REDACTED VERSION

ME/6514/15: Linergy/Ulster Farm By Products Limited

Response of Linergy and Ulster Farm ("the Parties") dated 19 August 2015 to Annex C of the CMA's First Day Letter: Request for Initial Submission from Linergy and Ulster Farm received from the CMA on 28 July 2015

Content of submission

Please provide a written submission by 18 August 2015 addressing the issues set out below. In each case, please provide the reasoning and evidence necessary to support any arguments or contentions that you make. ***(It was agreed with the CMA on 17 August, 2015 that the written submission would be provided to the CMA on 19 August, 2015).***

Please feel free to include as part of this submission your views on any other issues which you consider relevant.

Please feel free to copy in the information provided during phase 1 where it is still appropriate and complete, or information provided in response to the phase 2 initial factual information request—see Annex B. The purpose of copying this information in rather than cross-referring to it, is so that the non-commercially sensitive version for publication (see paragraph 27) is complete as a stand-alone document.

Background on Linergy and UFBP

1. **Brief histories of Linergy and UFBP, together with chronologies of significant events in the last five years. These should include details of their organizations and their shareholder organizations, merger activities, the history of any previous market entry and exit in relation to the supply of animal rendering services, financial structures and principal activities, including those outside the reference area, if appropriate.**

   Linergy Limited ("**Linergy**") operates an animal waste rendering facility at Dungannon, County Tyrone, Northern Ireland. Linergy processes Category 1 animal by-products and fallen stock at the Dungannon facility. The facility was established in 2005 by two abattoir operators, Fane Valley/Linden and Dunbia, and commenced operating in 2007. Attached in [✂] are tables which illustrate the shareholders in Linergy, both pre and post the transaction under review which involves, inter alia, the merger of the Linergy business with that of Ulster Farm By-Products ("**Ulster Farm**" or "**UFBP**") (the "**Transaction**").

   Ulster Farm operates an animal waste rendering facility at Glenavy, County Antrim, Northern Ireland. Ulster Farm processes Category 3 animal by-products at the Glenavy facility. Ulster Farm also processed Category 1 animal by-products and fallen stock at a Category 1 plant at the Glenavy site until it closed the Category 1 plant in October, 2012. The Ulster Farm facility was established in 1953 by Glenfarm Holdings Limited, which is a farmers' co-operative. Ulster Farm was acquired by S.A.P.I, S.P.A ("**SAPI**"), an Italian company, in 2012.

   Further information on Linergy and Ulster Farm is provided at Chapter 10 of this submission.

   SAPI is also engaged in the business of processing animal by-products. SAPI is based in Modena, Italy and is involved in animal rendering plants worldwide. SAPI's principal commercial interest is in the value of the end products that are produced as a result of the processing. Consequently, SAPI tends to operate a business model outside Italy whereby it holds minority shareholdings in rendering businesses and focuses on the value of the end

products produced by the business. This is consistent with the Transaction, whereby SAPI has acquired a 30% shareholding in Linergy which in turn has acquired Ulster Farm. [✂].

Information about the transaction

(See Part 3 of Merger Assessment Guidelines, CC2 (Revised)/OFT1254 (adopted) and Chapter 4 of Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2.)

2. **A statement of the circumstances leading up to the acquisition, together with the history of the previous relationship between the companies (if any) including relevant legal or financial issues. This should include details of the negotiations with UFBP, and the timetable of events leading up to the merger.**

Linergy entered into a Share Sale Agreement ("**SSA**") with SAPI on 8 May, 2015 for the acquisition of the entire issued share capital of Ulster Farm. In conjunction with this, SAPI acquired a 30% interest in Linergy.

As the CMA is aware, Linergy made a previous attempt to acquire Ulster Farm in November, 2011. That transaction (the "**Prior Transaction**") was not completed. The then Office of Fair Trading ("**OFT**") examined the Prior Transaction and made a decision in March, 2012 (the "**OFT Decision**")[1] to refer the Prior Transaction to the then Competition Commission ("**CC**"). The parties to the Prior Transaction believed that they could have established to the satisfaction of the CC that the Prior Transaction would not have resulted in a substantial lessening of competition ("**SLC**"). In particular, the parties believed that, contrary to the view expressed by the OFT in the OFT Decision, renderers of Category 1 and Category 3 material in Northern Ireland compete in markets which include renderers based in the Republic of Ireland and Great Britain. Given the extent of competition for Category 1 and Category 3 processing in these broader markets, the parties believed that the Prior Transaction would not have resulted in a SLC. However, the parties also believed that the trading and financial position of Ulster Farm at the time was such that the Ulster Farm business could not survive the time involved in a CC review. This was evidenced by the need for Linergy to provide a loan to Ulster Farm during the OFT investigation. As a result of this, the parties did not continue with the proposal.

Following the abandonment of the Prior Transaction in the Spring of 2012, and given the financial sate of the Ulster Farm business at that time, Ulster Farm was quickly put up for sale in the form of a tender process. SAPI participated in the tender process.

In [✂], SAPI approached Linergy when SAPI became involved in the tender process for Ulster Farm. SAPI explained to Linergy that it was interested to find out if Linergy would be interested in the possibility of becoming a partner with SAPI in Ulster Farm if SAPI was successful in acquiring Ulster Farm. As explained in Section 1, this was in line with SAPI's investment policy outside Italy, where the company would seek local partners who would take over the operational side of animal by-product processing businesses in which SAPI would invest.

Linergy explained to SAPI that it had recently withdrawn from an approach for Ulster Farm because Ulster Farm could not stay in business whilst regulatory approvals were sought from the CC. Linergy also explained that it would be interested in revisiting the issue at some stage in the future. This was because Linergy believed that the OFT had incorrectly defined the relevant geographic markets in Category 1 and Category 3 processing as Northern Ireland and that, if the geographic market was defined correctly as the island of Ireland and Great Britain, then regulatory issues would not arise. As a result of the discussions, a draft Memorandum of

[1] Case ME/5294/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited.

Understanding was prepared and a Memorandum of Understanding was agreed between Linergy and SAPI on 31 May, 2012 (the "**MOU**").

The MOU set out steps which would be followed if Linergy and SAPI were to attempt to merge the businesses of Linergy and Ulster Farm within the following two years. On any merger SAPI would hold 30% of the shares in the merged entity. The MOU was stated to be subject to "regulatory approval". [✂].

In its Phase 1 Decision, the CMA stated that the MOU expressed Linergy's and SAPI's intention to merge Linergy and Ulster Farm in the event that SAPI acquired Ulster Farm (paragraph 26). This is not correct. Rather, the MOU set out a framework under which a merger might take place, subject to a number of conditions, should SAPI acquire Ulster Farm and should the Parties subsequently attempt to merge Linergy and Ulster Farm in the following two years. If SAPI did acquire Ulster Farm, an attempted merger was not subsequently inevitable, as the CMA Phase 1 Decision would suggest. In a similar vein, the CMA was incorrect in stating (also at paragraph 26) that the discussions which took place between Linergy and SAPI in [✂], following the approach made by SAPI to Linergy, "explored the possibility of a partnership that would lead to the merger of Linergy and Ulster Farm at a future date" (underlining added). Rather, the discussions explored the possibility of an arrangement (i.e. the MOU) that could lead to the merger of the two businesses, subject to a number of conditions and subject to the Parties each deciding to attempt a merger at some stage in the first place.

This is an important point to note when considering the relevance of the MOU in the context of the review of the Transaction and the consideration of the counterfactual in particular. The Parties addressed this issue in detail in responses and submissions which they made during the Phase 1 investigation and at an "Issues Meeting" held in the CMA on 25 June, 2015 and a Response which they provided to the CMA on 26 June 2015 to an "Issues Letter" which was provided to the Parties on 23 June, 2015. The Parties also address the issue in detail in Chapter 10 of this Initial Submission.

Following the signing of the MOU, SAPI was successful in the Ulster Farm tender process and acquired Ulster Farm in early June, 2012. After acquiring Ulster Farm, SAPI reviewed the operation of a Category 1 plant which Ulster Farm had been operating at its Glenavy site (Ulster Farm also operated a Category 3 plant). Having done so, SAPI decided in October, 2012 to close the Category 1 plant. SAPI had come to the view that there was no business case for Ulster Farm to continue operating the Category 1 plant. The primary problem was a lack of supply of raw material, which was exacerbated by excess capacity in the industry generally. A price increase in early 2012 by Ulster Farm which was designed to reduce losses had resulted in the loss of two of the Category 1 plant's three major customers to rendering plants in the Republic of Ireland. The Category 1 plant was also loss making. [✂]. In addition, the plant was in a poor state of repair and needed significant upgrading and capital investment. The plant also had serious environmental problems. SAPI concluded that that the required level of investment could not be justified commercially. Consequently, SAPI decided to close the plant. In effect, the Category 1 plant was no longer commercially viable.

SAPI commented on these issues in detail in responses which the company provided to the CMA during Phase 1 of the CMA investigation and at the Issues Meeting held in the CMA on 25 June, 2015 and in the Response provided to the Issues Letter on 26 June, 2015. These issues are also addressed in detail at Section 10 of this Initial Submission.

Prior to attempting the original merger with Ulster Farm, Linergy had considered the possibility of building a Category 3 plant at its site at Dungannon (Linergy was operating a Category 1 plant at its site at the time). In May, 2011, the Board of Linergy had agreed to proceed with a proposal to build a Category 3 plant at the Dungannon site. This proposal was dropped when the opportunity arose later in 2011 to purchase Ulster Farm. Following the abandonment of

that proposal in the spring of 2012, Linergy revisited the issue of building a Category 3 plant at its site. Having done so, Linergy decided in December, 2012 not to build a Category 3 plant at its site. Linergy took this decision because the commercial considerations involved in the proposal had changed since the company had decided to build a Category 3 plant in May, 2011. As a result, the company concluded that the proposal was no longer commercially viable. Specifically, the cost of building and equipping such a plant had increased, while operating costs, particularly fuel costs, had also risen. The increased capital costs would also have required a higher level of bank borrowings than originally envisaged, which would have resulted in higher interest costs. The commercial risks involved in the proposal had also increased as competition had increased in the Category 3 rendering market in the period between May, 2011 and December, 2012. As a result of these considerations, Linergy decided in December, 2012 not to build a Category 3 plant.

Linergy commented on these issues in detail in responses which the company provided to the CMA during Phase 1 of the CMA investigation, at the Issues Meeting held in the CMA on 25 June, 2015 and in the Response provided to the Issues Letter on 26 June, 2015. These issues are also addressed in detail at Section 10 of this Initial Submission.

These developments meant that the rendering operations of Linergy and Ulster Farm no longer overlapped, unlike the situation pertaining when the OFT has carried out its investigation in 2011-2012. Linergy only rendered Category 1 material and Ulster Farm only rendered 3 material, whereas in 2011-2012 Linergy had been considering the possibility of building a Category 3 plant prior to attempting a merger with Ulster Farm and Ulster Farm had been operating a Category 1 plant. As was accepted by the OFT in its Decision, and by the CMA in its Phase 1 Decision, the rendering of Category 1 material and the rendering of Category 3 material constitute separate product markets. In the light of these developments, therefore, there was no longer any competitive overlap between Linergy and Ulster Farm.

In these circumstances Linergy decided in the Spring of 2013 to consider again the competition issues which would arise if Linergy were to be involved in a merger with Ulster Farm. As noted, Linergy had believed that the original proposal that Linergy would acquire Ulster Farm would not have resulted in a SLC, particularly if the relevant geographic market was defined correctly as the island of Ireland and Great Britain. In addition, the subsequent developments in the respective businesses of Linergy and Ulster Farm further lessened any competition issues which would arise if Linergy and Ulster Farm were to merge. As a result, Linergy instructed its lawyers in May, 2013 to advise on the competition issues which would arise if a merger between Linergy and Ulster Farm were to be attempted. Linergy's lawyers, Arthur Cox, advised that Linergy retain the services of an independent economics consultant to review the competition issues in conjunction with the lawyers and Linergy and this was arranged. As a result, Mr. Pat Massey of Compecon Limited was appointed to review the competition and economic issues. Mr. Massey is a former Head of the Mergers Division in the Irish Competition Authority and an independent economics consultant who advises companies on competition and merger control issues before competition authorities.

Around the same time that Linergy engaged its advisers, Linergy made contact with SAPI which confirmed a desire on both parties to explore further the possibility of carrying out a merger between Linergy and Ulster Farm. Linergy wanted to confirm that SAPI was still interested in a possible merger before carrying out the competition assessment.

Linergy and its advisers worked together over the course of May to October, 2013 in reviewing the competition issues that would arise if Linergy were to merge with Ulster Farm. This involved, in particular, analysing the changes which had occurred in the respective businesses of Linergy and Ulster Farm since the OFT investigation in early 2012 and the analysis undertaken by the OFT in that investigation.

The conclusion of the competition assessment was that a merger between Linergy and Ulster Farm would not be likely to result in a SLC, due to a combination of changes in circumstances since the OFT Decision and issues which arose in relation to the economic analysis undertaken by the OFT in its Decision. This analysis was contained in a Report prepared by Pat Massey. The primary reasons for this conclusion were as follows:

- There are three relevant product markets for processing Category 1, Category 3 and fallen stock material. Circumstances had changed since the OFT had considered the original merger proposal. In particular, Ulster Farm had closed its Category 1 plant and Linergy had decided not to proceed to build a Category 3 plant. In the light of these changed circumstances, there was no longer any competitive overlap between the Parties so that such a proposal would no longer have any effect on competition in any of the relevant markets.

  The position adopted by Linergy and its advisers on product market definition was supported by the approach of regulatory authorities.

  In its Decision in 2012, the OFT had stated that Category 3 plants did not exert a competitive constraint on Category 1 plants[2].

  In addition, the European Commission (the "**Commission**") has consistently held that Category 1 and Category 3 rendering services constitute separate product markets. The Commission examined the markets in Category 1 and Category 3 rendering services in detail in its merger Decision in *Saria/Danish Crown/Daka JV*[3]. The Commission found, in line with its previous decisions, that:

  "Products not fit for human consumption can be further broadly segmented according to the risk level of the materials and corresponding EU legislation into (i) category 1 and 2 (high-risk) materials and (ii) category 3 (low-risk) materials."

  The Commission further distinguished the markets for the collection of animal by-products and the processing and supply of animal by-products. With regard to the collection of animal by-products, the Commission found that the differentiation could be made at least between the collection of Category 1 and 2 animal by-prodycts on the one hand and the collection of Category 3 animal by-products on the other hand. This was on the basis that:

  "slaughterhouses receive a payment for the supply of the high-valued category 3 raw animal by-products. By contrast, the collection of low-value category 1 and 2 raw animal by-products is essentially a service for slaughterhouses. Therefore, rendering companies request a payment from slaughterhouses for the collection of these products. Slaughterhouses are at the same time obliged to ensure the correct disposal of these products under Article 4 of the Animal by-products Regulation and national health and hygiene obligations adopted in accordance with that Regulation."

  The Commission also found that there were separate markets for the processing and supply of Category 1 and 2 animal by-products and the processing and supply of Category 3 animal by-products. However, the Commission declined to make any further sub-segmentation of those markets and ultimately left the market definition open.

[2] Case ME/5214/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, OFT decision of 15 March 2012, paragraph 32.

[3] Case No COMP/M.6285 – Saria/Danish Crown/Daka JV, decision of 29 June 2012.

- The OFT Decision in 2012 was based to a significant extent on a conclusion that the relevant geographic market in each of Category 1 and Category 3 rendering was limited to Northern Ireland. This conclusion was inconsistent with evidence that rendering plants in Northern Ireland process material originating in the Republic of Ireland, while suppliers in Northern Ireland send material to renderers in the Republic of Ireland and Great Britain.

  In the case of Category 1 and Category 3 material, the relevant geographic market includes rendering plants in the Republic of Ireland and Great Britain. Even if there was a competitive overlap between the parties (which was no longer the case), in a wider geographic market a merger would no longer reduce the number of competitors from three to two, as the OFT had concluded in relation to the original proposal.

- The OFT had held that there was insufficient evidence to support a conclusion that the original proposal would give rise to co-ordinated effects. There were no good reasons for reaching a different conclusion in 2013. The Parties were no longer competitors while a wider geographic market meant that there were a larger number of competitors. In these circumstances, a merger would be even less likely to give rise to co-ordinated effects.

- The merger could only give rise to unilateral effects if the parties were still competitors (which they were not any longer) an if rendering plants in the Republic of Ireland and Great Britain would not exercise a sufficient competitive constraint on the Parties, i.e. a sufficient volume of business would not move to such rendering plants in the event of a post-merger unilateral price increase as to render such a price increase unprofitable. The response of Ulster Farm's principal customers to a price rise implemented by Ulster Farm in early 2012 (when two out of three of Ulster Farm's main meat processing customers switched to rendering plants in the Republic of Ireland) indicated that customers could switch to renderers in the Republic of Ireland in the event of a unilateral price increase post-merger. This episode demonstrated, contrary to the findings of the OFT Decision, that renderers in the Republic of Ireland would exercise a sufficient competitive constraint on the merged entity as to prevent a unilateral price increase, even if the Parties were still operating in the same product market (which was no longer the case).

