fallacy, by which the competition analysis is conducted solely within the context of the defined market.... In our view, competition analysis is always a matter of degree and in each case the degree of competitive pressure, whether from inside or outside the relevant market as defined, must be carefully assessed*".

¹¹² Footnote 1, Table 1 of the Decision.

Paper, 2Agriculture would increase production at Burston to [300-350]kT, which is similar to the level of production at Stoke Ferry in 2024 ([300-350]kT). Accordingly, no such adjustment should be made to the Tables which, even based on the Decision's flawed analysis, results in [100-150]kT of spare capacity being available within the catchments of Burston and Stoke Ferry and [150-200]kT within the catchment of Bawsey. To put this into context, this is equivalent to the entire capacity of a mid-sized feed mill being spare.

- (f) The parties are also concerned about the inferences and conclusions that the Decision seeks to draw from this type of analysis, which is not supported by the economic literature (as explained above)

6.28 Accordingly, it cannot simply be assumed that a reduction in spare capacity in some way leads to adverse outcomes for customers. Irrespective of whether the numbers in Tables 1-3 are correct, the analysis does not support the conclusions that are being drawn. On the contrary, higher utilisation rates can result in more efficient and lower costs of production, which can ultimately benefit customers through lower prices.

6.29 Moreover, whilst the Decision states that spare capacity can be a useful indicator to show whether competing suppliers will be able to bid for future upcoming contract opportunities, no such analysis has been carried out. Notwithstanding the various measurement issues set out above which are likely understate the available spare capacity, it is clear from the Decision's analysis (which correctly reflects the production volumes in the March Investment Paper of [300-350]kT) that there is more than enough spare capacity available to accommodate any (and indeed all) of 2Agriculture's customers at Stoke Ferry that wanted to switch supplier. As explained in Section 4 above:

- (a) under the March 2024 Investment Paper, 2Agriculture's intention was to produce [50-100]kT of third-party meat poultry feed at Burston (and total production at Burston would increase to [300-350]kT); and
- (b) under the April 2024 Investment Paper, 2Agriculture's intention was to continue supplying all of its third party customers from Stoke Ferry as it did before the transaction.

6.30 At most there needs to be only around [0-50]kT of spare capacity to accommodate any loss of third party customers from 2Agriculture based on these Investment Papers. The Decision confirms that there is significantly more spare capacity available (i.e. [100-150]kT in the catchment of Burston and Stoke Ferry and [150-200]kT in the catchment area of Bawsey). Accordingly, there is more than enough spare capacity to accommodate any (and indeed all) of 2Agriculture's third party customers at Stoke Ferry that wanted to switch supplier.¹¹³ Moreover, as set out in Section 5, there is a range of other competitive constraints and capacity that should be taken in account (e.g. from existing producers increasing output and spare capacity at mills just outside the catchment area).

¹¹³ This takes account of the "adjustment to Stoke Ferry volumes" in Tables 1-3, which do not reflect the level of production in the March Investment Paper and therefore has been incorrectly applied.

6.31 The Decision states that post-transaction each catchment area would have a high rate of capacity utilisation, suggesting that this is, in and of itself, problematic. However, it fails to consider how costly and inefficient it is for suppliers to sit on idle capacity, or that suppliers adjust operational capacity to reflect expected demand (as ForFarmers has done at Burston and Bury). Inefficiency and spare capacity imply higher costs of production which can push prices up (e.g. having to cover fixed costs with fewer volumes).

Seasonality, breakdowns and demand do not affect spare capacity

6.32 The Decision states that "*the CMA is also concerned that additional factors may further impact the limited spare capacity for supply to third parties*".¹¹⁴ These additional factors are: (i) seasonality; (ii) operational breakdowns; and (iii) increasing demand for poultry feed.

6.33 As explained further below, these factors have been significantly overstated in the Decision and in reality, they have no meaningful impact on the available spare capacity of animal feed mills in East Anglia.

Seasonality of turkey and game feed demand does not impact spare capacity in East Anglia

6.34 The Decision refers to "*seasonal demand for game feed*" as well as turkey feed, as a factor that 'may' reduce the amount of spare capacity available to third parties.¹¹⁵ However, seasonality has no impact on the relevant suppliers in East Anglia.

6.35 In relation to turkey feed, the majority of the increase in demand for turkey feed is met by in-house feed mills (in particular 2Agriculture Bawsey and Avara) rather than non-integrated feed mills. Specifically, 2Agriculture understands that AB Agri and Duffield no longer supply turkey feed in East Anglia as a result of declining demand and £ .¹¹⁶ Therefore, any increase in demand for turkey feed throughout the year will not meaningfully reduce the amount of spare capacity identified in the Decision.

