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Response to the CMA's Supplementary Interim Report – ABF / Hovis

Case ME/7129/25

1 June 2026

1. Executive Summary

1.1 This submission sets out [✂] views on the CMA's revised provisional findings in the Supplementary Interim Report ("**SIR**").

1.2 [✂] has serious concerns that the Merger will give rise to significant anti-competitive effects and so widespread consumer harm in NI.

1.3 The CMA has recognised this fact itself, but is nevertheless intending to clear the transaction unconditionally. This is contrary to the CMA's overriding duty to promote competition and protect consumers.

1.4 As is clear from the sales process that has been run by ABF in parallel with the Merger investigation, there are multiple potential purchasers for the AB NI business.

1.5 The CMA's reversal of its SLC finding in its Interim Report (the "**IR**") turns on its acceptance of the exiting firm defence in NI – that in the counterfactual, the AB NI business would exit the market (Limb 1); and there are no other less anti-competitive purchasers (Limb 2).

1.6 [✂] considers that the CMA's analysis and findings on both Limb 1 and Limb 2 are flawed:

(A) The AB NI liquidation counterfactual is no longer realistic. The CMA has already provisionally cleared the GB Merger, and assuming the GB Merger proceeds (which it highly likely will) there is no basis to consider that it is likely that the AB NI business would be liquidated. Limb 1 is therefore not met.

(B) The CMA's Limb 2 analysis depends on the liquidation valuation analysis. This is a complex and multifaceted calculation that must be robust and objective. The CMA based the liquidation valuation seemingly entirely on evidence supplied by the Parties, created after the Merger was in contemplation. The CMA recognises the need to take this into account when assessing the weight to be placed on that evidence, but does not in fact do so and rather accepts the Parties' evidence on face value. The key piece evidence, the Board Model, is moreover, described by the Parties themselves high-level. This is an unreliable and insufficient basis for a critical decision to clear a highly anti-competitive transaction. The CMA has also not been sufficiently cautious in its approach to the weight placed on Parties' submissions on the nature and outcome of the AB NI sales process which has been run not only against the backdrop of the CMA's Merger investigation, but with the stated purpose of bolstering the Parties' exiting firm defence.

1.7 The CMA has not met its statutory duty to consult with relevant affected third parties (including [✂]). The detail and substance of the CMA's liquidation valuation calculation is entirely redacted and it is not possible to understand, assess or comment on whether the CMA's approach is reliable.

1.8 [✂] considers that the CMA must adopt a more robust, cautious and nuanced approach to the analysis, which reflects the reality and particular circumstances of the Merger, rather than apply its guidance mechanistically.

1.9 For these reasons, explained in further detail below, the CMA should reverse the SIR findings and revert to its original (correct) assessment in the IR and reach an SLC finding in respect of NI. The CMA should require the sale of the NI business to a suitable purchaser and so avoid the inevitable consumer harm that would otherwise arise.

2. The Merger will significantly harm competition in Northern Ireland

2.1 As set out at Section 7 and 9.1(b) of the IR, the Merger may be expected to result in an SLC in the markets for plant bread, pancakes, potato farls and soda farls in NI.

2.2 The Parties have very high combined shares of supply: 60-70% for plant bread (branded and private label), 80-90% for all pancakes (branded and private label), 40-50% for potato farls (branded and private label) and 50-60% for soda farls (branded and private label). In respect of supply of the supply of private label plant bread, pancakes and soda farls, the Merger is a merger to monopoly.

2.3 The Parties are each other's closest competitors in NI and impose by far the most effective competitive constraint on each other.

2.4 The Merger will, therefore, inevitably result in that constraint being lost, will create a highly dominant player with very substantial market power and lead to the corresponding reduction in choice for customers. The risk of unilateral horizontal effect is very high and in the absence of sufficient competitive constraints, the merged entity will be able to increase prices and/or reduce quality. Customers will have very limited alternative sources of supply (in the case of some private label products, no alternatives at all) and no option but to continue to purchase products from the merged entity.