In light of the positive analysis and advice received as a result of the competition assessment undertaken in 2013, Linergy made further contact with SAPI in early 2014. A Linergy delegation went to Italy in [✂] to meet SAPI representatives and to discuss matters further. A follow up meeting in Italy took place in [✂] at which point it was agreed in principle to merge subject to negotiation of details.

Several months of telephone discussions followed during which time work was carried out on the mechanics of a deal. This was followed up with meetings in Belfast. Head of Terms were signed on [✂]. Numerous calls took place in the following months, then meetings in Dungannon, Glenavy and London. There was a final meeting in Italy in [✂] at which stage headline details were agreed. Finer details were agreed over various calls between then and the signing of the SSA in May, 2015.

3. **A statement explaining the rationale for undertaking this merger, including the benefits and financial synergies expected to be gained from the merger. This can include information copied in from your previous responses of 14 January and 5 February 2015.**

From Linergy's perspective, the rationale for the Transaction is that it would allow Linergy access to a Category 3 processing facility. This would assist Linergy to attempt to pursue other

business opportunities that would otherwise be difficult at the Linergy site, in particular, the possibility of developing [✂].

From SAPI's perspective, the rationale for the Transaction is that SAPI would have the opportunity to pair with a local partner who could oversee the day-to-day operations of Ulster Farm and who would bring local knowledge to the company. As explained in Section 1, this is consistent with SAPI's general approach to investments that SAPI makes outside of Italy in rendering businesses. SAPI had previously visited the Linergy facility at Dungannon and was aware of the processing capability and high standards set at the facility.

4. The Relevant Product Market

(See Part 5.2 of Merger Assessment Guidelines, CC2 (Revised)/OFT1254 (adopted).)

An explanation of what you consider to be the economic markets for this inquiry—both in terms of (a) the product and (b) the geographic market. This can include information copied in from your previous responses such as the Supplementary Response to the Issues Letter.

Introduction

The relevant markets in this case consist of the rendering of Category 1 material and the rendering of Category 3 material, each of which constitute separate product markets, in geographic markets which encompasses the island of Ireland and Great Britain, and, in particular, Scotland and the North of England.

The CMA agreed in its Phase 1 Decision, as did the OFT in its Decision, that the rendering of Category 1 material and the rendering of Category 3 material each constitute separate product markets (paragraphs 58 to 69 of the Phase 1 Decision). However, the CMA took the view that the relevant geographic market in respect of each of these products is Northern Ireland (as the OFT had considered in its Decision) (paragraphs 70 to 104 of the Phase 1 Decision).

The Parties do not believe that the approach adopted by the CMA to the relevant geographic market is correct in light of market evidence and economic theory. Furthermore, the approach adopted by the Parties is supported by market evidence which the parties provided to the CMA during the course of the Phase 1 investigation and by an economic analysis undertaken by Pat Massey, the independent consultant who has advised the Parties on the economic implications of the Transaction, including the definition of the relevant geographic market. The Parties have set out below their views on the relevant geographic market and on comments made by the CMA on the issue in the Phase 1 Decision. In addition, attached in [✂] is a Report prepared by Pat Massey which was provided to the CMA on 26 June, 2015 in conjunction with the submission of the Parties' Response to the CMA Issues Letter of 23 June, 2015. This Report was an updated version of the Report which Mr. Massey had prepared in 2013 and which Mr. Massey updated in light of the Issues Letter and the Issues Meeting. The original and updated version of the Report addressed, in particular, the definition of the relevant geographic market in light of the approach taken by the OFT in 2012 and the CMA in Phase 1. Reference is made in particular to Section 3.3, paragraphs 55 to 98, of Mr. Massey's Report, where he addresses the issue of the relevant geographic market in detail (this Report is referenced in this submission as the "**First Report**"). The comments contained in Section 3.3 should be read in conjunction with, and, in part, in addition to, the comments set out below.

(a) Relevant Product Market

4.1 General

The phrase '**animal by-products**' (also referred to as 'non-fallen stock') refers to what remains of an animal after meat and offal for human consumption, and other uses, has been removed. The phrase '**fallen stock**' refers to animals that have died on farms and therefore need to be disposed of by the farmer. As a result of applicable regulations, all animal by-products ("**ABPs**") and fallen stock must be processed by licensed processing plants in order to ensure that the risk of disease transmission is reduced to the greatest extent possible. Consequently, the disposal and processing of animal by-products and fallen stock is heavily regulated and disposal must be in accordance with applicable UK and European law.

4.2 Animal by-products

The animal rendering industry is essentially a downstream arm of the meat processing industry. When animals that have been reared for food production are slaughtered, the remaining part of the animal becomes a by-product. These animal by-products are processed by rendering plants. All ABPs must be removed and disposed of in a proper manner.

The Commission has considered the product market in ABPs in a number of merger control decisions. In addition, the OFT addressed the issue in the OFT Decision and the CMA addressed the issue in the Phase 1 Decision.

The Commission has found that the markets for ABPs can be broadly categorised into (i) ABPs that can be further processed for human consumption; and (ii) ABPs only fit for other uses.[4] Neither Linergy nor Ulster Farm is active in the category of ABPs that can be further processed for human consumption.

ABPs not fit for human consumption can be further segmented according to the risk level of the materials. Different categories of ABPs must be treated differently at all stages. There are three categories of ABPs which are not fit for human consumption: Category 1, Category 2 and Category 3. A separate licence is required to handle each category of material. A Category 1 plant can process Category 3 material but the end product is classified as Category 1. A Category 3 plant can only process Category 3 material.

The Commission has previously segmented ABPs not fit for human consumption into (i) Category 1 and 2 (high risk) materials and (ii) Category 3 (low risk) materials.[5] This is consistent with the approach taken by the OFT in the OFT Decision and by the CMA in the Phase 1 Decision (paragraphs 58 to 69).

The rendering process converts animal by-products into two finished products – tallow and Meat and Bone Meal ("**MBM**"). Tallow and MBM are classified as Category 1 or Category 3, depending on the categorisation of the material from which they are produced and the type of plant in which the material is processed. Products produced from Category 3 material in a Category 3 plant have a wider range of uses than those products generated from Category 1 material. Category 3 MBM may be included in pet food, for example. As a result, products produced from Category 3 material have a

[4] Case No COMP/M.3968 – Sovion / Südfleisch. [Para]

[5] Case No IV/M.1313 - Danish Crown / Vestjyske Slagterier, paragraph 48; Case No COMP/M.3175 – Best Agrifund / Dumeco, paragraph 15; Case No COMP/M.3337 – Best Agrifund / Nordfleisch, paragraphs 75 and 149; Case No COMP/M.3605 - Sovion / HMG, paragraph 122;Case No COMP/M.3968 – Sovion / Südfleisch, paragraph 85.

higher value than those produced from Category 1 material. This essentially drives the value of the raw material.

4.3 Processing of Category 1 Material

In the OFT Decision, the OFT stated that Category 3 plants did not exert a competitive constraint on Category 1 plants:[6]

> *"a renderer wishing to process both Category 1 and Category 3 animal by-products requires two separate plants and two separate licences from DARD [the Northern Ireland Department of Agriculture and Rural Development] (unless the renderer is willing to process all material as if it were Category 1 material, in which case the outputs are less valuable). A Category 3 plant cannot process Category 1 (or indeed Category 2) materials so it exerts no competitive constraint on the activities of a Category 1 plant."*[7]

Reference is also made to paragraph 90 of the OFT Decision, where the OFT stated:

> *"As explained above, the OFT believes that the processing of Category 1 and Category 3 animal by-products belong in discrete product markets"*

The approach adopted by the OFT is consistent with the approach adopted by the Commission and by the CMA in the Phase 1 Decision (paragraphs 58 to 69). This reasoning reflects the position of the Parties that the processing of Category 1 and Category 3 material involves two separate product markets.

In addition, meat processing plants must send Category 1 material to a Category 1 plant. A Category 3 plant may not process Category 1 material. Legally, a Category 1 plant could process both Category 1 and Category 3 material but all material processed at a Category 1 plant is then defined as Category 1 material.

As noted, Category 3 tallow and MBM have much higher resale values than Category 1 tallow and MBM, due to the wider range of end uses available for Category 3 based product. Consequently, Category 3 plants can pay higher prices for Category 3 material than Category 1 plants. It is therefore commercially unattractive for meat plants and other customers to supply Category 3 material to Category 1 plants.

In summary, from the demand side, there is no substitute for Category 1 processing. Meat processing plants must send Category 1 material to a Category 1 plant.

4.4 Processing of Category 3 Material

As noted, in the OFT Decision the OFT stated that Category 3 plants did not exert a competitive restraint on Category 1 plants. The Commission has also distinguished between the processing of Category 3 material and the processing of Category 1 and 2 materials.[8] The same approach was adopted by the CMA in its Phase 1 Decision (paragraphs 58 to 69).

Regulatory changes that have been implemented since the OFT Decision and emerging markets mean that some materials that were previously classified as Category 3 may

[6] Case ME/5294/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, paragraph 32.

[7] Case ME/5294/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, paragraph 32.

[8] Case No COMP/M.6285 – Saria / Danish Crown / Daka JV, paragraph 16.

now be included in pet food and, in some cases, are now classified as fit for human consumption. This means that a meat processing plant may be able to sell some of what was previously Category 3 material to customers other than renderers. In order to do so, the plant must strictly segregate such material from the remaining Category 3 material. Whether or not it will be worth doing so will depend on the relative prices offered. As such developments have only occurred relatively recently, it is difficult to fully evaluate their implications. Nevertheless, it suggests that Category 3 plants may now face competition from non-renderers such as, for example, soup producers in respect of such material as well as other renderers in the Category 3 processing market.

4.5 **Processing of Fallen Stock**

Fallen stock is classified as Category 2 material. All fallen animals must be rendered, incinerated or disposed of by licensed premises which can harvest meat for dog feed. There are undertakings which provide a collection/disposal services to farmers for fallen animals. These collectors collect fallen animals from farms and deliver them to rendering plants.

In the UK there is a scheme which is operated by the National Fallen Stock Company ("**NFS**") which provides an administrative service to both farmers and renderers concerning the collection of payments and a platform for commodity prices. According to the OFT Decision, the great majority of farmers in Northern Ireland are members of the NFS scheme.[9] The Parties can confirm that this is still the case.

There is a legal obligation on farmers to have fallen animals disposed of in an appropriate manner. This can include, primarily, rendering, incineration (there is only one registered incinerator in Northern Ireland at Derrylin in County Fermanagh which has a capacity of 70 tonnes per week[10]), or a hunt kennel (the hunt kennel will then be monitored to ensure that its waste is disposed of correctly, either via rendering or incineration). Consequently, it seems reasonable to conclude that there are no close substitutes for rendering and incineration. Such services for fallen stock therefore constitute a separate product market. Indeed, the OFT found in the OFT Decision[11] that the processing of fallen stock was a separate product market. The CMA took the same view in the Phase 1 Decision (paragraphs 58 to 69).

4.6 **Conclusion on Product Market Definition**

The Parties consider that there are three relevant and separate product markets:

4.6.1 processing of Category 1 material;

4.6.2 processing of Category 3 material; and,

4.6.3 processing of fallen stock.

This position is supported by the OFT Decision, the CMA Decision in Phase 1 (see paragraph 64) and precedents of the Commission. As explained above, circumstances have changed since the OFT considered the Prior Transaction. In particular, Ulster Farm has closed its Category 1 plant and Linergy has decided not to proceed to build a

[9] Case ME/5294/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, paragraph 40.

[10] There are also some small scale on-farm incinerators.

[11] Case ME/5294/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, paragraphs 48 and 49.

Category 3 plant. Consequently, there is no longer any competitive overlap between the Parties, as had been the case at the time of the OFT Decision.

(b) Relevant Geographic Market

As explained, the definition of the relevant geographic market was addressed in detail in the Report prepared in 2013 for Linergy by Pat Massey. As explained in Section 1, the parties to the Prior Transaction believed that the OFT incorrectly defined the relevant geographic market in each of Category 1 and Category 3 rendering as Northern Ireland whereas, in reality, the markets encompassed the island of Ireland and Great Britain. Consequently, the Report prepared in 2013 focused particular attention on the definition of the relevant geographic market. The Report concluded that the relevant geographic market was the island of Ireland and Great Britain. As also explained, Mr Massey's Report was updated during the course of the Phase 1 investigation and a copy of the updated report was provided to the CMA on 26 June, 2015 (the "**First Report**") in conjunction with the parties providing their response to the Issues Letter which was received from the CMA on 23 June, 2015 and in light of the Issues Meeting held on 25 June, 2015. As explained, a copy of the First Report is attached in [✂]. Reference is made in particular to Section 3.3 of the First Report, and paragraphs 55 to 98, where Pat Massey analyses the relevant geographic market in detail. As noted, these comments should be considered in conjunction with, and, in part, in addition to, the comments contained in this submission.

4.7 **Processing of Category 1 Material**

As the Parties commented in submissions made to the CMA during Phase 1, the geographic market for the processing of Category 1 material for the purposes of reviewing the Transaction consists of the island of Ireland and Great Britain and, in particular, Scotland and the North of England.

Rendering plants in Northern Ireland compete with those in the Republic of Ireland and in Great Britain for Category 1 raw material. Prices are determined on the basis of bilateral negotiations between renderers and meat processors and reflect market conditions.

The Parties' experience is that Category 1 renderers in Northern Ireland face competition from Category 1 renderers based in the Republic of Ireland and Great Britain. For example, and as noted, prior to the closure of its Category 1 plant in October, 2012, Ulster Farm lost two of its then three Category 1 customers to plants located in the Republic of Ireland following a price rise by Ulster Farm in January, 2012.

The fact that the Parties view rendering plants in the Republic of Ireland as competitors is illustrated in internal company documents which Linergy provided to the CMA in the course of its investigation. For example, in its Response of 5 February, 2015 (Question 13), Linergy commented on a slide contained in an internal company document that it had provided to the CMA which contained the following statement:-

'Able to defend against [✂]**'**

The document in question was presented to the Linergy Board on 12 May, 2014 and addressed, inter alia, opportunities that might arise form a merger with Ulster Farm. Linergy explained in its Response that the statement referred to the fact that one of Linergy's principle competitors, [✂]. In Linergy's opinion, the then proposed new facility at [✂] could have had a negative impact on Linergy's business, as [✂] would look to attract supply from Linergy's customers. Although the new [✂] plant was to be a Category 3 plant, as [✂] also operated a Category 1 rendering plant, [✂] would

be operating separate Category 1 and Category 3 plants and could accept both types of materials from processors. As a result of this, Linergy faced the prospect of losing Category 1 supply from suppliers to the proposed new [✂] plant.

The [✂] plant [✂] is [✂] from Dungannon in Northern Ireland. Nonetheless, this internal statement clearly shows that Linergy considered the plant to be a competitive threat.

In addition to Category 1 renderers in Northern Ireland facing competition from renderers in the Republic of Ireland, British based renderers have become increasingly active in seeking materials from Northern Ireland based meat processors in recent years. In particular, one Scottish rendering plant (Dundas Chemical Company, which operates a Category 1 plant in Dumfries and a Category 3 plant in Motherwell (otherwise known as Caledonian Proteins)), and a rendering plant located in Widnes in the North of England (Prosper DeMulder Group), have processed in recent years material originating in Northern Ireland and the Republic of Ireland (from Dunbia companies, Ballymena Meats and the Foyle Food Group). As noted in the Supplementary Report, all but three of the meat processing plants in Northern Ireland send ABP material to renderers located outside of Northern Ireland.

Dundas Chemical Company is currently processing material from the Foyle Food Group, Ballymena Meats, WD Meats and Hewitt Meats in Northern Ireland. These companies are located at Derry, County Derry, Ballymena, County Antrim, Coleraine, County Derry and Loughall, County Armagh, respectively. In some cases, this involves the processing of both Category 1 and Category 3 material, separately. In addition, the Foyle Food Group at Derry in Northern Ireland is currently supplying Western Proteins, located in County Galway in the west of the Republic of Ireland, with Category 3 material.

In summary, there is clear and extensive evidence that the relevant geographic market in Category 1 rendering is the island of Ireland and Great Britain and, in particular, Scotland and the North of England.

4.8 **Processing of Category 3 Material**

As the Parties commented in submissions made to the CMA during Phase 1, the relevant geographic market for the processing of Category 3 material for the purpose of reviewing the Transaction also consists of the island of Ireland and Great Britain. The Commission has previously left open the geographic scope of the market for the processing of Category 3 material.[12] However, the Commission did find in its market investigation in *Saria / Danish Crown / Daka JV* that a number of market participants confirmed that cross-border sales were relatively frequent for Category 3 products.[13]

Rendering plants in Northern Ireland compete with those in the Republic of Ireland and in Great Britain for Category 3 raw material. As with Category 1 material, prices are determined on the basis of bilateral negotiations between renderers and meat processors and reflect market conditions. British based renderers have also become increasingly active in seeking materials from Northern Ireland based meat processors in recent years. Category 3 material is currently being transported to processors in Great Britain from the island of Ireland. As the British renderers are competing for this material, the price that they are willing to pay will set the market rate. In particular, Caledonian

[12] Case No COMP/M.6285 – Saria / Danish Crown / Daka JV, paragraph 41; Case No COMP/M.3175 – Best Agrifund / Dumeco, paragraph 25.