6.36 In relation to game feed, the market for game feed is very small compared to other poultry, making any impact on spare capacity insignificant. In addition, there are several smaller specialist suppliers of game feed (such as Masseys¹¹⁷) that are able to meet customer demand for game feed.

6.37 Moreover, 'game season' (March-September) and 'turkey season' (September-December) are complementary. Any hypothetical impact of seasonality on spare capacity will therefore be extremely limited.

¹¹⁴ Paragraph 157 of the Decision.

¹¹⁵ Paragraph 157(a) and footnote 177 of the Decision.

¹¹⁶ 2Agriculture supplies turkey feed from Bawsey, however the Decision already includes Bawsey's spare capacity as 0.

¹¹⁷ <https://masseyfeeds.co.uk/county-game-feeds/>.

Operational breakdowns are similarly irrelevant to the overall demand for feed

- 6.38 The Decision states that the level of spare capacity may be further reduced in the event of operational breakdowns (e.g. due to the aging milling infrastructure).¹¹⁸ However, this materially overstates the significance of breakdowns.
- 6.39 All mills are subject to ongoing routine maintenance (to prevent breakdowns) and this is a factor that is taken into account in estimating of capacity. For example, as explained in the FMN, the estimate of technical capacity at the 2Agriculture mills (at Stoke Ferry, Bawsey and Billingham) "*allows for 12 hours of downtime per week, in which staff complete maintenance tasks and complete a stock count*".¹¹⁹ Similarly, the estimate of technical capacity at the ForFarmers mills in Burston and Bury is based on the mills running 21 hours a day and 51 weeks a year, which allows for ongoing routine maintenance and downtime to take place. Such routine maintenance (which is designed to prevent breakdowns) is already built into the capacity estimates and does not have an impact on the available spare capacity.
- 6.40 Accordingly, it is only unplanned breakdowns (outside routine maintenance work) that may have an impact on production and the level of spare capacity in the market. However, such unplanned breakdowns are infrequent and have a limited impact on the volume of production.
- 6.41 In this regard, as submitted in response to RFI3, between September 2023 and September 2024, 2Agriculture used third parties to supply feed as a result of operational breakdowns in a very small number of instances:
- (a) In \times , 2Agriculture acquired \times of feed from \times as a result of \times and \times as a result of \times ;
 - (b) In \times , 2Agriculture acquired \times as a result of \times .
- 6.42 These volumes are insignificant in the context of 2Agriculture's production of approximately \times a year in East Anglia (i.e. this represents approximately \times of total production in East Anglia).

Increasing demand for poultry is steady and predictable

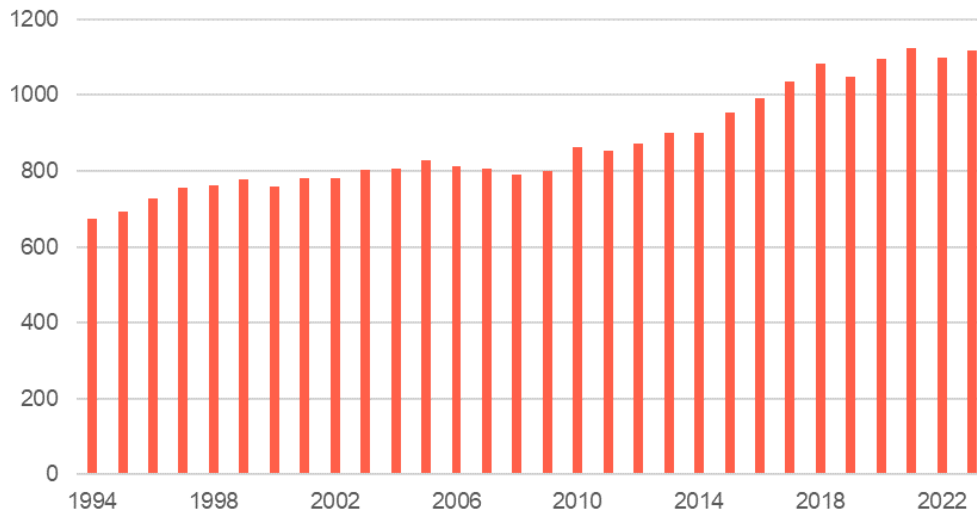
- 6.43 The Decision suggests that the demand for poultry feed is likely to increase in the coming years and states that "*a relatively modest increase in demand for poultry feed (and other feed) may result in little or no capacity being available to serve demand in the future*".¹²⁰
- 6.44 Whilst 2Agriculture anticipates an increase in the demand for poultry feed over the next decade, when considered historically, the increase in demand for chicken over the last 30 years has been fairly constant and predictable. For example, the following chart shows the number of meat chickens slaughtered annually since 1994.