2.5 In many respects, the Merger is a textbook example of an anti-competitive transaction, highly likely to harm competition and, ultimately, consumers. The affected markets are a core staple product that almost all consumers purchase, so the consumer harm will be direct and widespread.

2.6 These submissions are not controversial and are entirely consistent with the CMA's own competitive assessment and provisional findings in the IR.

3. The CMA's provisional conclusions in the SIR will lead to a perverse and harmful outcome

3.1 [✂] is, therefore, very surprised and disappointed that in the SIR the CMA has reversed its provisional decision with respect to NI and now proposes to unconditionally clear the Merger. In light of the considerations above, this is an extraordinary and wrong outcome.

3.2 The purpose of the CMA's merger investigation process is to examine the potential anti-competitive effects of relevant mergers and, if found to be likely to be harmful to competition, the CMA has a statutory duty[1] to take appropriate action to prevent that harm, promote competition and protect consumers.

3.3 The circumstances here, where ABF has run a sales process for the AB NI business and identified four potential bidders, show that the AB NI business has value and is saleable. This has significant implications for the exiting firm analysis, set out further below, but it also shows that there is a clear remedy available to the CMA to address the inevitable anti-competitive effects that will arise if the Merger is cleared unconditionally.

3.4 A sale [✂], would allow the AB brands (Kingsmill, Allinson's and Sunblest) to continue as significant competitive constraints on the merged entity post-transaction in NI. This would be the appropriate and most competitive outcome. As set out above, the CMA's own findings are that the Merger it is highly likely to give rise to anti-competitive effects in NI[2], but rather than seeking to remedy those anti-competitive effects, the CMA is now proposing to clear the Merger unconditionally.

3.5 This is a perverse outcome that is fundamentally at odds with the CMA's overarching duty to promote competition.

3.6 The CMA has reached this conclusion in error on the basis of flaws in its approach to the assessment of the counterfactual and exiting firm defence, as set out below.

3.7 For these reasons, [✂] urges the CMA to reconsider its provisional findings in the SIR and revert to the SLC finding, and so require the divestment of the AB NI business to a suitable purchaser in order to remedy that SLC and so protect competition and consumers in NI.

4. <u>The CMA's approach to the counterfactual is flawed and artificial</u>

The AB NI liquidation counterfactual is now unrealistic and not the correct approach

4.1 The CMA is correct to approach the counterfactual analysis for NI separately to the GB counterfactual, and [✂] agrees (as above) that there are likely purchasers for the AB NI business separate to the GB or GB/NI combined business.

4.2 However, the CMA's counterfactual for NI is highly artificial in that it posits a world in which the Merger does not proceed at all; whereas the appropriate counterfactual for the Merger <u>in NI</u> is one where the Merger does proceed in GB as this is now clearly the most likely outcome, regardless of what decision is reached in respect of NI.

4.3 In other words, even if the CMA decides (as [✂] submits it should) that the AB NI business should be divested, the Merger will still go ahead in GB. There is nothing to suggest (and we do not understand the Parties to have submitted) that, if the NI Merger does not proceed because the CMA requires a divestment, that the GB Merger will also be terminated. Accordingly, there is also nothing to suggest that the AB NI business will now be liquidated in any scenario, because the GB Merger will go ahead.

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1 s 41 Enterprise Act 2002 ("**EA**")

2 e.g. IR paragraph 41-43, *"In bread, evidence the Merger will combine the two largest suppliers, with the Parties accounting for nearly two thirds of the total market and nearly all of the private label bread supplied in NI. The Parties were also consistently recognised by third parties as effective alternatives for the supply of bread...Taking this evidence into account, we provisionally consider that ABF is acquiring one of the few alternative suppliers of bread in NI and the Merged Entity would face limited competitive constraints. We therefore provisionally consider that the Merger may be expected to result in an SLC in the supply of bread in NI."*

4.4 That being the case, the counterfactual in which the AB NI business is liquidated is now extremely improbably. The CMA's counterfactual analysis compares the competitive effects of the Merger, against a counterfactual world where the GB Merger proceeds, the AB NI business is liquidated. It is, therefore, artificial and incorrect to assess the NI exiting firm defence on this basis.