[13] Case No COMP/M.6285 – Saria / Danish Crown / Daka JV, paragraph 44

Proteins (based in Motherwell, Scotland) is currently servicing meat processors in Northern Ireland (details on the companies involved are provided in Section 4.7).

The fact that the markets in rendering Category 1 and Category 3 material extend beyond Northern Ireland is further illustrated by a number of related commercial considerations.

First, the [✂] refers to a relevant territory which is defined as the island of Ireland and Scotland. As the CMA will be aware, the territory concerned in a [✂] tends to reflect the geographic market in which a company operates.

Second, in response to a question at the Issues Meeting whether Linergy had ever considered acquiring a Category 3 plant outside of Northern Ireland, [✂] Linergy replied that Linergy had looked at the possibility of [✂].

These commercial considerations, as viewed by Linergy in the course of its rendering business, indicate again that Linergy views renderers in Northern Ireland as competing in a market encompassing the Republic of Ireland and Great Britain and, in particular, Scotland and the North of England.

In addition to the market evidence and considerations noted above which support the position of the Parties, the Parties would make the following comments on paragraphs 70 to 104 of the Phase 1 Decision, where the CMA considered the definition of the relevant geographic market. These comments further support the position of the Parties, particularly from an economics perspective.

The CMA's approach to defining the relevant geographic market is seriously flawed from a methodological persepctive and lacks any economic rationale.

First of all, in the Phase 1 Decision, the CMA began by excluding Linergy's customers in the Republic of Ireland on the grounds that the customers had a shareholding link with Linergy and then determined the relevant catchment area on the basis of where 80% of the remainder of Linergy's business came from (paragraphs 73 to 77). Thus, the starting point of the CMA's analysis excluded customers in the Republic of Ireland leading to the inevitable conclusion that the market was limited to Northern Ireland. Rather than undertaking an objective assessment of whether the market included all or part of the Republic of Ireland, the CMA's market definition exercise simply excluded the Republic of Ireland from the outset.

Second, the CMA analysis of catchment areas is flawed in several respects. It is crucial to recognise that a catchment area does not constitute a relevant geographic market and that the relevant geographic market will generally be wider than a catchment area. This is acknowledged in the Merger Guidelines.

"*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****. Consequently, if the impact of the merger on concentration in this catchment area appears unproblematic, then the Authorities may exclude the local area from further analysis without concluding on the boundaries of that particular relevant geographic market*." (Emphasis added).

Both these points are highly significant. A third point which is also relevant is that, as is widely recognised in the relevant economic literature, incorrectly defining a market too narrowly is likely to lead to an erroneous finding that a merger will have anti-

competitive effects. Consequently a finding of competitive harm where the market has been incorrectly narrowly defined cannot be relied upon.

Paragraph 74 of the Phase 1 Decision reads as follows:

"*Given this evidence, the CMA believes it appropriate to use the geographic catchment area within which the* ***great majority of the Parties' customers*** *are located as* ***a starting point*** *for determining the appropriate frame of reference*." (Emphasis added).

The Decision, however, treats the catchment area as the relevant geographic market rather than as the starting point for identifying the relevant market and analyses whether the merger is likely to be anti-competitive in the confines of the catchment areas identified. This constitutes a serious methodological error. Analysing the impact of a merger on competition within the confines of a catchment area can be a useful analytical approach in certain circumstances. This is because if a merger will not give rise to any competition problems in a narrowly defined market, then it is highly unlikely to create any competition problems in a wider market. In those circumstances it can be safely concluded that the merger will not pose any competition problems without the need to define the relevant market. The test cannot be applied asymmetrically, however, because any indication of competitive harm may be due to the fact that the market has been defined too narrowly so that firms that exercise a competitive constraint on the parties have been incorrectly excluded. In simple terms one can conclude from an analysis based on catchment areas that a merger will not have any negative effect on competition but such an analysis cannot establish that a merger will have a negative effect on competition.

This was pointed out in paragraph 63 of the First Report.

The next point to note is that there is no economic basis for defining a catchment area for a firm as the area within which 80% of customers are located. The 80% threshold is simply a rule of thumb used by the CMA. The figure has no economic significance and there is no explanation offered in the UK Merger Guidelines for picking 80% as opposed to 75% or 85%, for example. Indeed, the Merger Guidelines do not refer to the 80% threshold but refer to the "great majority" of customers.

"*When assessing mergers involving a large number of local geographic markets for example, mergers of grocery retailers operating over multiple localities—the Authorities may examine the geographic catchment area within which the great majority of a store's custom is located*."

The Parties previously commented in Phase 1 that a rule of thumb approach designed to provide a starting point for defining geographic markets in cases where there are a large number of local geographic markets such as grocery retailing is not relevant to the present situation. A "rule of thumb" approach designed to deal with one particular type of market scenario is not necessarily useful or applicable to other very different market scenarios. There are undoubtedly a large number of local geographic markets in grocery retailing in Northern Ireland. According to the CMA's own conclusions, the geographic markets for Category 1 and Category 3 material comprise all of Northern Ireland. There are not a large number of local geographic markets in the case of rendering.

Having excluded customers in the Republic of Ireland which accounted for [✂]% of Linergy's sales volumes, the CMA then analysed the area from which 80% of the remainder of Linergy's sales in volume terms originated. In other words, the CMA took the area within which [✂]% [✂] of Linergy's sales came from as the relevant catchment area. Clearly [✂]% of sales does not equate with the "great majority" of

customers which is the phrase used in the Merger Guidelines and is the threshold which the CMA claims to have used to define the market in paragraph 74 of the Decision. Thus, even if one were to accept that the "*great majority of customers*" test was correct, it is clear that the CMA failed to apply that threshold properly. More fundamentally, there is no economic basis for concluding that a firm's catchment area can be defined as the area from which [✂]% of its sales are drawn.

The CMA argues that shareholding customers should be excluded because they might choose to supply material to a related rendering firm for non-commercial reasons. In support of this contention at paragraph 76 of the Phase 1 Decision, the CMA cites the fact that Linergy's shareholders sent Category 3 material to Linergy in order to support Linergy even though they could have obtained higher prices for such material elsewhere. Again this analysis is incorrect because it does not involve a like for like comparison. As the Parties noted in Phase 1, the meat plants concerned only supplied Category 3 material to Linergy for a limited period based on an expectation that Linergy might enter the Category 3 market and thus be able to match the higher prices generally paid for Category 3 material. One cannot infer from the fact that shareholding firms might have been prepared to [✂] for a period of time in the expectation of achieving higher returns down the road that those firms would be willing to [✂] on a permanent basis in order to support Linergy. Yet this is the argument used by the CMA to justify excluding Linergy's shareholder customers when defining Linergy's catchment area. The fact that shareholders may have been prepared to [✂] for Category 3 material for a limited period does not establish that they would accept permanently [✂] on Category 1 material, which is what the CMA is implicitly claiming. The CMA analysis fails to distinguish between short-run and long-run.

Paragraph 77 of the Phase 1 Decision is quite important and bears quoting in full:

"*For these reasons the CMA has not placed much weight on the behaviour of shareholder customers when considering which alternative renderers provide a competitive constraint on the Parties or when assessing the distances over which renderers are competitive. The CMA has put* ***more weight on evidence of actual choice of suppliers by independent meat processors****. The CMA has also put more weight on the 80%* [i.e. [✂]%] *catchment areas for the Parties calculated excluding Linergy's shareholder customers.*" (Emphasis added)

The highlighted text is quite significant because, as will be outlined in some detail below, the CMA in several instances discounted or dismissed evidence of the actual behaviour of customers which did not support its conclusions.

In paragraph 78 the CMA defines the catchment areas for rendering plants on the basis of the 80% of sales but it uses sales volumes for Ulster Farm and sales values for Linergy. This is inconsistent and both should have been calculated on the same basis. The CMA excluded Linergy customers in the case of Ulster Farm as well as Linergy even though the argument advanced by the CMA for excluding such customers only applies to Linergy, i.e. Linergy's shareholder customers do not have any reason to supply Ulster Farm other than for commercial reasons as they have no shareholding in Ulster Farm. In practice, this does not make much difference to the Ulster Farm catchment area but nevertheless the reasoning used to justify excluding them also does not apply in the case of Ulster Farm.

Paragraph 79 refers to the College Proteins plant in the Republic of Ireland. The CMA concludes that this plant is unlikely to exercise a sufficient competitive constraint on the Parties. This point confuses the issue of market definition with the analysis of competitive effects. Unilateral effects theories of competitive harm recognise that

while firms may be in the same market, the degree to which they exercise a competitive constraint on one another depends on the closeness of substitution between them. The issue of the extent of the competitive constraint exercised on the Parties by College Proteins is separate to the question of geographic market definition. The fact that College Proteins may exercise a weak constraint (a point which is not accepted) does not mean that it lies outside the relevant geographic market. The College Proteins Category 1 plant is 57 miles from Linergy which lies within the 50-75 miles radius which the CMA defined as a plant's catchment area. The two plants are therefore in the same geographic market.

The Parties would also note that the two largest single site producers of ABPs in Northern Ireland both supply material to College Proteins. [✂] and [✂] have been supplying College Proteins for long periods and supply significant volumes.

Paragraph 80 reports the results of a SSNIP test carried out by the CMA. Significantly, the CMA only applied the SSNIP test on the basis of prices for Category 3 material. It then used Linergy's transport costs which relate to Category 1 material and concluded that in the event of a SSNIP price increase it would only be viable to transport material an additional [✂] miles. In contrast, the OFT in 2012 conducted a SSNIP test for both Category 1 and Category 3 material. The OFT came to an almost identical conclusion in respect of Category 3 material but found that it would be viable to transport Category 1 material an additional [✂] miles. The OFT pointed out that because Category 1 prices were higher to begin with, the SSNIP price increase would be greater for Category 1 and, thus, the extra distance over which it would be viable to transport category 1 material would be significantly greater for Category 1 material compared to Category 3 material.

The SSNIP analysis conducted by the CMA raises a number of issues. First, the CMA had concluded that there are separate product markets for Category 1 and Category 3 material. Therefore, it should have defined the relevant geographic market for each of these product markets. In fact, the CMA only performed the SSNIP test in respect of Category 3 material, knowing from the OFT decision that this would yield a result that supported a narrower market definition. In stating that "a SSNIP would result in an economic additional transportation distance of only 7.4 miles", the Phase 1 Decision makes no reference to the fact that this only applies to Category 3 material. The Phase 1 Decision then states:

"*On the basis of this evidence, the CMA believes that a hypothetical monopolist could increase the price charged in NI by 5% without facing significant additional competition by renderers located further away in the ROI or GB*."

The analysis supporting this conclusion is clearly seriously flawed.

(The Phase 1 Decision states in footnote 49 that the Parties had argued that it should not apply a SSNIP test. This misrepresents a point that the Parties made which was that in Phase 1 the OFT had applied the test incorrectly, not that it should not be used.)

The Parties would note a number of other points on paragraph 80 which further challenge the approach adopted by the CMA.

First, the prices quoted are from a range of products which vary greatly in range. For example, some of the Category 3 bone material could be valued at £[✂] while the fat purchase price could be £[✂] per tonne.

Second, the approach used assumes a constant profit margin across all customers/products and that the company would look to replicate that margin if it tried

to sell supply from a greater distance. As well as this not being the case, it also does not take into account other factors such as an increased spread of fixed overheads as a result of increased throughput volumes which changes the profit margin on all supply as a result of new supply.

In addition, the "test" does not take into account the sale of the end products and the variations in prices that occur there. For example, if Ulster Farm is paying a supplier £[✂] per tonne and is making a margin of [✂]%, the revenues generated from the sale of the end products will be factored into this calculation. Therefore, if the sales price of the end products increases, arguably that could allow the company to increase its distance by this logic.

Paragraph 83 of the Phase 1 Decision records that the CMA found evidence that:

- Some NI meat plants send materials to their own rendering plants in ROI;
- Some NI meat plants are sending material to a renderer in Scotland;
- A meat processor in NI is sending material to a renderer in ROI;
- Other NI meat processors active in a particular area were sending some of their material to a renderer in ROI; and
- Some hunts in ROI may send fallen stock to NI renderers.

Paragraph 85 of the Phase 1 Decision then states:

"*The CMA notes that there appears to be currently more cross-border trade in animal by-products than the OFT found in its March 2012 decision*."

The Phase 1 Decision then states, however, that the CMA "*believes it is necessary to exercise caution in considering how customers' current conduct informs the assessment of the competitive effects of the Merger against the counterfactual (in which Linergy and UFBP would each have had a Category 1 and Category 3 plant)*." This statement is inconsistent with the earlier statement in paragraph 77 that the CMA placed more weight on the actual choices made by customers. As previously noted, where the latter type of evidence is not supportive of the CMA case, the Phase 1 Decision seeks to downplay its significance. Material that supports the CMA position is not subject to comparable scrutiny. The other points to note are the scale of evidence of cross-border trade and the fact that it has increased since 2012.

The CMA then argues that rendering prices in Northern Ireland might already be above the competitive level and therefore customers' behaviour might overstate the extent to which renderers in Scotland and the Republic of Ireland would compete with the parties in the CMA's counterfactual scenario. The Phase 1 Decision contains no evidence to support the view that prices might be above the competitive level in Northern Ireland. This is a purely speculative argument advanced to address the reality that the facts do not support the CMA's arguments.

Paragraph 86 of the Phase 1 Decision states:

"*The CMA found that some of the independent meat processors which send material to Scotland had only begun doing so recently (i.e. in the first half of 2015). The CMA therefore believes that some of the trade flows to Scotland may be at least in part an effect of the Merger. One customer confirmed that it is sending materials to Scotland in part because of its concerns regarding the Merger*."

The above statement supports the Parties' case. If it were the case that customers switched to renderers in Scotland on becoming aware of the merger, then this provides a clear indication that any attempt to raise prices post-merger would lead to further switching. It is totally inconsistent for the CMA to simultaneously argue that it would not be viable for customers to switch to renderers in Scotland in the event of a post-merger price increase while claiming that news of the merger had actually led to such switching taking place.

Paragraph 91 states that the CMA is aware of four meat processors in Northern Ireland sending some of their material to renderers in the Republic of Ireland but states that it is unclear whether such flows would occur under its counterfactual scenario and states that it does not believe that such flows are informative of the extent of the competitive constraint posed by renderers in the Republic of Ireland. This is a further example of the CMA discounting evidence of customer behaviour where such behaviour does not support its conclusions.

Paragraph 93 states that third parties expressed mixed views on the importance of exchange rates on cross border trade flows. In fact none of the four parties cited indicated that exchange rates posed a problem. At worst, one renderer based in the Republic of Ireland indicated that it did not know if exchange rates materially affected trade flows.

At Paragraph 96 the CMA states that no Republic of Ireland renderers which responded to the CMA's merger investigation indicated plans to expand their activities in Northern Ireland. One Republic of Ireland renderer is stated to have told the CMA that, because of the high degree of vertical integration in Northern Ireland, the Northern Ireland meat processors controlled much of the bidding for animal by-products, and remaining volumes of material available from independent meat processors in Northern Ireland were too small to be commercially attractive.

There are four rendering companies in the Republic of Ireland operating 7 rendering plants between them. Currently 3 of the 4 renderers (5 of the 7 plants) are processing material originating from meat plants in Northern Ireland. It is important to note that while these renderers may say they have no plans to expand their activities in Northern Ireland, this does not mean to say they are not already significant competitors for this material.

At paragraph 97, the CMA states that on the basis of the evidence before it, the CMA does not believe that there is a sufficient basis to include Republic of Ireland renderers within the geographic frame of reference. This analysis seems to have completely disregarded any material which originates in the Republic of Ireland and is being processed in Northern Ireland. As well as the material being processed in Linergy and Ulster Farm, Foyle Proteins is currently processing significant volumes of material from both Republic of Ireland -based meat plants and Republic of Ireland -based fallen stock.

In summary, the market evidence and economic theory supports the position of the Parties. In contrast, the CMA's approach to the evidence can be seriously criticised and shown to fail to support the position of the CMA whilst the approach adopted in terms of economic analysis is fundamentally flawed.

4.9 **Processing of Fallen Stock**

The geographic market for the processing of fallen stock consists of the island of Ireland. In particular, a significant proportion of the fallen stock processed by Foyle

Proteins has come from the Republic of Ireland. Linergy previously processed fallen stock from the Republic of Ireland.