¹¹⁸ Paragraph 157(b) of the Decision.

¹¹⁹ Paragraph 14.8 of the Final Merger Notice.

¹²⁰ Paragraph 157(c) of the Decision.

Figure 6.2: number of broilers slaughtered in the UK (1994-2023)



- 6.45 Figure 6.2 above shows that the growth in the demand for chicken has been fairly constant over time, with the annual growth being approximately 2% a year over the last 30 years. Accordingly, any future growth in demand is likely to be relatively slow and predictable, which gives poultry feed suppliers plenty of time to adapt.
- 6.46 In addition, it would be incorrect to assume that the increase in demand for meat poultry feed will be driven by an increase in demand by non-integrated growers (i.e. third party customers). Over the last decade, there has been a significant move towards vertical integration (e.g. by Moy Park, Avara, Cranswick, Boparan and others).
- 6.47 Integrated producers have responded to increasing demand by building/expanding in-house mills. For example, 2Agriculture understands that Cranswick expanded its feed mills in Eye and Kenninghall. Similarly, Peddars Pigs, previously a significant customer of ForFarmers' Burston mill, has recently built its own feed mill in the region. Such a move to vertical integration has resulted in a decline in demand by third parties, which has resulted in excess capacity in the market and a number of mills closing.
- 6.48 As explained in the Final Merger Notice, the loss of third party customers (largely due to the move to vertical integration) is the reason why the Burston mill has become unprofitable, and explains why ForFarmers decided to sell it.¹²¹
- 6.49 Accordingly, to the extent that there is an expected increase in the demand for chicken (and therefore poultry feed) in future, it is important to determine how this will be split between vertically integrated suppliers and independent growers. This factor has been overlooked in the Decision.

Views on the merger

The Decision relies on undisclosed and untested evidence from certain third parties that have a commercial interest in the outcome of the CMA's investigation

¹²¹ Paragraph 2.35 of the Final Merger Notice.

- 6.50 The Decision refers to multiple submissions by third parties in response to information requests and questionnaires issued by the Case Team, including competitors and customers of the parties. In most cases, summaries of the information relied upon in the Decision have either been redacted or anonymised. The parties have requested that an unredacted copy of the Decision (in addition to relevant excerpts from third party responses that have been relied upon in the Decision) be disclosed to the Parties advisers by means of a confidentiality ring, but the request has been declined
- 6.51 The Parties consider that the views of third parties, and in particular submissions by the Parties' competitors, should be treated with a degree of caution. At the very least, their views would need to be tested. This is particularly the case where third parties have an interest in the outcome of the Merger, i.e. in circumstances where the Burston mill is ultimately not sold to 2Agriculture. These concerns are particularly relevant the views expressed by X.

The alternative bidder X

- 6.52 The Decision considers a sale of the Burston mill to an alternative purchaser to be the relevant counterfactual. Specifically, the Decision identifies X as "*an alternative less anti-competitive purchaser*" of the Burston Mill.¹²² When considering X responses to the CMA's questionnaire(s), the Inquiry Group will no doubt take into account X business interests and its strong commercial incentive to ensure that the Merger does not proceed. In particular, if the Merger is not approved, X is likely to consider such an outcome to provide an attractive opportunity to acquire the Burston mill at X.
- 6.53 As part of its assessment of the counterfactual, the Decision places weight on a key submission by X that a "*small but material proportion of the Burston capacity*" would be used for third-party feed supply had X acquired the Burston mill.¹²³ The parties have requested a copy of relevant extracts from X response to the CMA's request for information by means of a confidentiality ring. However, as a preliminary observation, the parties note that any submissions made by X should be interpreted with caution in circumstances where it stands to benefit financially from the outcome of the CMA's investigation. It will therefore be necessary to establish whether X stated plans to supply third parties with meat poultry feed from the Burston mill are supported by its contemporaneous internal documents (i.e. documents created prior to the rejection of X bid to acquire Burston).

X is an existing supplier of 2 Agriculture

- 6.54 In relation to X, the Decision recognises that the Merger may result in the "*potential internalisation*" by 2Agriculture of X volumes currently produced by X.¹²⁴ It is therefore important to bear in mind that X stands to potentially lose a major customer if the Merger were to proceed. Evidence provided by X should therefore be assessed and considered accordingly. Moreover, if it does not acquire the Burston mill, 2Agriculture would need to reduce the output of the Stoke Ferry mill to a sustainable level of around [200-250]kT, which would mean that it would need to purchase increased levels of meat poultry feed from third

¹²² Paragraph 77 of the Decision.