4.5 There is precedent for the CMA to take into account changes in the facts and relevant circumstances that take place during the merger investigation and it ought not to restrict its analysis to only the pre-merger facts and circumstances. For example, in *Amazon / Deliveroo*,[3] the CMA took into account changes resulting from the Covid 19 crisis, which needed to be reflected in a revised counterfactual analysis.

4.6 The CMA should likewise take account of its existing decision in respect of the GB Merger and that this means there is no realistic counterfactual liquidation scenario in NI. Accordingly, Limb 1 of the exiting firm test is no longer satisfied in respect of the AB NI business and the CMA should proceed with its SLC finding and require the divestment of the AB NI Business to a suitable purchaser process (where the sale of the business is required irrespective of the bid value) in order to preserve competition and protect NI consumers.

4.7 It is worth noting that, had the Merger taken place under the previous Merger Assessment Guidelines[4], and had the CMA concluded likewise that Limbs 1 and 2 of the exiting firm scenario were met, the CMA would then have had to consider Limb 3 and what would likely happened to the firm's sales and assets. The CMA would have considered whether they would have been dispersed to competitors in a way that meant that liquidation was not a less competitive outcome than the merger (in which case the exiting firm test would not be met).

4.8 Limb 3 was not included in the current MAGS not because it is not a valid consideration, but for practicality reasons and because the same considerations can be dealt with under Limb 2 and as part of the counterfactual assessment. The CMA should, therefore, still consider what liquidation would look like and whether AB NI's assets, brands and so associated sales would be acquired by competitors resulting in a more competitive outcome than the Merger. [✂] submits that this is the most likely outcome here. The AB NI brands and assets would likely to be acquired by the bidders identified in the sales process and would remain in the market as a competitive constraint.

4.9 By only considering a now highly unlikely AB NI liquidation counterfactual, the CMA's decision will lead to the least competitive of the possible merger outcomes and certainly one that is less competitive than the sale of AB NI (or part of it) to one or more suitable purchasers.

5. <u>The Liquidation Valuation is not robust</u>

5.1 The CMA's provision decisional in the SIR turns on its liquidation valuation for the NI business. This is the benchmark against which the bids received for the AB NI business have been assessed. It is, therefore, critical that the liquidation valuation is thorough, robust and objective.

5.2 However, from what [✂] can understand of that analysis from the IR and SIR, the liquidation valuation appears to be almost if not entirely based on the Parties' own documents and

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3 *Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo*, 4 August 2020

4 OFT1254, September 2010, paragraph 4.3.18

submissions, which appear to have been accepted largely without challenge, testing or proper consultation.

5.3 This is particularly problematic given the facts of this Merger and that it is the Parties' expressed merger strategy to put forward an exiting firm defence and to run a parallel NI sales process with the stated purpose of gathering evidence to support that defence.

5.4 In that context and given the Parties' motivations, the CMA must view their submissions relating to the AB NI valuation, the costs of a transaction versus liquidation, and the approach to the sales process through a cautious lens.

The NI sales process

5.5 The CMA goes some way to recognising that AB's incentives in this sales process are different from a normal process (or indeed a remedy divestment process), but ultimately still seemly accepts the Parties' submissions on many of these points at face value.

5.6 [✂] it appears from the CMA's description in the SIR, that there are certain aspects of the AB NI sales process that have not been typical. Sellers typically make every effort to market the business, supply detailed information (without prompting) at the outset, in order to maximise the chances of receiving bids that reflect value. For example, it is normal for there to be price negotiations and for a seller in a competitive process to seek to negotiate a higher price which unusually does not appear to have been the case here, [✂]. Sellers and their advisors follow up with interested parties and try to obtain as many bids as possible for as much value as possible. [✂]. It is particularly extraordinary that, in a sales process in which the Parties purportedly sought to market the AB NI business, the initial information provided to potential bidders did not include basic financial information for the AB NI business.