4.10 **Conclusion on Geographic Market Definition**

The Parties consider that the relevant geographic markets for the processing of Category 1 and Category 3 material each include the island of Ireland and Great Britain (in particular, Scotland and the North of England). In particular, the market evidence and economic theory clearly support the position of the Parties and not the approach adopted by the CMA. The relevant geographic market for the processing of fallen stock consists of the island of Ireland.

5. **An explanation of the regulation, licencing and statutory requirements relating to the collection, disposal and processing of animal by-products and fallen stock, and the sale of end-products.**

Regulation (EC) 1069/2009 regulates health rules as regards animal by-products and derived products not intended for human consumption. Regulation (EC) 1069/2009 categorises animal by-products, as explained in the following extract from guidance issued by the Department for Environment Food and Rural Affairs (DEFRA) on the control of Animal By-Products:

"8. Categories of "animal by-products"

Under Regulation (EC) 1069/2009 animal by-products can fall into one of three categories.

(a) Category 1 Material

Category 1 material is defined in Article 8. Category 1 material is the highest risk, and consists principally of material that is considered a TSE risk, such as Specified Risk Material (those parts of an animal considered most likely to harbour a disease such as BSE, e.g. bovine spinal cord).

Pet animals, zoo and circus animals and experimental animals are also classified as Category 1 material due to the level of veterinary drugs and residues they are likely to contain and due to the fact that adequate diagnoses of the exact cause of death of exotic animals can be difficult to achieve. Several are known to harbour TSEs and may carry other diseases. Likewise, wild animals may be classified as Category 1 material when they are suspected of carrying a disease communicable to humans or animals. Catering waste from means of international transport (i.e. which has come from outside the EU) is also Category 1.

(b) Category 2 Material

Category 2 material is also high risk material and is defined in Article 9. Category 2 material includes fallen stock, manure and digestive content. Category 2 is also the default status of any animal by-product not defined in Regulation (EC) 1069/2009 as either Category 1 or Category 3 material.

(c) Category 3 Material

Article 10 of Regulation (EC) 1069/2009 defines Category 3 animal by-products. Category 3 materials are low risk materials. Category 3 material includes parts of animals that has been passed fit for human consumption in a slaughterhouse but which are not intended for consumption, either because they are not parts of animals that we normally eat (hides, hair, feathers, bones etc.) or for commercial reasons. Category 3 material also includes former foodstuffs (waste from food factories and retail premises such as butchers and supermarkets).

Catering waste, including domestic kitchen waste, is Category 3 material, though it is only in the scope of the Regulations in certain situations, to prevent it from being fed to livestock (which is banned under the Regulations) or such as when it is intended for composting or anaerobic digestion."

Material can only be downgraded in the processing stage. For example, any material processed in a Category 1 plant will all be deemed to be Category 1 when it has been processed, despite the designation it would have otherwise received in its raw form. Therefore, as there are no dedicated Category 2 processing facilities anywhere in Ireland or the UK, all Category 2 material is processed in Category 1 plants.

The end uses for the varying categories of both tallow and MBM are summarised in the following extract from the DEFRA guidance on the control of Animal By-Products:

"10. Disposal and use of animal by-products

(a) Disposal and use of Category 1 material

Article 12 of Regulation (EC) 1069/2009 sets out the disposal routes for Category 1 material. As the highest risk material, generally speaking this material must be destroyed by incineration, or by rendering followed by incineration. These are the only options for TSE suspects. Other Category 1 material is also permitted to be pressure-rendered and disposed of in an authorised landfill site.

International catering waste may be disposed directly in an authorised landfill site.

In principle the Regulation allows for Category 1 material to be used as a fuel for combustion though the European Commission is yet to formulate rules for this.

Category 1 material can also be used for the manufacture of derived products as specified by the Regulation, such as medical devices.

(b) Disposal and use of Category 2 material

Article 13 of Regulation (EC) 1069/2009 sets out the disposal routes for Category 2 material.

The basic options of incineration and rendering followed by incineration are permitted, as with Category 1 material. All Category 2 material can also be pressure-rendered and disposed of in an authorised landfill site. Use as fuel for combustion is foreseen in the Regulation once the Commission formulates rules for this. Category 2 material can also be used for the manufacture of derived products as specified by the Regulation, such as medical devices.

However, there are also other uses for Category 2 material which do not apply to Category 1 material. Category 2 material can be pressure-rendered and then used for the production of organic fertilisers and soil improvers. It can also be pressure-rendered and used in an approved composting or anaerobic digestion plant.

A very limited number of Category 2 materials (manure, digestive tract content, milk and milk based products and colostrum) may be applied directly to land without processing provided there is no risk of transmitting a disease.

There is also an option for ensiling of Category 2 fish under national rules. However, currently in the UK we have no agreed rules to permit this.

(c) Disposal and use of Category 3 material

Article 14 of Regulation (EC) 1069/2009 sets out the use and disposal routes for Category 3 material. As low-risk material, there are a much wider range of options for use and disposal of Category 3 material compared to higher risk material.

Category 3 material can like Category 1 and Category 2 material be incinerated, or rendered followed by incineration. Category 3 material can also be rendered followed by disposal in an authorised landfill (unlike higher Category material this does not have to be pressure rendering).

Use as fuel for combustion is foreseen in the Regulation once the Commission formulates rules for this. Category 3 material can also be used for the manufacture of derived products as specified by the Regulation, such as medical devices.

Category 3 material can be rendered for the production of pet food and organic fertilisers or soil improvers. Rendered Category 3 material can also be used in the production of animal feeding stuffs, though TSE related restrictions on the feeding of processed animal protein severely restrict this.

Category 3 material can be used directly in approved composting or anaerobic digestion plants, and in the production of raw pet food.

Certain Category 3 material (raw milk, colostrum and products derived from these) can be applied directly to land provided there is no risk of transmitting a disease. Shells from shellfish and eggshells may be applied to land in accordance with national rules.

There is also an option for ensiling of Category 3 fish under national rules. However, currently in the UK we have no agreed rules to permit this."

In addition to the above comments, reference is also made to the comments made previously at Sections 4.1 to 4.5.

6. **Your views on competition within the relevant product and geographic markets, and any other market definition you may consider relevant. This should include comments as appropriate on each of your competitors, as well as on your customers and suppliers in relation to the relevant markets, on the level of prices and variety and quality of products in the relevant markets, and on any capital structure and financing issues.**

The issue of competition in the relevant product and geographic markets is addressed generally in Section 11 of this Submission. Reference is also made to the First Report and the Supplementary Report where Pat Massey addresses competition in the markets.

In addition, the Parties would note the following. As previously stated, the Parties' view on the relevant markets is that there are two markets to consider.

1. Category 1 in NI, ROI and GB

The Category 1 market consists of two elements; Category 1 ABPs and Fallen Stock. The processing of each of these elements and the service offered for the processing of each of these groups of materials would be viewed generally as a disposal facility for the material. Category 1 outputs are limited in their use and must only be supplied to a user that will ultimately have the product combusted. This limits output uses of Category 1 products and therefore their value.

As a result of this, renderers are unable to deliver any value back to the suppliers for the material that they are producing, hence the belief that it is a disposal route and not a process which seeks to add value to the material.

The processors that will generally be able to be more competitive in the industry are those which can reduce costs within their operation or run with a lower cost model (for example, using a cheaper fuel such as gas, where available), maximise efficiencies within their operation, or decrease costs by maximising throughput and therefore achieve a greater spread of fixed costs per tonne processed and lower the processing cost per tonne of material intake.

There are no major gains to be made in maximising end product prices, as Category 1 products are generally commodity products and will be restricted by a price range which will be similar for all competitors.

In terms of Linergy, the most significant restriction it is under is a lack of access to natural gas. The rendering operation requires a large volume of steam production, and therefore uses a large amount of fuel in this process. Access to natural gas would significantly reduce Linergy's fuel bill. In Linergy's case, this is actually a loss of revenue as opposed to a cost, as Linergy uses tallow that it produces as fuel to produce the steam required. This is a product which could otherwise be sold. All other Category 1 rendering plants in the British Isles have access to natural gas to Linergy's knowledge.

To compensate for this, Linergy focuses on [✂]. This is done by [✂].

2. Category 3 in NI, ROI and GB

The Category 3 market consists of the processing of a wide range of material produced at meat processing facilities which is not deemed to be Category 1 or 2 and therefore not deemed to be an at risk product. However, these products are not always fit for human consumption or do not have appropriate markets available at any particular time.

The outputs from this process may be sold for a much wider range of uses than Category 1 outputs, and can have varying uses including pet food, soap production, etc.

The net result of this is that, while similar to the Category 1 industry in that cost efficiencies and best practises are helpful in differentiating competitors, the greater options for selling the Category 3 end products allows competitors to set themselves apart.

Products can be specially made by the Category 3 producers which will suit different customers at any particular time and allow producers to gain a slight advantage over their competitors.

A current example of this is the [✂].

As a result of this, [✂].

This summarises the dynamic of the Category 3 market. The ability to innovate and produce higher value end products delivers an ability to compete more effectively in the market for the raw material.

This, along with efficiencies, and, importantly, sufficient volumes to effectively cover overheads, will drive a renderer's competitiveness.

7. **Please summarize your current strategy in relation to the supply of animal rendering services to the extent that it is not explained in the latest versions of your strategy documents submitted in response to the CMA's initial factual information request (see Annex B).**

[✂].

[✂].

Barriers to market entry/exit

(See Part 5.8 of Merger Assessment Guidelines, CC2 (Revised)/OFT1254 (adopted).)

8. **A description of all the barriers to entry and the barriers to exit in the supply of animal rendering services. In addressing this issue, please explicitly consider factors such as legal or regulatory barriers, patents or know-how, licences, the importance of economies of scale and/or scope, the minimum efficient scale for a business and access to sources of supply. Please also consider the role of incumbency advantages in the form of information, reputation and cost as a barrier to entry. This can include information copied from your previous submissions to the CMA.**

Linergy provided a table on barriers to entry to the CMA as Appendix 25 to its Response of 4 March 2015. A copy of the table is attached at [✂]. In addition, the Parties have provided details of expansion, entry or exit in animal rendering over the past five years below.

Fallen Stock and Category 1

1. Entrant: Envirocare, Derrylin, County Fermanagh

   Envirocare has been licensed to process Animal By-Products ("ABP") since 2008 at an incinerator in Derrylin. However, the company entered the Fallen Stock market for the first time in 2013. This can be confirmed with the NFSCo.

2. Entrants: Route Hunt Ltd, Portrush and Mr H Cochrane, Rasharkin, County Antrim

   Reference is made to [✂] which is taken from the DARD website.[14] This contains the list of approved ABP premises in Northern Ireland and includes the two companies named above. The last two digits of the registration number indicate the year that registration was approved. In both cases, the year was 2014.

3. Exit: Premier Proteins, Ballinasloe, County Galway

   [✂] contains a document which was published by the Environment Protection Agency ("EPA") in Ireland on 19 January 2012. Linergy discovered this document on an internet search on Premier Proteins. The document confirms that Premier Proteins was sold to College Proteins. The document refers to College Proteins' intention to "carry on rendering activities at the Ballinasloe site, albeit rendering of a different type and scale". As far as Linergy is aware, there is no Category 1 activity currently in operation on the Premier Proteins site at Ballinasloe.

Category 3

1. Entrant: Simply Soups, Naas, County Kildare

   Simply Soups' operation preceded the five year period referred to in this question. However, the company has only been active within the last couple of years in the purchasing of Category 3 bones for its production facility. As explained above in response to Question 14, the use of Category 3 bone material for soup production is an emerging market and one which has expanded over the last couple of years.

2. Expansion: Munster Proteins, ABP Group, Cahir, County Tipperary

[14] http://www.dardni.gov.uk/index/animal-health-and-welfare/animal-by-products/approved-premises.htm

Munster Proteins, which is part of the Anglo Beef Processors Ireland Group, is in the process of establishing a new Category 3 facility at its site in Cahir, County Tipperary. This will operate in addition to the existing Category 3 facility on the same site. As far as Linergy is aware, this development is not yet operational. [✂] contains a copy of a letter from South Tipperary County Council sent to the EPA in March 2013 regarding the permissions needed for the development of this site to proceed (planning permission was subsequently granted for the facility by South Tipperary County Council). As the facility is not yet completed, no further licenses have yet been issued.

3. Expansion: Dublin Products, Dunlavin, County Wicklow

In 2012 Dublin Products opened a new processing facility at its site in Dunlavin, County Wicklow. This was a Category 3 facility which has been in operation since that time. [✂] contains a copy of an Integrated Pollution Prevention and Control ("IPPC") license issued by the EPA to Dublin Products on 2 May 2012. This confirms that Dublin Products is authorised to operate the plant at Dunlavin.

4. Exit: Premier Proteins, Ballinasloe, County Galway

As explained above, [✂] contains a document published by the EPA in Ireland. This confirms that Premier Proteins was sold to College Proteins. As noted, the document refers to College Proteins' intention to "carry on rendering activities at the Ballinasloe site, albeit rendering of a different type and scale". As far as Linergy is aware, there is no rendering activity currently in operation on the Premier Proteins site. Since submitting the original response on Premier Proteins, Linergy has become aware that Premier Proteins has not actually been involved in Category 3 rendering. The company was only involved in Category 1 rendering and, as noted, is no longer involved in that activity.

9. **Your views as to whether there will be any sizeable entry of animal renderers, or other parties you consider pose a competitive constraint on animal renderers, into the supply of animal rendering services in the next three years. Similarly, your views on whether there will be any sizeable exit in the next three years.**

A sizeable entry has already recently occurred in the Category 3 market via the new plant which has been opened in Munster Proteins at Cahir, County Tipperary in the Republic of Ireland. This plant adds capacity and [✂]. As noted, [✂].

Linergy would also expect more non renderers to enter the market for material which is currently being processed in rendering plants. Legislation is likely to change over the next three years and certain products will start to find their way into the food chain or have direct access to pet food markets without having to be processed in a rendering plant first.

Category 1 is less likely to attract new entrants as the available raw material for this process is likely to decline over the next three years and/or as legislation progresses on the categorisation of tissues produced at meat processors. At the same time, Linergy does not expect this to result in any exits from the market. There will always be a certain portion of material which will be categorised as Category 1 and which will need to be processed in a Category 1 plant in order to retrieve some value for the meat processors. In addition to this, fallen stock will remain as Category 2 material and will therefore be processed in Category 1 plants. There is a possibility that some plants may switch to become Category 2 plants and try and maximise the value from Category 2 products, the outputs of which would have a higher value than Category 1 outputs.

10. **The Counterfactual**

(See Part 4.3 of Merger Assessment Guidelines, CC2 (Revised)/OFT1254 (adopted).)

A description of what would have happened in the absence of the merger situation and, separately, in the absence of the MOU, to UFBP and in the market in general. This can include information copied from your previous submissions to the CMA.

10.1 **Introduction**

The CMA states (paragraph 27) that it assesses a merger's impact relative to the situation that would prevail absent the merger. The counterfactual is generally taken to be the prevailing conditions of competition at the time of the merger. In the current case, the Parties believe that absent the Transaction (i.e. the merger), Linergy would continue to process Category 1 material at its Dungannon plant and Ulster Farm would continue to process Category 3 material at its Glenavy site. The counterfactual, therefore, would involve the same conditions of competition as currently prevail. As a result, competition issues would not arise when the Transaction is considered in the context of the counterfactual as the Parties would not be competitors. Moreover, each of the Parties would operate in separate product markets (Linergy in Category 1 rendering, Ulster Farm in Category 3 rendering) which are highly competitive, particularly as the relevant geographic market in each case involves the island of Ireland and Great Britain (in particular, Scotland and the North of England).

The counterfactual is addressed at paragraphs 27 to 56 of the CMA's Phase 1 Decision. In considering the relevant counterfactual (paragraphs 27 to 31), the CMA states that it believes that the MOU influenced each of the Parties' conduct from 31 May 2012 and that the counterfactual should be informed by the situation directly preceding the signing of the MOU, rather than the situation pertaining at the time of the Transaction. Taking this approach, the CMA concludes on the counterfactual (paragraph 56) that "*it is realistic that Linergy would have built a Category 3 plant and Ulster Farm would not have closed its Category 1 plant, and that both firms would have operated both plants through to the time of the Transaction in the absence of the MOU*". This, the CMA states, would have represented a more competitive situation than the prevailing conditions of competition at the time of the Transaction. Consequently, for the purposes of its Phase 1 competitive assessment, the CMA decided that it should use the situation in which each of Linergy and Ulster Farm operate both a Category 1 and a Category 3 plant.

The Parties do not agree with the approach taken by the CMA in its Phase 1 Decision to the relevant counterfactual and the conclusions that it drew from its approach. In particular, contrary to what the CMA states in its Phase 1 Decision (see, for example, paragraph 31), the evidence does not support the conclusion that the MOU influenced the conduct of Linergy and Ulster Farm from 31 May 2012 and, in particular, in relation to the decisions which the companies respectively took concerning, on the one hand, the possibility of Linergy building a Category 3 plant and, on the other hand, SAPI's decision to close Ulster Farm's Category 1 plant. This is the key issue to the correct approach to be applied to the analysis of the counterfactual in this case and the evidence supports the position of the Parties and not the position adopted by the CMA in its Phase 1 Decision. In addition, the CMA's approach to the counterfactual generally is fundamentally flawed from an economics perspective. This is addressed in detail by Pat Massey at Section 4.1, paragraphs 120 to 130 of the First Report and at Section 2, paragraphs 20 to 29 of the further Report which Pat Massey prepared which was provided to the CMA on 9 July, 2015 ("**the Supplementary Report**") ([✂]). This is also addressed further below in this Section.