¹²³ Paragraph 77 of the Decision.

¹²⁴ Paragraph 143 of the Decision.

party suppliers, the bulk of which would be purchased from 2Agriculture. This outcome would be extremely attractive to 2Agriculture.

Other views from third parties

- 6.55 The Decision concludes that "*most customers responding expressed negative views on the Merger*", with customers suggesting "*the loss of the Burston Mill for supply to third parties*"¹²⁵ represents a "*reduction in choice*"¹²⁶ and "*a reduction in the number of mills (and suppliers) they have available in East Anglia*".¹²⁷
- 6.56 These statements appear to be based on incorrect premises. As the Inquiry Group will be aware:
- (a) there is no reduction in the number of competitors as a result of the Merger. ForFarmers would continue serving the same customers (and competing for new customers) from its neighbouring mill in Bury, which is 19 miles away.¹²⁸ The number of competitors in the East Anglia region will therefore remain the same; and
 - (b) the Merger would not result in the "loss" of the Burston Mill for supplying third parties. Indeed, the Decision itself assumes that 2Agriculture would continue to supply between [0-50] – [100-150]kT to third parties at Burston post-Merger, whilst the March Investment Paper states that 2Agriculture would produce [50-100]kT at Burston for third parties. The views of these customers are inconsistent, which suggests that the questions that were put to them were flawed.
- 6.57 Moreover, the questions put to third parties during the Phase 1 investigation are likely to have been based on the flawed theories of harm contained in the Decision, including the contention that 2Agriculture would close the Stoke Ferry mill post-Merger. Accordingly, it appears that respondents may have been asked to comment on the potential closure of both the Burston and Stoke Ferry mills, which would have been highly misleading and does not reflect either the March or April Investment Papers.
- 6.58 The comments made by third party customers therefore raise questions as to whether they understood the factual background to the Merger and the actual plans of 2Agriculture to continue to serve them.

¹²⁵ Paragraph 163(a) of the Decision.

¹²⁶ Paragraph 163(a) of the Decision.

¹²⁷ Paragraph 162(d) of the Decision.

¹²⁸ Paragraph 4(b) of the Final Merger Notice.

7. **The Decision provides no evidence that input foreclosure is a credible theory of harm**

7.1 The analysis of input foreclosure in the Decision is inadequate and deviates significantly from the Guidelines. In particular:

- (a) in relation to the **ability** to foreclose, the Decision makes no attempt to show that 2Agriculture has market power or is able to harm the competitiveness of its downstream rivals;
- (b) in relation to the **incentive** to foreclose, the analysis in the Decision is similarly inadequate, as it makes no attempt to consider the potential benefits to Boparan of foreclosing rivals;
- (c) in relation to the **effect** of foreclosure, the Decision simply asserts that there would be an effect, and fails to consider any evidence in this regard; and
- (d) the Decision makes no attempt to consider the **effect of the Transaction**. Boparan is already active at both levels of the supply chain and supplies third party customers with meat poultry feed. The Decision makes no attempt to explain what will change in this regard as a result of the Merger.

7.2 Each of these points is considered in more detail below.

The Decision has not evidenced that 2Agriculture has the ability to foreclose rivals

7.3 The Guidelines correctly highlight the importance of establishing market power in the upstream market.¹²⁹ However, the Decision's analysis of upstream market power is non-existent – the Decision simply asserts that *"feed customers would have less choice, would be less able to switch, and that competition upstream would be weakened"*: As explained in Section 6, this assertion is based on:

- (a) customer feedback in response to (misleading) questions;¹³⁰ and
- (b) some form of coordinated effects in the upstream market. The Decision states that *"[2Agriculture] and its rival suppliers of meat poultry feed would have the ability to compete less aggressively, increase prices and/or reduce quality or service"*.¹³¹ This is pure assertion, as the Decision does not consider whether the key factors are present to demonstrate coordinated effects.

7.4 The Decision does not claim that 2Agriculture has market power and does not present any evidence that suggests this is the case. In fact, the shares of supply presented in the Merger Notice show that 2Agriculture has a share of supply below [30-40]% on all plausible bases. Downstream customers will continue to have a range of suppliers they can switch to,

¹²⁹ Paragraph 7.14 of the CMA Merger Assessment Guidelines.

¹³⁰ Paragraph 172 of the Decision.

¹³¹ Paragraph 173 of the Decision.

including AB Agri, ForFarmers, WL Duffield and Noble Foods. This is inconsistent with a finding of 2Agriculture having market power.