5.7 The CMA must view the outcome of the sales process against this context and so adopt a cautious approach when assessing whether a bid above the liquidation value would have been likely in the counterfactual. This is particularly the case when the analysis is so central to the outcome, the assessment is finely balanced, and is the basis for allowing an anti-competitive merger to proceed unconditionally.

The CMA appears to have accepted the Parties' submission at face value

5.8 In relation to the evidence relied on for the liquidation valuation, the CMA relies almost if not exclusively on ABF's internal documents, all of which appear to have been prepared once the merger (and CMA clearance strategy) was already in contemplation; and/or anecdotal statements made by the Parties at the oral hearing. Again, the CMA must review this evidence on a cautious basis given the Parties' vested interest in presenting evidence consistent with the exiting firm defence.

5.9 This is especially the case given that this is not a typical exiting firm scenario – it is not an acquisition of a failing target business, where the CMA has to determine whether that business is genuinely going to exit absent the transaction. In that scenario, the target's pre-existing accounts, internal documents and financial analysis provide good evidence. In this case, the exiting firm is the purchaser – this is highly unusual and again the evidence provided (and the approach to the sales process) must be assessed in that context and taking into account the Parties' stated pre-existing merger strategy.

5.10 The CMA recognised this issue itself in *East Coast Buses*[5] where the CMA concluded that it could rely on the Parties' own valuation because "*this benchmark was established through a normal commercial process at a time when the Merger was not in contemplation and can therefore be considered to be a fair valuation of the assets*."

5.11 The CMA notes in the current Merger in the IR that *"[w]hen considering any exiting firm argument, the CMA will usually attach greater weight to evidence that has not been prepared in contemplation of the merger. It is clear that the Merger was in contemplation when the internal documents described above that refer to the possible closure of AB were created and we have borne this carefully in mind when considering how much weight we should place on them. We have taken the internal documents described above into account as part of an in the round assessment with the other evidence discussed below*".[6]

5.12 [✂] agrees that this is the correct approach. However, despite the CMA recognising its shortcomings, it appears from the IR and the SIR that the <u>only</u> evidence relied on by the CMA in assessing the liquidation valuation is the Parties' and their advisors' own submissions and internal documents, prepared not only once the Merger was in contemplation but once the CMA Merger investigation was underway. It appears, therefore, that whilst the CMA recognises the risks of relying on the Parties' submission, this is nevertheless what it has done.

5.13 This is again not a sufficiently robust evidence base for an unconditional clearance decision for an anti-competitive merger.

The valuation calculation appears light-touch

5.14 As to the valuation calculation itself, this appears to be high-level and light-touch. The key inputs for the valuation (such as the relevant costs estimates and asset value estimates) are taken from a single 2025 Board Model, again produced when the Merger (and presumably the Parties' CMA clearance thinking and strategy) was well progressed.

5.15 The CMA repeatedly notes the danger in relying on evidence of this nature, yet proceeds to do just that. There is no indication in the SIR of how the CMA has moderated, tested or verified this critical piece of evidence, to mitigate the risks identified. It does not appear that the CMA has undertaken any analysis itself of the relevant costs or benchmarked the Parties' estimates to confirm accuracy. Simply recognising the weakness in evidence does nothing to mitigate that risk when the CMA proceeds to rely on it nonetheless.

5.16 Furthermore, the valuation in the Board Model can only be a rough and ready calculation. This document is described by the Parties themselves as a 'high-level' 'quick snapshot' of the relevant costs and estimates. This is a seriously flawed and insufficient basis for the CMA's liquidation valuation, which is critical to its findings and to the outcome.

5.17 Whilst, as discussed below, it is extremely difficult [✂] to assess the valuation calculation given the extent of the redactions in the SIR, it can be inferred from the SIR[7] that the Parties' advisors prepared a different financial model, not to give an estimate of liquidation costs but rather to compare the net cash cashflows. This model provides a higher total asset valuation (by some millions). As the CMA itself notes "*such a large difference in asset values has a significant impact on estimates of the financial impact of liquidation*".