As the Parties explained in submissions that they provided to the CMA during Phase 1, at the Issues Meeting and in their Response to the Issues Letter, each of Linergy and SAPI decided independently to take the course of action which they adopted in,

respectively, October, 2012 and December, 2012 in relation to SAPI's decision to close the Category 1 plant at Ulster Farm and Linergy's decision not to build a Category 3 plant at its Dungannon site. Each decision was taken for commercial reasons, based upon each company's consideration at the time of the commercial viability of what was involved. The decisions were not influenced by the MOU which Linergy and SAPI agreed in May, 2012. Consequently, the Parties do not believe that it is appropriate to suggest that, had the MOU not been signed, Linergy would have built a Category 3 plant at Dungannon and SAPI would have maintained the Category 1 plant at Glenavy. In each case, the same decision would have been taken for the same commercial reasons, whether or not Linergy and SAPI had agreed the MOU.

For its part, Linergy explained in Responses provided to the CMA during Phase 1 that its Board of Directors did not take into account the MOU with SAPI at the time of the decision not to proceed with the development of a Category 3 plant in December, 2012. Linergy confirmed that, rather, the Board took the decision on a purely commercial basis (see Response of 5 February, 2015 to Question 8 of a CMA Section 109 Notice of 22 January, 2015 – copy attached in [✂]).

For its part, SAPI explained in Responses provided to the CMA during Phase 1 that SAPI decided to close the Category 1 plant at Glenavy in October, 2012 because there was no business case to justify continuing to operate the plant.

The Parties would make a number of comments in this regard:

(i) the reasons involved in respect of each decision clearly illustrate that these decisions were taken solely for commercial reasons;

(ii) information and internal, contemporaneous company documentation which the CMA sought from the Parties in the Phase 1 process clearly supports the position of the Parties and does not provide evidence to support the position adopted by the CMA in the Phase 1 Decision.

The Parties have elaborated on these matters below.

10.2 SAPI's decision to close Ulster Farm's Category 1 plant

10.2.1 Background to SAPI's Decision

The Ulster Farm Category 1 plant was regulated by the Industrial Pollution & Radiochemical Inspectorate ("**IPRI**") from 2005. There were ongoing issues with odours from the site and emissions to a nearby river.

In 2012, the IPRI was investigating the odours at the site and, while they could not pinpoint the cause, it was clear that the odour emissions from thermal oxidisers were at unacceptably high levels and needed to be addressed. The IPRI was also concerned that there were a number of times when odours were detected in the vicinity of the plant even though the facility was not operating. This suggested that there was a need to address improvements in the containment and treatment of room air, and other possible fugitive emissions. Finally, the IPRI indicated that there were occasions when malodours were detected in the vicinity of the treatment plant.

At the time that SAPI purchased Ulster Farm, a technical audit of the Category 1 plant was carried out by SAPI's technical staff. The evaluation related to the oxidiser and was made on the basis that the system that Ulster Farm had in place was not capable of eradicating the odour problem. This was evident from

the number of complaints that Ulster Farm received about the Category 1 plant (these complaints were sometimes reported by the Northern Ireland Environment Agency ("**NIEA**") to the company and sometimes made directly to the company by private persons). Details are as follows:

- 2006 - 96 complaints.
- 2007 - 92 complaints.
- 2008 - 64 complaints.
- 2009 - 45 complaints.
- 2010 - 64 complaints.
- 2011 - 110 complaints.
- 2012 - 73 complaints (the last complaint before the Category 1 line was closed was made on 29 August 2012).
- 2013 - no complaints.
- 2014 - no complaints.

On the basis of the above, SAPI believes that its decision to close the Category 1 plant was the correct one from the perspective of this background and these environmental issues. SAPI's manager can also report that the Glenavy community and the NIEA appreciated the effort made by SAPI and that both have complemented SAPI for the way that SAPI resolved the problem.

In addition to the environmental problems with the condition of the Category 1 plant identified above, SAPI also believed that there was no commercial case for Ulster Farm to continue operating the plant. [✂]. As noted in Section 1, the primary commercial problem was a lack of supply of raw material, which was exacerbated by excess capacity in the industry generally. A price increase in early 2012 which was designed to reduce losses had resulted in the loss of two of the Category 1 plant's three major customers to rendering plants based in the Republic of Ireland. In addition, as noted above, the plant was in a poor state of repair and raised serious environmental issues and needed significant upgrading and capital investment. The required level of investment could not be justified commercially. Consequently, SAPI decided to close the plant in October, 2012.

10.2.2 **Evidence on SAPI's Decision**

At the Issues Meeting held on 25 June, 2015, [✂] of SAPI explained that SAPI decided to close the Category 1 plant because of the environmental problems with the plant highlighted above in Section 10.2.1 and the lack of a business case to continue operating it, as also referenced in Section 10.2.1. In particular, [✂] confirmed that the Category 1 plant was [✂]. It was agreed at the Issues Meeting that [✂] would provide [✂] of the Category 1 plant in October, 2012. This information was provided the following day to the CMA in conjunction with the submission of the Parties' Response to the Issues Letter of 23 June, 2015. A copy of the information is attached in [✂].

On the environmental issues, [✂] explained that SAPI is a well-established company which operates internationally in the animal rendering business and one which takes compliance and its reputation very seriously. SAPI would not want its reputation to be damaged because of one operation in Northern Ireland. [✂] also explained that the actual scale of the problems which SAPI encountered after acquiring Ulster Farm was greater than the company had expected. SAPI was also concerned with the scale of the issues that had been raised by the regulator. These were important considerations for SAPI (whatever views may have been expressed to the CMA on regulatory issues and deterrents – see page 5 of the Annex on the Counterfactual which was attached to the Issues Letter – statements which the Parties found surprising).

Having reviewed the Category 1 plant, SAPI concluded that the plant needed an oxidiser. This would have cost £[✂] to £[✂] and would have required [✂] to [✂] months to build. SAPI could not have installed a new oxidiser with the technology which was then in the Category 1 plant as that technology was too old. Consequently, new technology would also have had to be installed if the Category 1 plant was to be refurbished. In addition, there were other problems with the plant which meant that SAPI had to often stop operations. The overall costs involved would have been in the region of £[✂] million which represented [✂]% of the price that SAPI had paid on purchase. SAPI would also have had to close the plant for [✂] and would have lost its suppliers as a result. In these circumstances, the Board of SAPI decided to close the plant.

In addition, in responses provided to CMA requests for information and documentation during Phase 1, the Parties provided all relevant internal documentation relating to the Category 1 plant decision that was available. This is summarised below. This evidence supports the explanation provided by SAPI that it decided to close the Category 1 plant for its own commercial reasons.

In Question 23 of a Section 109 Notice dated 15 December, 2014, the CMA asked Linergy to provide copies of all internal documents prepared by Linergy discussing the closure of Ulster Farm's Category 1 plant in October, 2012. Linergy explained in a 14 January, 2015 Response that it did not have any such documents. This reflected the fact that SAPI took its own decision on the Category 1 plant without any involvement or influence on Linergy's part.

Linergy commented in submissions to the CMA during Phase 1 on the current state of Ulster Farm's Category 1 plant and related issues which were raised by the CMA. These comments are helpful in highlighting and confirming the scale of the problems which had arisen at the plant and why SAPI had to close down the plant, in addition to the fact that it [✂].

In particular, at Question 24 of a Section 109 Notice which was issued to Linergy on 15 December, 2014, the CMA asked Linergy to provide details of the then current state of the Ulster Farm Category 1 plant, including what was originally at the site, what machinery had been removed, details of all servicing and maintenance at the plant since October, 2012, details of any licences still held by the plant, details of any steps taken to decommission the plant, and details of what would be required for the plant to recommence operations.

In responding to Question 24 on 14 January, 2015, Linergy commented on the basis of information which the company obtained on Ulster Farm's former Category 1 plant during Due Diligence and as a result of Linergy's impression

of the plant from visiting the site. Linergy's comments were also based on the company's own experience of the industry and the operation of rendering plants generally.

The Buildings

Linergy found that the buildings in which the plant was located were in a state of disrepair. In particular, the buildings were no longer airtight and there were holes in the buildings. This leads to environmental issues and would have been linked to the problems highlighted above which Ulster Farm experienced with the NIEA. The process was housed in two separate buildings and part of the process passed through the walls of each building and was outside in between. This is not good for environmental control. The buildings would have needed significant repair work in order to bring them up to standard and to fix such problems. Linergy estimated a budget for building works at around £[✂].

The Plant

At the time the plant was functional, it was not well maintained. Since the closure of the plant, a number of the presses have been removed from the process and reinstalled in the Category 3 process on site. Other parts of the process have also been removed and used in the Category 3 process, including motors and drives. The Category 1 plant has been used as a spare parts backup for the Category 3 plant with the result that there are parts missing throughout the process. In addition, the cooker was not properly cleared out at the time of shut down, so there was material still in the cooker when it was shut down that still is there. This would make it very difficult to restart the plant and function properly. Linergy would estimate a budget for addressing these issues as follows: presses (£[✂]); cooker (£[✂]); and other (£[✂]).

Licenses

An Animal By-Products processing license may technically still be in place as issued by the Department of Agriculture and Rural Development ("**DARD**"). This is a matter of displaying the ability to process within the regulations set by DARD. This could only be done if the necessary repair works indicated above were carried out and the plant parts replaced. DARD would have to inspect the process before allowing material to be accepted onto the site.

The environmental license (IPPC) is still in place for the Category 1 plant as the license covers the whole site. It would not have been adjusted to recognise the fact that the Category 1 plant is not operational, as the emission point is still there and could be used again. Consequently, in terms of starting up again, the license is in place. However, as indicated above, being able to meet the conditions as set out in the license would require the remedial work highlighted to be carried out. In other words, whilst a licence is still held, the Category 1 plant is not capable of satisfying the licence conditions without substantial investment and upgrading, as described above.

Other Issues

Category 1 material will decrease significantly in the future. Regulations will change in the Republic of Ireland from the end of 2015 which will mean that there will be no more Category 1 material produced in meat plants in the Republic of Ireland. Fallen Stock will remain Category 2 which will still have to be processed in a Category 1 plant or else incinerated. Similar changes will

occur in the UK at the end of 2018, with some changes to the classification of certain parts of the animal expected in 2015, which will also reduce Category 1 supply.

Given the combination of excess Category 1 capacity and an ongoing decline in the supply of raw materials, there is no realistic likelihood of the Ulster Farm Category 1 plant being re-opened by SAPI or indeed any other operator of the plant. A business case cannot be made for it.

10.3 Linergy's Decision not to build a Category 3 plant

10.3.1 Background to Linergy's Decision

As explained in Section 1, Linergy was established in 2005 as a result of a combination of two meat processors, Linden Foods (owned mainly by Fane Valley Co-Op) and Dunbia (the Shareholder Meat Processors ("**SMP's**")). Other non-meat processors were engaged at the time as well and had input as shareholders. As explained in Section 1, attached in [✂] are tables which illustrate the shareholders in Linergy, both pre and post the Transaction.

The SMPs in 2005 were solely in the business of processing live animals from slaughter through to producing retail packs for sale in supermarkets. The process resulted in the production of Animal By-Products ("**ABPs**") which could not be sold for any edible use, either human or animal. This in particular was made up of Category 1 material, as at that time a large portion of ABPs were deemed to be Specified Risk Material ("**SRM**") as a result of the BSE crisis in 1996. This material had to be disposed of in an approved rendering plant and the meat plants were under inspection to ensure that this was carried out. At that time, there was no separation of ABPs between SRM and other materials (now known as Category 3). No separate market existed for Category 3 products, so no separation was required.

Following the BSE crisis, all meat processors oversaw a shift change in their business which saw material, which previously would have carried value and provided revenue to the companies, become a cost burden. The SMPs were no exception to this.

This shift change caused the SMPs to re-examine their businesses. They decided that they needed to address what had become a significant cost to their business. The most logical way to do this was to establish a rendering plant themselves to process the ABPs. This required collaboration between Linden and Dunbia as neither party would have the required volumes to supply a rendering plant on their own. This led to the creation of Linergy.

In 2007 Linergy started processing the ABPs from the SMPs and gradually started to build up the business by processing material from other sources. The process produced two products, Category 1 tallow and Category 1 MBM.

The intention of Linergy at start-up was to produce these two products for sale initially, but to then develop further solutions for the use of these products. This would involve using the two products for electricity production, which was seen as a means of extracting further value from the ABPs which were being produced by the SMPs. The long term strategy of Linergy at the outset was to deliver as much value as possible from the ABPs, which would develop a sustainable business for both the rendering company and the SMPs, by delivering value from the ABPs produced.

The electricity production end of the business was under technical development from the time that the rendering plant started operation, and this has essentially continued ever since. [✂]. It would have been a pioneering project as the plan was to create a facility to combust Category 1 MBM without using incineration, as environmental and planning agencies would not permit this technology to be used. As time went on, this plan became increasingly difficult to deliver as reliable, tested technology was not readily available. Several options were researched extensively by Linergy without any success.

By 2009 new markets had started to develop for Category 3 end products. Category 3 end products were being sold in the market place for prices significantly higher than Category 1 products.

At this time, Linergy management identified this as having an impact on Linergy's future business for varying reasons.

Firstly, as the Category 3 end products were more valuable than Category 1 end products, Category 3 ABPs became more valuable than Category 1 ABPs. As Linergy was not producing Category 3 products, it could not therefore afford to meet the higher value of the Category 3 ABPs. This was an impending threat to the volumes processed by Linergy as ABP suppliers would likely switch to a renderer that could deliver this value, unless Linergy was willing to accept this material at Category 3 prices and absorb the impact of this.

Secondly, as the strategy of Linergy was to derive best value from the ABPs supplied both by the SMPs and other sources, an inability to process Category 3 ABPs would mean that this target was unattainable. Consequently, the SMPs would not be receiving best value for their Category 3 ABPs. The power generation project was still stalling and no solution seemed achievable. As it was, this means of adding value would still not have delivered the value achievable through the sales of Category 3 products.

In these circumstances, Linergy management decided that the best course of action for the company was to explore the possibility of establishing a Category 3 rendering plant in order to produce Category 3 products, to preserve the volumes processed, and to protect the values of the ABPs being processed. This was first discussed by the Linergy Board in May, 2009. Alongside this, the power generation project research would continue with a view to adding value to Category 2 products, but would be considered on a reduced scale to reflect the expected reduced Category 1 products volumes.

This new plan presented problems from the start as establishing a new Category 3 facility would add capacity to the Linergy business. This additional capacity would be added to volumes already being processed by Linergy and would not necessarily result in the attraction of new customers, rather it would help to retain the services of existing customers. Consequently, when considering any proposals to build a new Category 3 facility, Linergy also had to consider the impact on the Category 1 facility.

[✂].

[✂].

[✂]. This was the plan which was approved at the May, 2011 Board meeting.

This proposal was put off subsequently in 2011 when the opportunity to purchase the Ulster Farm business arose. At this time, Ulster Farm was operating both Category 1 and Category 3 plants. However, the two plants were trading poorly.

The benefit to Linergy in purchasing the Ulster Farm business was that it would give access to its established Category 3 plant and would do so both with less capital required and with less of a lead time than if Linergy proceeded with the plans to build its own Category 3 plant. In addition to this, Linergy would acquire the small volume of Category 1 material which Ulster Farm was processing, provided it retained its existing customers which were on rates favourable to suppliers at the time. If retained, this volume would help offset the loss in the Linergy Category 1 plant which would be suffered as a result of the Category 3 material that Linergy was still processing switching to the Category 3 plant at Ulster Farm.

[✂].

Linergy agreed Heads of Terms for the purchase of Ulster Farm in September, 2011, completed Due Diligence in October, 2011 and approached the OFT in October, 2011 to seek approval to complete the transaction. However, in March, 2012 the OFT informed Linergy of its decision to refer the case to the CC for clearance. The HOTs stated that approval should be sought only from the OFT in order for the transaction to proceed. This was specifically included as the owners of Ulster Farm were concerned about the length of time that a CC process would involve and believed that, given its financial position, Ulster Farm would not survive trading for the duration of a CC review. As a result, the HOTs fell away following the OFT Referral Decision.

As explained in Section 1, in May, 2012, Linergy was approached by SAPI which was by then involved in the tender process for the purchase of Ulster Farm, which had been placed on the market subsequent to the collapse of the agreement with Linergy. SAPI was interested in purchasing Ulster Farm and was also interested in having an arrangement with Linergy which could see Linergy and Ulster Farm being merged subsequently into one company. However, this was not then possible given the Decision of the OFT. Consequently, Linergy and SAPI entered into an MOU that could see the companies merge within two years of the MOU if the circumstances permitted and there were no regulatory issues.