- 7.5 There are also no features of the market that limit the constraint from upstream rivals. For example, the cost of switching feed providers is low, there are no direct or indirect network effects and economies of scale are not a particularly important feature of the market.
- 7.6 Moreover, the analysis set out in the Decision shows that there is sufficient spare capacity in East Anglia to which independent growers can switch. Tables 1, 2 and 3 of the Decision show that even if 2Agriculture stopped supplying all of its third party customers, there would be more than sufficient capacity for third party feed mills to supply these customers.¹³² Accordingly, there is no plausible way in which 2Agriculture could limit rival growers' access to meat poultry feed.

The Decision has not evidenced that 2Agriculture has the *incentive* to foreclose rivals

- 7.7 The Guidelines state that "*the assessment of incentives typically involves a combination of quantitative and qualitative evidence*".¹³³ However, the Decision makes no attempt to evaluate any evidence – either qualitative or quantitative.
- 7.8 In particular, the Guidelines state that an assessment of incentives may consider: business strategy, gain in downstream sales, loss of upstream sales, relative profit margins as well as other costs and benefits.¹³⁴ Rather than follow the approach set out the guidelines, the Decision includes:
- (a) an inadequate assessment of Boparan's business strategy; and
 - (b) no evidence at all in relation to the other four categories of evidence.

The Decision's assessment of Boparan's business strategy is superficial, inadequate and incorrect

- 7.9 In relation to the assessment of 'business strategy' the Guidelines state that: "*the purpose of the incentives analysis is to predict the merged entity's behaviour, and it may be possible to understand this directly from its past conduct, business strategy and deal rationale. For example, if the merger firms' internal documents show that it would be strategically beneficial to stop supplying rivals, it may not be necessary to try to infer their behaviour from their financial incentives*" (emphasis added).¹³⁵
- 7.10 The Decision contains an 'analysis' of Boparan's business strategy that is nothing more than a reformulation of theory of harm 1 (i.e. that the transaction reduces the capacity available for

¹³² Tables 1, 2 and 3 show that third party competitor feed mills will have at least [100-150]kT of spare capacity post-Merger. Therefore, if Stoke Ferry stopped supplying all [100-150]kT of its third party customers, there is sufficient spare capacity in the market for 2Agriculture's customers to switch to.

¹³³ Paragraph 7.18 of the CMA Merger Assessment Guidelines.

¹³⁴ Paragraph 7.19 of the CMA Merger Assessment Guidelines.

¹³⁵ Paragraph 7.19(a) of the CMA Merger Assessment Guidelines.

third parties).¹³⁶ There is no analysis or evidence that considers the benefit to Boparan of such a strategy or whether it has the incentive to engage in it.

- 7.11 In fact, as set out below, a proper assessment of Boparan's business strategy and the types of evidence set out in the Guidelines show that Boparan does not have the incentive to foreclose rivals.

2Agriculture's past conduct

- 7.12 There is no evidence in Boparan's past conduct that suggests it has a strategy of foreclosing rivals.
- 7.13 The Boparan Group first became vertically integrated in 2013, when Boparan acquired Vion poultry (which included the Stoke Ferry, Fairview and Llay feed mills). Following the acquisition, the Vion feed milling business was renamed 2Agriculture.
- 7.14 2Agriculture has been vertically integrated over 10 years and continues to supply third party customers, including the vast majority of the customers that it acquired through the Vion transaction.¹³⁷ 2Agriculture has not attempted to foreclose rival growers and continues to have strong relationships with its customers. Accordingly, Boparan's past conduct does not provide any evidence that Boparan is likely to conduct a foreclosure strategy; in fact, the opposite is the case.

2Agriculture's business strategy

- 7.15 As explained above and in the Issues Letter Response, third party customers form a key part of 2Agriculture's business strategy:
- (a) ✂;
 - (b) ✂; and
 - (c) ✂.
- 7.16 Accordingly, an assessment of 2Agriculture's business strategy does not provide any evidence that it is likely to conduct a foreclosure strategy; in fact, the opposite is the case.

2Agriculture's internal documents and deal rationale

- 7.17 As explained in Section 4 above, 2Agriculture prepared three investment papers relating to the Merger (in February, March and April 2024). These documents are entirely inconsistent with 2Agriculture having an incentive to foreclose rivals.
- 7.18 First, the investment papers contain financial modelling of the post-Merger plans for Burston/Stoke Ferry. The models clearly show that 2Agriculture intended to carry on supplying third parties, and not to foreclose them. In particular:

¹³⁶Paragraph 183 of the Decision.

¹³⁷ In relation to the customers no longer supplied by 2Agriculture, this is not a result of a foreclosure strategy (e.g. some of the customers have gone out of business).