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5 Completed acquisition by East Coast Buses Limited of the east coast operations of First Scotland East Limited, ME/6642-16, 23 January 2017, para 51

6 IR paragraph 6.19 and also 6.47

7 SIR paragraph 6.183

5.18 The evidence reviewed by the CMA demonstrates the difficulty of undertaking a liquidation valuation with accuracy and that there is wide scope for different methodologies and assumptions to lead to significantly different valuations. It is not an exact science and there is wide margin for error.

5.19 When considering an acquisition, businesses undertake detailed and lengthy financial due diligence processes with the support of specialist financial advisors and accountancy firms, in order to reach a valuation and so inform any offers made. It is inconceivable that any rational business would make a critical commercial decision on the basis of a single "high level" "snapshot" Board Model, prepared by the target business itself.

5.20 It is also not rational for the CMA to reach a pivotal decision in the Merger Investigation on such a weak basis.

5.21 Moreover, the CMA has evidently changed its view on the value of the NI AB business in the period between the IR and SIR – in the IR, the CMA considered and stated that the AB NI business was profitable,[8] whereas it seems no longer to consider this to be the case (although does not say so expressly).

5.22 But whilst the CMA's views on profitability have changed, the liquidation valuation (which is made up in part of a valuation of the NI business) has not been adjusted to reflect this change and is, therefore, an overstated and inflated benchmark against which to assess the bids.

5.23 The Parties have made much of the transaction costs and risks associated with a transaction (and have made submissions post-the IR to that effect) with the aim of raising the bar for the liquidation valuation and in support of their exiting firm defence. Again these submissions do not appear to have been properly interrogated – the CMA simply refers to generic costs cited by the Parties that are associated with all M&A such as advisors fees and due diligence etc.[9]

5.24 Other aspects of the valuation do not seem coherent. For example, it appears from the IR and SIR that the property valuations are made on the basis that they would be purchased for an alternative commercial use. This would likely lower the value of those properties compared to what a trade purchaser may be willing to pay with the intention of continuing their current commercial use, but this does not appear to have been considered or factored in. No value is stated as having been applied to the IP and brand value, [✂].

5.25 Overall, the CMA's liquidation valuation is very largely based on a "high level" "snapshot" analysis, with numerous high-level assumptions. It seems to have involved a broad brush "finger in the air" approach and, as is apparent from the other financial models considered, is likely to be highly sensitive to assumptions and inputs. The CMA must take this into account and it is wrong to apply the liquidation valuation as an objective bright line test when assessing the bids. It must instead undertake this exercise in the round and taking into account the uncertain nature of the valuation.

5.26 The CMA recognises that one of the bids received [✂] is close to the liquidation valuation. The CMA should recognise that there is a realistic possibility that the liquidation valuation may be overstated (and this seems likely given the assumptions and apparent gaps discussed above) and that its findings on the Limb 2 test are, accordingly, not reliable. If so,

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8 IR paragraph 6.220

9 SIR footnote 69

that bid may be above the liquidation value, meaning that the Limb 2 test is met. The bigger risk is that this means that the CMA is unconditionally clearing an anti-competitive merger.

5.27 The CMA itself recognised in its April 2020 paper – *"Summary of CMA's position on mergers involving 'failing firms'"* how important it is to ensure that the liquidation valuation is robust and why a conservative approach is called for including:

"*As the SLC test requires that the merger be the cause of competitive harm, the CMA has previously found that mergers should, on the basis of sufficiently evidenced 'failing firm' arguments, be unconditionally cleared after rigorous assessment. The conditions for the failing firm scenario (as described further below) are stringent, however, and the CMA's experience to date (consistent with the experience of other competition authorities, such as the European Commission) has been that relatively few cases have met the criteria to be cleared on the basis of the failing firm counterfactual.*"

5.28 [✂] considers that: the CMA has not applied a sufficiently rigorous or stringent approach to the evaluation of the evidence and liquidation valuation; the CMA has failed to take into account relevant considerations when making that evaluation; and that there is not a strong enough basis on which to conclude that the Merger, and so the inevitable harm to competition, should proceed.