[✂].

Following on from this, Linergy management again started research on the project for a Category 3 plant. This was then presented to the Board in December, 2012. Some of the variables had changed in the period between the last approval being sought in May, 2011. In particular, a number of the financial assumptions made at the Board meeting of May, 2011 had to be reviewed (Linergy comments further on this below in Section 10.3.2). The same problems still existed as previously, in particular, the plan still involved a high investment by the shareholders and high bank borrowings. These had increased since the previous proposal as the capital costs had increased. In addition, the Category 3 rates for the supply of Category 3 ABPs were higher than that which was budgeted in the previous proposal. Essentially, the market had been established in the intervening period and was more aggressive and competitive than had been anticipated. Taking into account all these

considerations, the plan was considered by the Board to be too risky and was rejected as a result.

10.3.2 **Evidence on Linergy's Decision**

[✂] Linergy, explained at the Issues Meeting held on 25 June, 2015 the reasons why the Linergy Board decided in December, 2012 not to build a Category 3 plant. [✂], which is one of the principle shareholders in Linergy. It was clear from [✂]'s summary that the Linergy Board decided that this was the appropriate commercial course of action to take in light of the information available to the Board at the time. Reference is therefore made to the comments provided by [✂] at the Issues Meeting. The key comments are summarised below.

First, as noted above, circumstances had changed from May, 2011 which impacted upon the assumptions upon which the proposal had originally been based. Linergy factored those changes into a revised model. One of those factors was what Linergy had been told in a conversation with its possible equipment supplier that it should factor in an increased level [✂]. Other factors were also relevant, i.e. higher [✂] costs.

Second, the risk profile of the project had changed. The Category 3 market was more competitive at the end of 2012 than it had been in early 2011. There was movement of material to the Republic of Ireland and Northern England and it was also anticipated that Scottish renderers would be competing for material, which subsequently turned out to be the case. In addition, there were also risks on the timeframe, in particular, in relation to planning.

Third, Linergy, and others, had little certainty as to how regulatory issues were likely to unfold after 2012.

Fourth, Linergy had not yet approved bank funding.

In these circumstances, [✂], as an investor in Linergy, decided that it could not invest in the proposal.

In addition to the evidence presented by [✂] at the Issues Meeting, Linergy has provided all relevant internal, contemporaneous documentation to the CMA concerning its decision on the Category 3 proposal. In particular, in Notices which the CMA issued in its Phase 1 investigation, the CMA asked Linergy to provide all relevant internal documentation relating to its decision not to build a Category 3 plant. Linergy did so in various responses which it provided to the CMA. This evidence illustrates that Linergy decided for its own commercial reasons not to build a Category 3 plant because the proposal was not commercially viable. The evidence does not support the views expressed by the CMA in the context of the counterfactual in the Phase 1 Decision.

In these circumstances, it is helpful to summarise and detail the evidence below.

At Question 21 of a CMA Section 109 Notice dated 15 December, 2014, the CMA requested Linergy to provide all internal documents produced by Linergy, or its associated companies, in the then previous 5 years which discussed the possible construction of a Category 3 processing plant by

Linergy. Linergy provided all such documents in Appendix 21 to its Response of 14 January, 2015 ([✂]).

The attached documents are minutes from Board meetings ranging from May, 2010 to December, 2012 at which the possible construction of a Category 3 plant was discussed. The documents plot the path from the plan first being discussed at Board level to the plan being abandoned. As can be seen from the documents, various problems were encountered during the planning of the project that caused several delays and postponements. As is also evident from the documents, some uncertainties were constant during the period of review. In particular, attainment of volumes, capital costs and expected rates for raw material were always uncertain and the viability of the project was dependant on these factors.

In addition, at Question 9 of a CMA Section 109 Notice dated 22 January, 2015, the CMA requested Linergy to provide full details of the financing arrangements made as part of Linergy's original plans to build a Category 3 plant. Relevant documents were provided by Linergy in Appendix 9 of its Response of 5 February, 2015 to that request ([✂]).

The documents provided are the principle documents which were used in an attempt to secure financing for the proposed Category 3 plant. [✂].

As explained above, in taking its decision in December, 2012, Linergy had to revise a number of assumptions which had been used in considering the original proposal in May, 2011. In a CMA Information Request dated 20 February, 2015, the CMA requested Linergy to explain the reasoning behind each of the revised assumptions which Linergy considered at its Board meeting of 10 December, 2012 when it decided not to continue with the proposal to build a Category 3 plant (Question 23). These revised assumptions were referred to in Section 7 of the Board minutes. The CMA also requested Linergy to provide supporting evidence for the reasoning. Linergy responded on 4 March, 2015 that the reasoning behind the revised assumptions was as follows.

1. **Increase in cost of construction**

[✂].

2. **Increase in** [✂] **costs**

[✂].

3. **Increase in** [✂] **costs**

[✂].

4. **Decrease in** [✂]

[✂].

5. **Increase in** [✂]

[✂].

[✂].

[✂].

[✂].

6. **Increase in** [✂]

[✂].

[✂].

[✂]:

[✂].

10.4 CMA Comments in the Phase 1 Decision

10.4.1 Preliminary Comments

The CMA makes a number of comments at paragraphs 27 to 31 of the Phase 1 Decision by way of background to its analysis of the counterfactual (which is generally provided at paragraphs 32 to 56). The Parties have commented below on certain aspects of these comments before addressing the CMA's counterfactual arguments as this is important in understanding the background to the issues which arise.

For example, at paragraph 28, the CMA states that, directly prior to the Parties entering into the MOU, Linergy had secured the necessary licensing and planning approvals for construction of a Category 3 plant at its Dungannon site. This is not correct.

Linergy had not "secured" the necessary licensing and planning approvals. Rather, Linergy had obtained planning permission for another process which Linergy was confident could be converted into the necessary approvals for a Category 3 plant. The building which was approved was not of a sufficient size for a Category 3 plant, as evidenced by the need to seek permission to extend the building. [✂].

Similarly, at paragraph 29 of the Phase 1 Decision, the CMA stated that the OFT Decision had found that, absent the original attempt at a merger, there had been a "realistic prospect" that Linergy would have built its own Category 3 plant which would have competed with that of Ulster Farm.

On reflection, the "realistic prospect" of Linergy building a Category 3 plant at that time was not as realistic as it may have appeared. [✂]. However, clearly this was a project which was never certain of proceeding and which never made it past the planning stage. The plan to build was effectively replaced by the plan to purchase Ulster Farm and this was a realistic prospect between September, 2011 and March, 2012, when the referral by the OFT to the CC led to the purchase agreement being revoked by the seller due to the financial state of Ulster Farm at the time. Following the collapse of that proposed merger, Linergy turned its attention back towards the possibility of building a Category 3 plant later in that year. However, by then, there had been changes in some of the factors which were key to the decision making process, which were highlighted to the CMA in Phase 1. It was at this point, in December, 2012, almost four years after it had first been raised as a proposal, that the final decision to not build a Category 3 plant was taken.

The point that emerges from these comments is that the CMA overstates the extent to which Linergy had progressed the possibility of building a category 3 plant at its Dungannon site when the opportunity to purchase Ulster Farm arose in September, 2011.

Linergy would make one final preliminary comment in a similar vein. As noted, the CMA states in its Phase 1 Decision that the counterfactual should be informed by the situation directly preceding the signing of the MOU (paragraph 31). Linergy would note a number of points on this.

The situation which preceded the original attempt at a merger is not the same as the situation pertaining prior to the signing of the MOU. In the situation immediately preceding the original attempt at a merger, Linergy had abandoned plans to build a Category 3 plant in favour of purchasing Ulster Farm. This proposal had subsequently been referred to the CC by the OFT which led to the purchase agreement collapsing. It does not necessarily follow that, after this, Linergy would have gone back to plans which were over one year old and picked up where it had left off. Investment decisions of this nature are highly sensitive of many factors which can change over the course of months and years. In addition, any project that Linergy had planned on progressing had [✂]. Linergy had made progress on this in 2011 but would have had to revisit any project with the bank at this point, and it would have had to take into account any changes to relevant factors in the intervening period. To assume that Linergy would have picked up where it had left off had it not signed the MOU is not a justified assumption.

In addition to this, the situation at Ulster Farm should be analysed prior to the MOU. At that stage, it was a loss making company which did not have sufficient funds or a promising enough business plan to survive the course of a CC investigation. Hence, the reason why the original merger was abandoned by the Parties, the then owners did not have confidence that their business would survive the expected 6 months of a CC review. Therefore, any purchaser coming into Ulster Farm would have had to make changes to the business in order to correct performance.

The Parties have demonstrated above how the decisions taken subsequent to the signing of the MOU were taken for purely commercial reasons. However, it should be considered how this fits in with the circumstances of each company prior to the MOU.

10.4.2 **The MOU**

The CMA analyses the MOU at paragraphs 32 to 40 of the Phase 1 Decision. The Parties have summarised the CMA's comments below and then commented in response.

First, the CMA states that the MOU was an expression of intent to work towards a merger rather than a formal sale and purchase agreement but that, for the purpose of assessing the counterfactual in this case, the character of the document is less important than the effect that the document might reasonably be expected to have had on the Parties' conduct (paragraph 32).

The MOU was not an expression of intent but rather a framework under which a merger could take place if the parties decided to attempt to proceed with one at some point in the two year period following the MOU. Either party had the option of aborting the MOU. In addition, the MOU would expire naturally at

the end of the two year period if both parties did not want to proceed. It is for these reasons that the MOU cannot be relied on as a definite future path and therefore cannot be factored into any decision which would affect the long term strategy and investment plans of the respective businesses.

Second, the CMA states (paragraph 33) that the MOU included binding terms [✂] and created a mechanism which would enable each of SAPI and Linergy to [✂] between the signing of the MOU and its expiry. The CMA continues that the effect of the MOU was that each party had [✂], as if the Parties were already merged.

This is not an accurate analysis of the effects of the particular clauses in the MOU.

First, the intent of the clauses referred to was not [✂] but rather to allow for the fact that valuations had been agreed for each company at the time of the MOU but that there could be a time lapse of up to two years before any merger might take place (if at all). Therefore, the valuations of the companies could change as the companies made profits/losses in that period. A mechanism had to be agreed to reflect this and these clauses were an attempt to do this.

Secondly, the net effect of these clauses does not necessarily lead to a conclusion that the clauses [✂]. In fact, there was a clear incentive to do the opposite. As shareholdings were already agreed, and the method of satisfying the considerations was agreed, the only point to be determined if a merger were to take place was the [✂].

[✂].

The CMA notes in its Phase 1 Decision (paragraph 34) that the Parties disagreed with the CMA's assessment of how the MOU was likely to have affected the Parties' incentives prior to the Transaction. The Parties made a number of comments in this regard in the Response to the Issues Letter which they provided to the CMA on 26 June 2015 (though no reference is made to the detail of these comments in the Phase 1 Decision). It is worth reiterating these comments and this is done below.

First, as noted, there was no certainty as to what would happen as a result of the MOU. In particular, it was not inevitable that the Parties would attempt to effect a merger pursuant to the MOU.

Second, a number of the provisions highlighted by the CMA could only enter in play in the event of a number of events occurring. For example, [✂].

Third, the possibility of any merger was subject expressly to regulatory approval. At the time of the MOU, and when SAPI and Linergy subsequently took their respective decisions in 2012 on their Category 1 and Category 3 businesses, Linergy had just come out of a regulatory process which on the face of it would not have offered encouragement that regulatory approval would be obtainable (whatever Linergy's views on the OFT Decision). It is also worth noting that the background to the MOU involved SAPI approaching Linergy rather than Linergy instigating any discussions with SAPI on possible future arrangements. Further, it was only subsequently in 2013, when Linergy sought and obtained advice that a merger could obtain regulatory approval in light of criticisms that could be made of the OFT analysis and the changes

which had taken place in the respective businesses of the two companies in the meantime, that Linergy considered the possibility of revisiting the issue.

Fourth, the MOU was only to last for two years. As explained by the Parties at the Issues Meeting, the timeframe involved in building a Category 3 plant at Dungannon (had Linergy decided to do so at the Board Meeting of December, 2012) and in refurbishing the Category 1 plant at Ulster Farm (had SAPI decided to do so in October, 2012) would have extended beyond this time period.

The CMA raised a query on the purpose of [✂] in MOU at the Issues Meeting. [✂], would have been subject to regulatory approvals.

In summary, the MOU had too many possible outcomes, dependent upon too many events, as to be a consideration which could impact upon decisions which were of the importance involved to the respective businesses of Linergy and SAPI. Rather, each party took its own decision based upon the commercial and regulatory issues involved and the information available to it at the time. This is supported by the documentary evidence which has been provided to the CMA and the submissions which the Parties provided to the CMA in Phase 1 and which they provide in this Submission. This position is also supported by economic analysis contained in the First Report provided to the CMA on 26 June, 2015 ([✂]) and the Supplementary Report provided to the CMA on 9 July, 2015 ([✂]). The Parties also comment further below on the MOU, particularly from the perspective of economic theory. Before doing so, the Parties comment on certain claims made by the CMA on market evidence.

In this regard, in addition to analysing the MOU, the CMA states at paragraphs 35 to 40 that it found evidence that it believes shows that the Parties, following the MOU but prior to the Transaction, conducted themselves as if they had already merged. The Parties have commented on this below. As a preliminary comment, the Parties would note that no such claims were made by the CMA at the Issues Meeting, rather the focus of the CMA's comments was on the MOU itself and the Parties have commented on that above. Without prejudice to that, the Parties have demonstrated below that the claims made at paragraphs 35 to 40 are not supported by the evidence.

First, the CMA refers to a decision taken by the SMPs in Linergy in July, 2012 to switch the supply of their Category 3 materials from Linergy to Ulster Farm (paragraph 36). The Parties had explained to the CMA during Phase 1 that the SMPs took the decision because Linergy [✂]. The CMA then states that the Parties' submissions show that the SMPs had supplied Category 3 material to Linergy for some time prior to July, 2012 in order [✂]. The CMA then states that it believed that nothing had changed from this position at the time the SMPs started sending Category 3 material to Ulster Farm in July, 2012, other than there now being the MOU. On the basis of this the CMA states that it believed that it was highly likely that the terms of the MOU influenced the timing of the SMPs' decision.

The interpretation of this evidence is highly questionable. All of the quotes in italics above would suggest that the shareholder suppliers were entirely correct to switch supply as [✂]. However, the CMA seems to be questioning the timing of the decision rather than the decision itself. The declaration that nothing had changed between (an unstated time) and July, 2012 when they switched supply is not factually accurate. Since as far back as 2009 until

March, 2012, Linergy had been looking at plans to build or purchase a Category 3 plant of its own. The intent was that this would deliver value for the shareholder suppliers, and therefore the shareholder suppliers maintained supply of these products in anticipation of this development. Following the collapse of the purchase agreement for Ulster Farm from Glenfarm in March, 2012, Linergy had no immediate prospect of purchasing a Category 3 plant. Given that the latest plans for building a Category 3 plant were more than one year old at that point, any plans to build were going to require further analysis, before any decision could be taken and [✂] could be achieved. Therefore, in the period up to and including July, 2012, Linergy was at best [✂] months away from operating a Category 3 plant. This was a significant change to the circumstances prior to March, 2012. The Linergy shareholder suppliers in question operate as meat processors and have a duty of care for those businesses which has to be considered.

To put this into context, the two suppliers in question are Linden Foods and Dunbia. Linden Foods has an annual turnover of £[✂] per annum and employs close to [✂] staff across all its sites. Dunbia has a turnover of approximately £[✂]per annum and employs [✂] staff across all its sites. Linergy has a turnover of £[✂] and employs [✂] staff. The meat plant operators could not conceivably have continued on a strategy of [✂]. That was the reason for their decision and the timing of the decision. The decision had nothing to do with the MOU.

Second, the CMA states (paragraph 37) that third parties which responded to the CMA's merger investigation, including customers, competitors, and companies involved in the collection and transportation of animal by-products, told the CMA that they understood that the Parties had effectively combined their businesses some time prior to completion of the Transaction. One customer is stated to have told the CMA that, several years prior to the Transaction, Linergy had encouraged it to switch the supply of its Category 3 materials from Linergy to Ulster Farm in order to help Linergy to "get into bed" with Ulster Farm. Another customer is stated to have expressed its belief that there had been an "unwritten agreement" in place between Linergy and Ulster Farm prior to the Transaction and that the Transaction merely formalised this pre-existing arrangement. Finally, the CMA states that another customer said that it had been told by SAPI some time prior to the Transaction that the Parties had already merged.

The Parties would strongly refute this and point out that it is difficult to comment on such comments when the commenters are unknown to Linergy and no evidence is required by the third parties to back up their comments. The Parties would also note that no issues have arisen in relation to the application and enforcement of the Interim Order which was adopted in March, 2015.