- (a) The February and March Investment Paper (documents on which the Decision's incentives analysis relies) are based on 2Agriculture supplying significant volumes of meat poultry feed to its third party customers; and
- (b) The April Investment Paper is based on 2Agriculture supplying [50-100]kT of meat poultry feed to third parties.

7.19 Second, the March Investment Paper (on which the Decision seeks to rely) contains clear evidence that 2Agriculture has no intention to foreclose rivals:

- (a) The document considers the risk of an adverse customer reaction to the Merger but concludes that: ✕. This is irrefutable evidence that 2Agriculture intends to supply its third party customers, rather than foreclose them.
- (b) Similarly, the document considers whether the Merger would result in worse terms for third party customers but concludes that: "✕". Once again, this is inconsistent with Boparan seeking to limit supplies to third parties.

7.20 Third, the Decision does not identify any documents that demonstrate it is 'strategically beneficial to stop supplying rivals' (i.e. the kind set out Merger Assessment Guidelines).

7.21 Accordingly, the internal documents (including those explicitly relied on in the Decision to support its theories of harm) do not support the existence of any incentive to foreclose.

Conclusion on Boparan's incentives to foreclose

7.22 As explained above, a review of 2Agriculture's past conduct, business strategy internal documents, and transaction rationale conclusively show that 2Agriculture does not have the incentive to foreclose rival growers.

7.23 Moreover, as explained in the CMA's merger guidelines, the assessment of incentives typically involves an assessment of: gain in downstream sales, loss of upstream sales, relative profit margins as well as other costs and benefits. The Decision does not present any evidence of this nature.

7.24 In this regard, 2Agriculture notes that:

- (a) As set out in the Decision,¹³⁸ Boparan faces strong competition from vertically integrated producers downstream (e.g. Moy Park, Avara and Cranswick). Therefore, it would be anticipated that 'downstream gains' from a foreclosure strategy would be both highly uncertain and partial (as any downstream diversion would be shared between downstream suppliers);
- (b) Boparan only holds a 50% stake in H2S and therefore would not capture all of the profits that arise from 'downstream gains'. This is in contrast to the fact that Boparan owns 100% of 2Agriculture and would therefore lose 100% of all 'upstream losses'; and

¹³⁸ Table 4 of the Decision.

- (c) Boparan operates across multiple levels of the poultry supply chain across the UK. Any foreclosure strategy by 2Agriculture would have significant reputational costs on the wider Boparan group and would risk retaliation from third parties.

The Decision has not evidenced that foreclosure would have any downstream effects

7.25 The Decision correctly finds that: "*a foreclosure strategy by Boparan would not substantially harm any vertically integrated suppliers' ability to compete in the downstream supply of poultry meat, and in particular chicken, as they do not rely on independent feed suppliers*".¹³⁹ These vertically integrated suppliers account for 87% of the supply of poultry in the UK (Boparan [30-40]%, Moy Park [20-30]%, Avara [20-30]% and Cranswick [0-10]%).¹⁴⁰

7.26 Despite the high-levels of vertical integration, the Decision still concludes that a foreclosure strategy would have an adverse effect on downstream competition, on the basis that:

- (a) "*smaller, non-integrated chicken growers and processors represent an important competitive constraint which might be lost as a result of a foreclosure strategy by Boparan*";¹⁴¹ and
- (b) "*a foreclosure strategy by Boparan could increase barriers to entry and expansion downstream*".¹⁴²

7.27 These findings are inconsistent with the Guidelines and the evidence.

Only 3% of UK poultry suppliers could potentially be affected by a foreclosure strategy

7.28 The Guidelines recognise that a foreclosure strategy will have limited effect "*if sufficient credible rivals to the downstream party would be unaffected, for example because they are vertically integrated*".¹⁴³ However, the Decision fails to apply the CMA's own guidance in this regard.

7.29 Almost all UK poultry suppliers would be unaffected by a foreclosure strategy, including the most credible rivals:

- (a) As recognised by the Decision, vertically integrated suppliers of poultry in the UK account for 87% of the market. These suppliers would be unaffected by a foreclosure strategy.
- (b) The Decision's analysis in the Boparan/Banham decision shows that these vertically integrated suppliers (i.e. those unaffected by a foreclosure strategy) are the most credible suppliers: "*The third parties who responded to the CMA's market testing generally supported the Parties' view that each of Moy Park, Avara, Cranswick, and*

¹³⁹ Paragraph 191 of the Decision

¹⁴⁰ Table 4 of the Decision.