5.29 Given the significance of the finding that the bids received are below the liquidation value, and the implications for the outcome of the Merger investigation, the CMA should reconsider its assessment as against the bids received with a significantly more rigorous and cautious approach.

6. <u>The CMA has not met its statutory obligations to consult on its IR and SIR</u>

6.1 The CMA has a statutory duty to consult on its decisions concerning the Merger under section 104 EA. Section 104 requires the CMA to consult on any Merger outcome decision with a party when that decision is "*likely to be adverse to the interests of a relevant party*". When such an obligation arises, the CMA is obliged to consult and, so far as practicable, to give reasons for the proposed decision.

6.2 As explained by the CAT in *Meta*[10], 'practicability' includes consideration of confidentiality issues. In that case, the CMA considered Meta's appeal including on the grounds that the CMA had failed properly to consult with it including by providing only redacted version of its Provisional Findings (now the Interim Report). The CAT upheld that aspect of the appeal and found that "*not only does the Enterprise Act 2002 regime that we have described <u>not</u> preclude the disclosure to Meta of the redacted material, it actually <u>obliges</u> the CMA to take that course*".

6.3 The CAT in *Meta cited and relied on BMI Healthcare*[11] in support of its conclusion that confidentiality rings are an appropriate way to manage disclosure of confidential information in satisfaction of the CMA's obligations under section 104.

6.4 [✂] does not consider that the CMA has provided it with sufficient time or information to allow it to understand the reasons for the proposed decision as set out in the SIR to reverse its SLC finding in respect of NI.

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10 *Meta Platforms Inc. v CMA* [2022] CAT 26, para 157(2)

11 *BMI Healthcare Limited v. Competition Commission* [2013] CAT 24

6.5 As discussed above, central to the CMA's decision making is its liquidation valuation, and other financial information, relating to the AB NI business.

6.6 The sections in the IR and SIR relating to the liquidation valuation and financial information are heavily redacted and all figures are redacted. The CMA has not applied ranges and it is effectively impossible [✂] to understand the substance of the CMA's assessment. It can only (as above) make inferences as to the general approach. It is unable to assess whether the calculations and assumptions themselves are robust.

6.7 In other words, the critical analysis on which the CMA's decision to clear the merger is based is entirely redacted and not open to comment by third parties.

6.8 This does not satisfy the CMA's statutory duty to consult as confirmed by the Competition Appeal Tribunal.

6.9 [✂] accordingly requests that the CMA provide it with the relevant redacted information to allow it properly to assess and comment on the CMA's liquidation valuation which underpins the no SLC provisional decision in the SIR.

The CMA's proposed findings will lead to the least competitive of the possible outcomes

6.10 [✂] considers that the CMA's decision making is flawed and will, if confirmed, result in a seriously anti-competitive merger in NI with the creation of a super-dominant (and in some markets monopoly) supplier. This can only have significant anti-competitive effects and will harm consumers.

6.11 The consumer harm will be widespread – the affected product markets are for bread and bread products which are a staple food purchased by a very high proportion of consumers such that the CMA's decision will harm the very large majority of consumers in NI.

6.12 The CMA has made serious errors in its approach to the liquidation valuation and has not satisfied its obligations to consult [✂].

6.13 [✂] submits that the CMA must accordingly:

(A) reconsider its provisional decision in the SIR, given the margin for error in its liquidation valuation and the high evidential bar required to meet the exiting firm defence

(B) revert to its SLC findings in the IR in respect of NI

(C) require the divestment of the AB NI business to a suitable purchaser.

6.14 If the CMA is not minded to change its provisional decision in the SIR, it must provide [✂] with more detailed and unredacted information on the liquidation valuation, so as to allow [✂] properly to evaluate and comment on the CMA's analysis.