Third, the CMA states (paragraph 38) that it believes that Linergy's internal documents show that the MOU influenced Linergy's considerations about its commercial development plans. Linergy provided the CMA with four sets of Board minutes which pre-dated the MOU, including the minute of a Board meeting which had been called [✂]. The CMA comments that each of the three other minutes shows that the Board extensively discussed Linergy's plans to build or buy a Category 3 plant. The CMA comments that minutes of a 24 January 2011 Board meeting record a lengthy discussion during which all board members expressed themselves in favour of the project. One board member stated that [✂]. The CMA then comments that at a Board meeting of

8 April, 2011 the Board discussed [✂]. The minutes of the 6 April, 2012 Board meeting, shortly after the OFT's March, 2012 decision, record a discussion of [✂] Category 3 plant options to Ulster Farm, and the Board's decision that they [✂]. In the CMA's view, these minutes indicated Linergy's clear strategic intent, prior to the MOU, of buying or building a Category 3 plant.

Linergy has never denied that its strategic intent was to enter the Category 3 market. However, Linergy would make a couple of points in relation to the comments above.

First, the comments taken from the Linergy Board minutes and quoted above which show Linergy's intent on pursuing the project were taken from Board meetings in January/April 2011. These meetings pre-date the MOU by more than a year so cannot be an indication of the board's intent at the time immediately prior to the signing of the MOU. The comments taken from the April, 2012 Board meeting show that the Board did not want to make any major decision [✂] given they were in the aftermath of a failed purchase attempt of Ulster Farm, which had subsequently been placed on the market for sale. It is very understandable that the board should both consider their options but also not make any major decisions at that point in time.

Second, even though the Board had a strategy which showed intention to operate a Category 3 plant, any major capital investment would have to be a commercially viable project to satisfy both [✂]. As much as there was a desire to operate a Category 3 plant, the commercial viability was crucial to any plan ever being implemented. This is very evident from the minutes of the Linergy board meetings.

The CMA references certain other Linergy Board minutes at paragraph 39. The CMA notes that on 21 May, 2012, the Board [✂]. The CMA states that in the Linergy Board minutes submitted to the CMA which follow the signing of the MOU, there is no discussion of the Category 3 project. The CMA states that the minutes of the 3 July, 2012 Board meeting state simply under the heading [✂] section of the 27 September 2012 minutes states: [✂]. Finally, the CMA states that the Board minutes which Linergy provided to the CMA from after the signing of the MOU [✂] until December 2012, i.e. seven months after the MOU, when the Board resolved not to pursue the project.

The CMA then states that it believes it is implausible that the MOU had no influence on Linergy's limited consideration of the Category 3 project following the signing of the MOU and its subsequent decision not to construct a Category 3 plant. The CMA states that it believes that it is realistic that, but for the MOU, the Linergy Board would have continued to discuss the company's Category 3 plans, particularly in light of the cancellation of the earlier merger plans following the OFT's March 2012 decision.

In response, Linergy would comment as follows.

As detailed above, in the immediate period after the collapse of the Linergy purchase attempt of Ulster Farm from Glenfarm Holdings, the Linergy Board decided to [✂]. This was entirely understandable in the circumstances.

Linergy management had to then reassess the original business plan before it could be represented to the Board. As the previous plan had last been prepared in April 2011, they had to understand how key factors had developed in the meantime and how they were likely to develop in future. This takes time.

A [✂] time frame in which Linergy had to take stock after a failed purchase attempt of another company, had to reassess its future strategy, and had to reassess the options and business plans for that strategy, all the while going through significant changes in its own business with the loss of a large volume of input product, is not a long time in comparable terms. As pointed out above, a continuation of discussions about the company's Category 3 plans would not necessarily have led to implementation of those plans. In any case, the discussions did recommence after a reasonable period of time considering the changes taking place during that period.

10.4.3 **Linergy's Category 3 plant Decision and Ulster Farm's Category 1 plant Decision in the Counterfactual**

As noted above, the Parties have submitted evidence to the CMA, during the Phase 1 investigation and in this Initial Submission, which shows that Linergy's decision not to construct a Category 3 plant, and Ulster Farm's decision to close its Category 1 plant, were taken by each Party based on commercial and regulatory considerations and independently of each other and without reference to the MOU. Consequently, in the counterfactual there is no horizontal overlap in the Parties' activities.

These issues are addressed at paragraphs 43 to 55 of the Phase 1 Decision and below.

Linergy's Decision not to build a Category 3 plant (paragraphs 43 to 47)

At paragraph 43, the CMA states that, although Linergy's Board had approved construction of a Category 3 plant in 2011, the case for doing so deteriorated subsequently and the Board therefore reversed its Decision in December, 2012.

The use of the term "reversed" is misleading. Linergy took a decision in 2011 to build a Category 3 plant, taking into account the information available to it at that time. This was subsequently reversed by the decision to purchase Ulster Farm in late 2011. This purchase attempt failed for reasons outside of Linergy's control. Following that, Linergy had to then reassess the business case for investment in a new Category 3 plant and took the decision not to build, taking into account the information available to it at that time. There were two separate business case assessments and decisions. The business plan in 2011 was different from the business plan in 2012 and therefore warranted reassessment as opposed to continuing on with a plan which was 18 months out of date. This was prudent of the Linergy board.

At paragraph 44, the CMA states that Linergy told the CMA that steel costs had increased since the previous financial modelling exercise in 2011 and therefore the capital costs of constructing the Category 3 plant had increased. The CMA states that it found evidence that the cost of building the plant would only have changed in line with inflation and exchange rates movements (which were favourable to Linergy). On that basis, the CMA estimated that capital costs may actually have decreased by around [✂]% between the dates of the two assessments.

At the time Linergy assessed the case for building a new Category 3 plant in late 2012, the company had a conversation with a manufacturer of the plant equipment which would be used in construction of the factory. This was the same supplier which had provided a quotation for the original proposal in mid-2011. For the initial planning phase, Linergy asked in late 2012 for indicative

prices, and did not seek a fully detailed and costed quotation at that stage. Had the board decided to proceed with the plan, then detailed quotations would have been sought. As an indicative price, Linergy was advised to factor in a cost for likely higher costs. Linergy also took into account costs for other factors, such as [✂]. This resulted in Linergy using the quoted price from mid-2011, adjusted for the difference in the sterling/euro conversion rate at the time, and adding a [✂]% contingency. Linergy had previously used a [✂]% contingency in mid-2011 and [✂]. An additional [✂]% contingency was added in 2012 when assessing the business case afresh, hence, the total [✂]% contingency used in late 2012.

At paragraph 45, the CMA states that Linergy also said that its revised financial modelling in December, 2012 forecast lower gains from switching Category 3 materials (which at the time it was processing in its Category 1 plant) to a new Category 3 plant. The CMA states that Linergy attributed this to (i) a projected fall in Category 3 output prices and (ii) an increase in the value of Category 1 yields. The CMA then states that it did not find evidence that the value of Category 3 outputs was projected to fall. The CMA states that Ulster Farm told the CMA that Category 3 outputs were expected to increase in value at the time and that it had not found any evidence that Category 1 yields were expected to improve. The CMA states that in the financial projections that Linergy sent to its bank for consideration in April, 2011, Linergy's forecast Category 1 yields did not change over time.

In response, Linergy would comment as follows.

Linergy did not project a fall in the Category 3 output process. Linergy used lower Category 3 output prices in 2012 than those used in mid-2011 to reflect the market position at that time. The prices in late 2012 were lower than in mid-2011. Linergy did not make any attempt to forecast future prices as it had no way of knowing how the prices would perform in future. Linergy could only use the information available at that time. Whether Ulster Farm told the CMA that Category 3 output prices were expected to increase in future has no relevance to the financial models Linergy was using.

Linergy did not attribute this to "*an increase in the value of Cat 1 yields*". Linergy stated that the model used in 2012 factored in lower yields for Category 1 production than that used in 2011. The reason for this was that the yields used in 2011 were estimates made at a time when Linergy was not processing Category 1 material exclusively. Linergy was still processing Category 3 material along with the Category 1 material which was skewing the actual production yields. Therefore, the yields used in the model at that time were estimates of how the yield was expected to perform based on Category 1 material only. By late 2012, Linergy was processing almost exclusively Category 1 material. Therefore, at that stage Linergy was able to use actual data to project the yields and this resulted in lower yields being used in the model as this reflected the then current performance.

Linergy would note that Category 3 input prices did increase over the period. As [✂] explained at the Issues Meeting, the commercial risks involved in the proposal had increased over 2011/2012 as the Category 3 market had become increasingly competitive. As a result, Category 3 renderers were paying higher prices for material. Linergy estimated in late 2012 that this would impact on the proposal in terms of increased costs of an extra £[✂] per week, or £[✂]

annually. This had a greater impact on the commerciality and viability of the proposal than the revised cost assumptions.

In summary, the evidence provided by Linergy in its documents and at the Issues Meeting, and comments provided above on the particular issues raised by the CMA in the Phase 1 Decision, clearly illustrate that Linergy decided in December, 2012 on the basis of the information available to it at the time not to build a Category 3 plant at Dungannon. Despite this evidence, the CMA suggests in the Phase 1 Decision that the MOU "must have" (or words to that effect) influenced Linergy in taking its decision (and SAPI in taking its decision to close the Ulster Farm Category 1 plant). That is not the case and there is no evidence to suggest that it was the case. Furthermore, it does not seem appropriate to effectively ignore the actual evidence which is available on the issue in taking what is essentially a theoretical approach. In addition, that approach is fundamentally flawed in terms of economic theory. The Parties comment further on this below.

Ulster Farm Decision on its Category 1 Plant (paragraphs 48 to 55)

At paragraph 48, the CMA states that Ulster Farm told the CMA that, at the time Ulster Farm decided to close its Category 1 plant, returns from Category 1 end-products were declining and the price of Category 3 end-products was increasing. The CMA states that Ulster Farm said that its Category 1 plant was loss-making and causing environmental concerns which would require expensive remediation. The plant would also have needed to be taken offline during remediation, resulting in losses. Ulster Farm therefore decided to close its Category 1 plant and invest in improvements to its Category 3 plant.

In paragraph 49, the CMA states that it had found that data provided by Ulster Farm regarding the cost of Category 1 disposal and the price of Category 3 inputs was inconsistent with information supplied separately by Linergy. The CMA states that Linergy provided data showing that the cost of Category 1 disposal was declining at the time of its decision regarding its Category 3 plant and said that it was forecasting a fall in the value of Category 3 outputs, however, Ulster Farm submitted that, at that time, it expected higher returns from Category 3 outputs as a result of the expected reintroduction of Category 3 MBM into animal feeding and it projected increased costs from disposing of Category 1 MBM.

In response, the Parties would comment as follows.

Firstly, as mentioned above, Linergy made no attempt to project future prices for either output. Linergy simply reflected current markets prices when undertaking its own analysis. If Ulster Farm was speculating as to future performance of these prices then that is a different exercise and cannot be used as a like for like comparison.

Secondly, in any case, future projections are a matter of opinion for any particular individual/company and it is not unreasonable that they may differ from company to company.

At paragraph 50, the CMA states that Ulster Farm's forecast increased cost of disposing of Category 1 MBM would have increased its cost of sales by less than [✂]%. The CMA then comments that it does not believe that an increase in costs of this magnitude could alone have justified Ulster Farm's decision to close its Category 1 plant.

Ulster Farm did not claim that this cost increase alone justified its decision to close the Category 1 plant. It was one of a number of factors. The size of the increase to cost of sales should be considered in the context of the gross profit of the Category 1 plant at that time (if available) as it is Linergy's understanding that [✂]. Therefore, [✂]. In addition, as Ulster Farm was processing low volumes at that time, the full impact was not going to be clear. Were Ulster Farm to have increased its Category 1 throughput, which it would have needed to do to improve performance, then the impact of this cost increase would have become starker. Finally, this comparison is being made against the overall cost of sales of both Category 1 and Category 3 plants at that time. It should be looked at against the performance of the Category 1 plant only for a true analysis.

At paragraph 51 of the Decision, the CMA comments on financial information which was provided during Phase 1 of the investigation to the CMA concerning the loss-making nature of the Ulster Farm Category 1 plant when it was closed by SAPI in October, 2012. The Parties had submitted Ulster Farm's management accounts to the CMA which the Parties believed showed that the plant was loss-making as the accounts illustrated that profitability increased after Ulster Farm closed its Category 1 plant. The CMA challenged this view by arguing that the increase in Ulster Farm's profitability at the time was primarily attributable to increased throughput at Ulster Farm's Category 3 plant, due in part to the decision by the SMPs in July, 2012 to transfer their Category 3 material to Ulster Farm. This issue of evidence concerning the loss-making nature of the Category 1 plant was discussed at the Issues Meeting and it was agreed at the meeting that SAPI would provide accounting information on the Category 1 plant for the period June to December 2012 which would confirm that the Category 1 plant was loss-making when it was closed. This information was supplied the following day to the CMA.

In the light of this, the Parties were very surprised by the comments which were made by the CMA at paragraph 51 of the Phase 1 Decision on this data. For example, the CMA stated that it noted that the data had not been provided in response to previous CMA requests for internal documents. As explained, data had been provided previously and this further data was then supplied when the CMA had raised questions on the original data. Furthermore, the CMA had agreed at the Issues Meeting that this further data would be provided.

In a similar vein, it was surprising to read the comment that, although apparently prepared by SAPI, it was not clear when (the data) had been produced. As noted, SAPI agreed with the CMA at the Issues Meeting to obtain the information internally from the company's accountant and to provide it the following day.

The CMA also attempts to challenge the value of the data, stating that the methodology involved was unclear, and that the data was only for a very short period of time prior to the closure of the plant. The time period involved was indicated at the Issues Meeting. Moreover, the whole point was that the CMA was seeking confirmation that the Category 1 plant itself was loss-making at that time, i.e. when it was closed. The data also covered the period from the time that SAPI purchased the company until the time it closed the Category 1 plant. SAPI has advised that it can provide data for a longer time period, together with any detail required.

In these circumstances it appears entirely reasonable to rely upon the data. The Parties therefore find it extremely difficult to understand why the CMA "*did not place much weight on this data*" (end of paragraph 51). The Parties submit that this data is reliable and is very important in illustrating the commercial reasons why SAPI closed the plant.

The Parties would make one final point on the CMA's approach to the data supplied generally. As the CMA pointed out, it was not possible to properly analyse the original data without seeing the split between Category 1 and Category 3 performance. Therefore, it is equally unfair for the CMA to state that the improved performance of Ulster Farm was due to the increased Category 3 throughput as opposed to the Category 1 closure without this information. As with the CMA's approach to the data supplied on 26 June, 2015, the CMA's approach does not appear to be balanced.

As noted, Ulster Farm decided to close the Category 1 plant in part because of the environmental problems affecting the plant. The CMA appears to attempt to challenge this explanation at paragraph 52. Whilst acknowledging that Ulster Farm submitted "substantial evidence" about its environmental concerns, the CMA appears to place more emphasis on third party comments. For example, the CMA states that a third party told the CMA that environmental fines are typically low, and suspension notices or licence revocations are rare. The third party also apparently told the CMA that the history of odour complaints concerning Ulster Farm dated back around a decade, and the CMA states that it found no evidence that Ulster Farm had introduced significant remediation measures during this period (of course, SAPI did not own the company at the time). While recognising that there were environmental concerns with Ulster Farm's Category 1 plant, the CMA states that there was insufficient evidence that, absent the MOU, Ulster Farm would have considered these concerns a priority such that the prospect of the costs of fully remedying them would have led it to close the plant.

On this point, the CMA has argued that the punishment for non-compliance is so low as to not encourage compliance, not that the remedial costs would not be prohibitive enough to prevent remedy.

Even if it were to be accepted that punishment levels are low, it does not necessarily follow that a company would therefore decide to ignore the laws governing certain aspects of their business. SAPI is an international company, trading across the world including the UK and Ireland for end products. It is not unreasonable to suggest that the reputational damage that SAPI could suffer as a result of flaunting the environmental regulations would outstrip the ramifications from the regulator. This was an assessment which SAPI alone could make. The fact that these problems had existed for around a decade was irrelevant. SAPI had purchased the company 5 months before the closure of the Category 1 plant and was focused on the future.

The CMA states (paragraph 53) that, although there was evidence that Ulster Farm considered rectifying the problems with its Category 1 plant a lower priority than upgrading its Category 3 plant, it does not follow from this prioritisation that, absent the MOU, Ulster Farm would have closed its Category 1 plant.

The CMA also states at paragraph 54 that several parties told the CMA that renderers derive strategic commercial benefit from operating both a Category

1 and a Category 3 plant. The CMA states that Linergy told the CMA that: "[✂]." The CMA states that this was confirmed by a third party, which told the CMA that a renderer lacking either a Category 1 or a Category 3 plant was at a significant competitive disadvantage. The renderer apparently told the CMA that operating both types of plant would enable a vertically-integrated renderer to extract greater value from its meat processing operations, and would enable it to offer its meat processor customers a more complete service. The CMA comments that it has observed that, consistent with this explanation, many established renderers in the UK and the Republic of Ireland (ROI) operate both Category 1 and Category 3 plants at the same site (or in close proximity), including College Proteins, Dublin Products, SARIA, Dundas, and ABP Ltd. In light of this evidence, the CMA believes that, absent the MOU, Ulster Farm would have had a commercial incentive to maintain its Category 1 plant even if the plant was loss-making and/or if remediation costs would have been significant.