¹⁴¹ Paragraph 195 of the Decision. 5

¹⁴² Paragraph 193 of the Decision. 3

¹⁴³ Paragraph 7.22 of the CMA Merger Assessment Guidelines.

(to a lesser extent) Salisbury Poultry are alternative suppliers for their chicken requirements".¹⁴⁴

- (c) Moreover, a foreclosure strategy would have no effect on non-integrated suppliers located outside East Anglia. 2Agriculture estimates that approximately 80% of non-integrated poultry suppliers are located outside of East Anglia. Therefore a further 10% of the UK poultry market (i.e. 80% of 13%) is unaffected by a foreclosure strategy.

7.30 Accordingly, 97% of UK poultry suppliers would be unaffected by a foreclosure strategy.

7.31 In relation to the 3% of poultry suppliers that could potentially be affected by a foreclosure strategy, the Decision states that "*The CMA is of the view that smaller, non-integrated chicken growers and processors represent an important competitive constraint which might be lost as a result of a foreclosure strategy by Boparan*".¹⁴⁵

7.32 The Decision provides **no** evidence to support this assertion and it is completely unclear how the CMA has arrived at its conclusion.

The downstream market is a national market with strong buyer power

7.33 The Decision recognises that the downstream market (i.e. for the supply of poultry) is UK-wide, but adds that "*harming rival growers and processors within the catchments centred on the Parties' Burston, Stoke Ferry and Bawsey mills could reduce competition in the national downstream market*".¹⁴⁶

7.34 It is inconceivable that feed prices to non-integrated poultry growers in East Anglia would affect the price of poultry in the UK.

7.35 First, the Decision overstates the importance of East Anglia as a poultry growing region when it states that: "*Norfolk, the county in which the Burston Mill is situated, continues to be the single most important poultry growing county, with approximately 10% of the UK's total poultry stock*".¹⁴⁷

7.36 Other regions in the UK are equally as important as East Anglia. For example, Shropshire and Herefordshire (in the West of England) combined have more poultry stock than Norfolk and Suffolk.¹⁴⁸ In addition, as shown in Figure 7.1 below, there are large holdings of poultry in the Lincolnshire/North Yorkshire, South West, Wales and Scotland and a significant number of areas in the UK with a high density of poultry stock.

¹⁴⁴ ME/6975/21 – *Boparan/Banham*, paragraph 80.

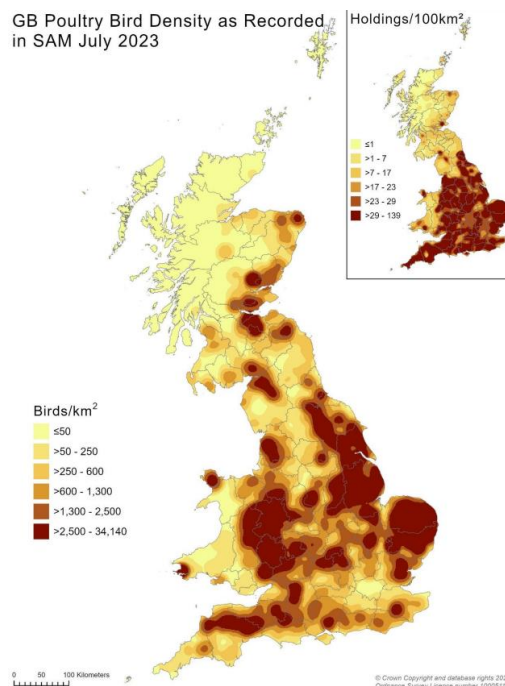
¹⁴⁵ Paragraph 195 of the Decision.

¹⁴⁶ Paragraph 194 of the Decision.

¹⁴⁷ Norfolk is in fact the county with the second largest, not the largest, stock of poultry birds in the UK (behind Lincolnshire).

¹⁴⁸ Norfolk (35.5m) and Suffolk (23.7m) have a combined 59.2 million poultry birds; whereas Herefordshire (35.1m) and Shropshire (23.3m) have a combined 63.4m poultry birds.

Figure 7.1: Map showing the density of poultry birds in Great Britain¹⁴⁹



- 7.37 Second, the downstream purchasers of poultry products are large sophisticated buyers (including the national supermarket chains and food wholesalers) that have significant buyer power and control over the supply chain. In the Boparan/Banham decision, the CMA recognised the buyer power of downstream customers: *"The CMA also found that retail customers are, in many cases, able to enter into contracts with chicken suppliers that provide for open accounting practices and ratchet clauses, whereby chicken suppliers are able to negotiate price increases only in proportion to cost increases of certain key inputs, such as poultry feed. Third parties told the CMA that they are not always able to pass through their cost increases (or the full amount of a given cost increase) to retail customers, and that the amount of pass-through depends on the terms of each negotiated retail supply contract"*.¹⁵⁰
- 7.38 Accordingly, the Decision has provided no evidence of a link between meat poultry feed prices in East Anglia and downstream poultry prices in the UK.

The Decision does not consider the impact of the Transaction

- 7.39 As explained above, Boparan has been a vertically integrated supplier in the poultry supply chain for over 10 years, 2Agriculture has a strong relationship with non-integrated growers and supplies them with meat poultry feed in East Anglia and other parts of GB. At the same time H2S, 2SFG and Banham are already active downstream in the rearing and sale of poultry.
- 7.40 This shows that Boparan clearly does not have the ability or incentive to foreclose non-integrated growers pre-Merger. The Decision makes no attempt to explain why Boparan's

¹⁴⁹ Livestock Demographic Data Group: Poultry population report, <https://assets.publishing.service.gov.uk/media/669e3a76fc8e12ac3edb011e/lddg-pop-report-avian23.pdf>.

¹⁵⁰ ME/6975/21 – Boparan/Banham, paragraph 84.

ability and/or incentive change post-Merger. This is particularly relevant in the context of a transaction that does not increase 2Agriculture's share of supply or market power at the upstream or downstream levels of the supply chain.

ANNEX 1

Timeline of the Snetterton project

2015 – 2019

- (a) The Snetterton project was first considered in \mathcal{X} and \mathcal{X} as part of 2Agriculture's long-term plan \mathcal{X} .¹⁵¹
- (b) In \mathcal{X} .¹⁵²
- (c) In \mathcal{X} .¹⁵³
- (d) \mathcal{X} the Board of 2Agriculture approved \mathcal{X} .¹⁵⁴
- (e) On \mathcal{X} , 2Agriculture entered into an agreement to acquire the land for the Snetterton mill, which was subject to planning permission.¹⁵⁵

2020 and 2021

- (f) In \mathcal{X} , 2Agriculture applied for planning permission for the construction of a new feed mill, \mathcal{X} .¹⁵⁶
- (g) \mathcal{X} , discussions relating to Project Voeden commenced in or around April 2021, and plans relating to the mill's construction were \mathcal{X} .¹⁵⁷
- (h) As agreed between the parties to the proposed Project Voeden transaction, \mathcal{X} .
- (i) \mathcal{X} .¹⁵⁸

2022

- (j) \mathcal{X} , 2Agriculture continued to consider that the Snetterton project was necessary to accommodate 2Agriculture's growth plans.
- (k) \mathcal{X} . 2Agriculture's monthly board packs from \mathcal{X} consistently describe the Snetterton project as being \mathcal{X} .¹⁵⁹

2023

¹⁵¹ Paragraph 21 of Kevin Sketcher's witness statement.

¹⁵² Paragraph 5.1(a) of Response to CMA's RFI, \mathcal{X} .

¹⁵³ Paragraph 25(b) of Kevin Sketcher's witness statement.

¹⁵⁴ Paragraph 25(c) of Kevin Sketcher's witness statement.

¹⁵⁵ Paragraph 25(c) of Kevin Sketcher's witness statement.

¹⁵⁶ Paragraph 25(c) of Kevin Sketcher's witness statement.

¹⁵⁷ Paragraph 25(d) of Kevin Sketcher's witness statement.

¹⁵⁸ Paragraph 25(c) of Kevin Sketcher's witness statement.

¹⁵⁹ Annex 9.002 to the Final Merger Notice, \mathcal{X} , page 25.

(l) ~~the~~, after the abandonment of Project Voeden in January 2023, ~~the~~.¹⁶⁰

(m) ~~the~~.¹⁶¹ ~~the~~.¹⁶²

(n) ~~the~~.

2024 – present

(o) Following the decision to put construction of the Snetterton mill ~~the~~.¹⁶³

(p) The Snetterton project remains part of 2Agriculture's long-term strategy, including as part of its ~~the~~ business plan.¹⁶⁴ ~~the~~.¹⁶⁵

¹⁶⁰ Paragraph 26 of Kevin Sketcher's witness statement.

¹⁶¹ Paragraph 27 of Kevin Sketcher's witness statement; Page 31 of Annex 9.005 to the Final Merger Notice, ~~the~~.

¹⁶² Paragraph 27 of Kevin Sketcher's witness statement.

¹⁶³ Paragraph 5.4 of Rob Kiers' witness statement.

¹⁶⁴ Paragraph 30 of Kevin Sketcher's witness statement.

¹⁶⁵ Paragraph 5.6 of Rob Kiers' witness statement.