While it may be the case that there are some strategic commercial benefits from operating both a Category 1 and Category 3 plant, it is extremely difficult to ascertain that this would be of greater benefit to a renderer than closing a loss making plant under its operation.

It should also be pointed out that there is little tangible benefit from operating two plants, even if both plants happen to be on the same site. Category 1 and Category 3 plants must operate as two stand-alone operations. Due to regulations, all material in and end products out must be transported separately and in designated containers. Therefore, no transport savings can be made by operating two plants. It may be possible to make some slight cost savings in the energy production end but even this is minimal.

The only area which can benefit from increased efficiencies is the steam production end. The efficiency of the steam production cycle increases as volumes increase which could present a potential saving, if the production system is set up to operate in this manner. Therefore, the removal of the Category 1 plant would presumably have had an adverse effect on the efficiencies of this system.

The reality is that, although there is a strategic benefit to operating both Category 1 and Category 3 plants in terms of dealing with suppliers, the supplier will make its decisions based on the best price for each stream of material. As renderers typically collect the material from the site, the meat plant operator does not have any additional work by choosing to operate with two different rendering providers. The material is collected from the supplier's premises and transported away so that the only difference is that he will be charged by two different companies. The Parties do not view this as a sound enough reason to continue to operate a loss-making Category 1 plant which required investment.

In concluding on SAPI's decision to close the Category 1 plant, the CMA comments (paragraph 55) that it believes that because of the environmental concerns with the plant, the evidence that SAPI, absent the MOU, would have closed the Category 1 plant is stronger than the evidence that Linergy, absent the MOU, would have decided not to construct a Category 3 plant. However, the CMA states that it believes that based on the evidence before it, SAPI's decision to close the plant was informed by the MOU and that it is realistic that, absent the MOU, SAPI would not have done so. The CMA also states that

there is no reason to believe that Ulster Farm would not have continued operating the plant through to the time of the Transaction.

The evidence does not support the CMA's conclusion. As with Linergy's decision not to build a Category 3 plant, the evidence supports the position of the Parties, and not the CMA, that SAPI decided, independently and without reference to the MOU, to close the Category 1 plant at Ulster Farm for the environmental and commercial reasons that are explained above. The evidence provided by the Parties cannot be ignored. In addition, there are fundamental flaws from an economics perspective in the approach adopted by the CMA to the counterfactual in considering the issue. This is addressed below in addition to the comments made above.

In this regard, the Parties commented on the counterfactual in the First Report and the Supplementary Report which were provided to the CMA during Phase 1. Reference is therefore made to both Reports in this regard ([✂]). In particular, Pat Massey commented at Section 4.1, paragraphs 102 to 130, of the First Report, and Section 2, paragraphs 20 to 29 of the Supplementary Report on the appropriate counterfactual in this case. These comments should be considered in conjunction with, and, in part, in addition to, the comments contained in this Submission.

The Parties have also commented further below on the approach adopted by the CMA in its Phase 1 Decision to the counterfactual, particularly from an economics perspective. These comments further support the position of the Parties that the approach adopted by the CMA, and the conclusions that it draws from it, are wrong.

As noted, the CMA argues that the counterfactual against which the Transaction should be assessed is not the pre-merger situation in which Ulster Farm and Linergy operate in separate markets as Linergy operates a Category 1 plant and Ulster Farm a Category 3 plant. Rather, the CMA puts forward an alternative counterfactual based on a hypothetical scenario whereby Ulster Farm would have continued to operate a Category 1 plant which it closed in October, 2012 because it was not commercially viable, while Linergy would have constructed a new Category 3 plant which was not commercially viable. The CMA claims that there is a realistic prospect that this situation would have come about were it not for the fact that Linergy and SAPI had entered the MOU in May, 2012. According to the CMA, "*the effect of the MOU was that each Party had an incentive to* [✂]*, as if they were already merged*" (Paragraph 33). The Decision provides no explanation to support this claim, i.e. it offers no explanation of how the MOU incentivised the Parties to act in this fashion. It simply states this to be the case without putting forward any economic explanation of how the MOU had this effect.

The Decision goes on to state that "*the CMA has found evidence that it believes shows the Parties, following the MOU but prior to the Merger, conducted themselves as if they had already merged*" (Paragraph 33). As noted (Paragraph 36), the CMA cites three points of evidence in this regard.

First, the CMA referred to the fact that Linergy's shareholder customers switched their Category 3 material from Linergy to Ulster Farm in July, 2012. The CMA states that these customers had been supplying Category 3 material to Linergy for some time. Linergy started handling Category 3 material in mid 2010. The customers concerned supplied Category 3 material to Linergy even

though this [✂]. According to Linergy, they were prepared to [✂] for a period of time in order to [✂]. The CMA states, however:

"*On the basis of the evidence it has found, the CMA believes that nothing had changed from this position at the time that the shareholder meat processors started sending Category 3 material to Ulster Farm BP in July 2012, other than there now being the MOU. On the basis of this evidence, the CMA believes it highly likely that the terms of the MOU influenced the timing of the shareholder meat processors' decision*."

The CMA has adduced no evidence of causation, i.e. nothing that indicates that the shareholders decision was affected by the MOU. The fact is that sending Category 3 material to Linergy involved a [✂] to these customers and they took a decision that they were no longer prepared to [✂]. That is the most obvious explanation for why those customers switched. It was clearly in their interest to do so regardless of the MOU.

Second, the CMA cited statements made to it by third parties who "*understood*" that the parties had effectively combined their businesses some time prior to the Transaction. The CMA cited one individual as claiming that several years previously Linergy had encouraged it to switch its Category 3 material to Ulster Farm. This appears to predate the MOU and so, even if true, would not support the CMA claim that the Parties had altered their behaviour as a result of the MOU. Another customer expressed a "*belief*" that there had been an unwritten agreement between the Parties prior to the Transaction while a third person claimed to have been told by SAPI that the Parties had already merged. All of this amounts to nothing more than gossip and hearsay.

Third, the CMA cites the absence of any discussion about the possibility of investing in a Category 3 plant in the Minutes of Linergy Board meetings between May, 2012, when Linergy agreed to enter the MOU, and December, 2012, when Linergy decided not to proceed with the building of a Category 3 plant, as evidence that Linergy's decision was influenced by the MOU. The CMA Decision states:

"*The "*[✂]*" section of the 27 September 2012 minutes states:* [✂][15]

The statement that Linergy would aggressively attack the Category 1 market is totally inconsistent with the CMA hypothesis that the MOU resulted in the Parties internalising the impact of their decisions on each other and acting as though they had already merged. If that were the case then Linergy would have had no incentive to aggressively attack the Category 1 market. This statement clearly demonstrates that the MOU did not lead the Parties to behave as though they had already merged, contrary to the CMA claims. The CMA Decision cites the absence of any discussion about a possible Category 3 plant as evidence while ignoring actual statements in the Linergy Minutes which contradict the CMA's theory. This is consistent with a general approach on the part of the CMA to market evidence which overstates the possible relevance of evidence which may support its views but consistently challenges or downplays evidence which is contrary to its stated position.

The Decision states:

[15] Paragraph [✂]

"*The CMA believes that it is realistic that, but for the MOU, the Linergy Board would have continued to discuss the company's Category 3 plans, particularly in light of the cancellation of the earlier merger plans following the OFT's March 2012 decision*."[16]

This is pure speculation by the CMA and does not establish that Linergy would have built a Category 3 plant but for the MOU.

Paragraphs 43 to 46 set out the CMA's reasons for claiming that, but for the MOU, Linergy would have built a Category 3 plant. Linergy has stated that the information available to it at the time the decision was taken not to proceed with a Category 3 plant was that the cost of building a plant had risen since Linergy's original decision to build one while the expected returns were less certain. The CMA has argued that construction costs did not increase significantly and that there was no evidence of a decline in revenue for Category 3 material. The CMA cite the fact that Ulster Farm told it that Category 3 output prices were expected to increase at that time, a point which is returned to below. Linergy's decision was based on the information available to Linergy at the time it took its decision. Linergy's view of what might happen to construction costs and output prices might turn out to have been wrong but that is irrelevant. Linergy approached a building contractor that it had previously obtained a quote from who indicated that the cost of building a Category 3 plant would be significantly higher than previously indicated; it analysed the project using the same financial model with revised cost and price estimates and concluded that the project was not commercially viable. This is recorded in the minutes of the December 2012 Board meeting. The fact that prices might not have evolved as Linergy expected is irrelevant.

Paragraphs 48 to 55 of the Decision set out the basis for the CMA's assertion that Ulster Farm would not have closed its Category 1 plant in the absence of the MOU. The CMA notes that Ulster Farm stated that it decided to close its Category 1 plant because it was loss making; had significant environmental problems; and because they expected Category 3 output prices to rise and therefore decided to invest in improvements to its Category 3 plant. The CMA notes that Ulster Farm's view that Category 3 prices were likely to rise was inconsistent with Linergy's (see above). The CMA dismissed Linergy's claim that one of the reasons why it decided not to build a Category 3 plant was because it thought Category 3 prices would fall on the basis that Ulster Farm said it expected Category 3 prices to rise. The CMA then discounts Ulster Farm's statement that it decided to concentrate on its Category 3 business because it expected Category 3 output prices to rise because Linergy said it thought such prices would fall. The CMA is thus seeking to have it both ways. It cannot use the argument that Category 3 prices were expected to rise to support a claim that Linergy would have built a Category 3 plant in the absence of the MOU while simultaneously arguing that Ulster Farm would have kept its Category 1 plant open because Category 3 prices were expected to fall.

There is an additional point that may be made as far as the Parties' differing expectations about Category 3 prices is concerned. The outlook for prices of Category 3 prices depended on a number of factors including the potential for regulatory changes at EU level. It is thus perfectly reasonable that different individuals looking at the various factors which influenced prices could have reached different conclusions. It is also the case that one of the parties, Ulster

[16] Paragraph 40

Farm, was engaged in the sale of Category 3 material while the other, Linergy, was not, so that there was an information asymmetry between the Parties about the market. Finally, if the Parties were acting as though they had already merged, which is the key point underlying the entire CMA case, one might expect that they would have shared information on likely market developments to a much greater extent.

The CMA states at paragraph 50 that the increase in the costs of disposing of Category 1 material would have increased Ulster Farm's cost of sales by less than [✂]% and that it did not believe "that an increase in costs of this magnitude could alone have justified Ulster Farm's decision to close its Category 1 plant." Ulster Farm has not claimed that it decided to close its Category 1 plant solely on the basis of the increase in the cost of disposing of Category 1 material and so to that extent the CMA statement is inaccurate and misleading. Ulster Farm stated that (a) the plant was loss making; (b) had serious environmental problems which would have been costly to put right; (c) Category 1 disposal costs were rising; and (d) it expected Category 3 prices to improve. In light of the other factors Ulster Farm may well have decided to close the Category 1 plant anyway but obviously any increase in the level of losses increased the incentive to close the plant. Had the plant been operating profitably, with no pollution problems, then it is unlikely that an increase in costs of less than [✂]% would have prompted SAPI to close the plant, but that was not the actual situation.

Paragraph 52 of the Decision deals with the environmental issues argument in relation to the Ulster Farm Category 1 plant. The CMA dismisses this argument on the grounds that (a) these problems had been around for a long time; and (b) no serious penalties were likely to be imposed. The first point ignores the fact that SAPI had just acquired the Ulster Farm business. The fact that the former owners may have failed to address the environmental issues for many years is therefore irrelevant. As SAPI explained to the CMA at the Issues Meeting, SAPI is a major international company, which is involved in operating rendering plants in many countries, and it takes its environmental responsibilities and reputation seriously.

Paragraph 54 of the CMA Decision advances the argument that rendering firms may derive a strategic advantage from operating both Category 1 and Category 3 plants. Based on this the CMA claims that Ulster Farm would have had a commercial incentive to keep its Category 1 plant open even if it was loss making and/or remediation costs would have been significant. This conclusion is simply incorrect. Even if there was some strategic benefit from operating both types of plant, this does not mean that Ulster Farm would have had an incentive to keep its Category 1 plant open. Contrary to what the CMA states, Ulster Farm would only have had an incentive to keep the Category 1 plant open if the strategic benefit exceeded the combined losses and amortised upgrade costs. The CMA has produced no evidence to show that this was the case. To that extent the CMA's analysis is flawed.

At paragraph 55 the CMA concedes that it believes that the case for Ulster Farm closing its Category 1 plant was stronger than the case for Linergy not building a Category 3 plant, even though it argues that it believes Ulster Farm would have kept the Category 1 plant open were it not for the MOU. The CMA conclusion in respect of Ulster Farm makes no economic sense. The CMA is implicitly arguing that Ulster Farm decided to close a plant, which the CMA (a) says was not loss making; and (b) provided Ulster Farm with a strategic

advantage, based on the possibility of a future merger which the Parties could not be sure would be attempted and, if so, would gain regulatory approval. In effect, if the CMA claims were correct, SAPI would forego revenues in the short-run for the uncertain prospect of higher future revenues.

10.4.4 **Summary**

The approach adopted to the counterfactual by the CMA in the Phase 1 Decision is not supported by the evidence and is fundamentally flawed in terms of economics theory. In particular, the CMA adopts a purely hypothetical counterfactual which depends entirely on the proposition that Ulster Farm would not have closed its Category 1 plant and Linergy would have built a new Category 3 plant had the Parties not signed the MOU. The evidence does not support this proposition.

Instead, the evidence shows that the Parties each decided independently and without reference to the MOU to take the commercial decisions which they adopted on their respective rendering businesses for the commercial and regulatory reasons detailed in this submission and in the previous Responses provided to the CMA in Phase 1. In these circumstances, the Parties are not competitors, either in fact or in the counterfactual, and competition issues do not arise.

11. The Competitive Effects of the Merger

(See Parts 4.2 and 5 of Merger Assessment Guidelines, CC2 (Revised)/OFT1254 (adopted).)

A statement setting out the expected consequences of the acquisition on competition, including in particular the effect on customers. You may wish to cover in your answer the expected effects on prices, quality, availability and innovation. The submission should address the issues identified by the CMA in its decision that it is under a duty to refer the merger to phase 2. This can include information copied from your previous submissions to the CMA.

11.1 General

Linergy is only active in the market for the processing of Category 1 material and Ulster Farm is only active in the market for the processing of Category 3 material. As a result, there is no competitive overlap in the companies' activities as Category 1 and Category 3 rendering plants operate in separate markets. This was acknowledged by the OFT in its 2012 Decision and by the CMA in its Phase 1 Decision. This is also consistent with Decisions of the Commission. The merging Parties do not therefore exercise a competitive constraint on one another. In addition, in both cases, the geographic market is wider than Northern Ireland and includes rendering plants in the Republic of Ireland and in Great Britain, and, in particular, Scotland and the North of England. In these circumstances, the Transaction is not likely to result in a SLC. While fallen stock is classified as Category 2, as there are no Category 2 plants in Northern Ireland, all fallen stock must be processed in Category 1 plants. As already pointed out, Ulster Farm is no longer active in this market and therefore there is no competitive overlap between the Parties in respect of fallen stock.

11.2 Summary of the Key Issues

As the Parties explained in previous submissions to the CMA, Linergy undertook in 2013 a competition assessment of the issues which would arise if Linergy were to acquire Ulster Farm from SAPI prior to Linergy deciding to attempt to negotiate the Transaction. In particular, Linergy retained Pat Massey in 2013 to undertake a review

of the competition issues which would arise. Pat Massey is an independent economics consultant and a former Head of the Mergers Division in the Irish Competition Authority. The conclusion of the competition assessment was that a merger between Linergy and Ulster Farm would not be likely to result in a substantial lessening in competition, due to a combination of changes in circumstances since the OFT Decision and issues which arose in relation to the economic analysis undertaken by the OFT in its Decision. The primary reasons for this conclusion were as follows.

11.2.1 **Relevant Product Market**

As noted, there are three relevant product markets for processing Category 1, Category 3 and fallen stock material. Circumstances have changed since the OFT considered the original proposal. In particular, Ulster Farm has closed its Category 1 plant and Linergy has decided not to proceed to build a Category 3 plant. In the light of these changed circumstances, there is no longer any competitive overlap between the Parties so that such a proposal would no longer have any effect on competition in any of the relevant markets.

As noted, the position adopted by the Parties on product market definition is supported by the approach of the OFT, the CMA and the Commission.

In the OFT Decision, the OFT stated that Category 3 plants did not exert a competitive constraint on Category 1 plants.[17]

In addition, the Commission has consistently held that Category 1 and Category 3 rendering services constitute separate product markets. The Commission examined the markets for Category 1 and Category 3 rendering services in detail in its merger Decision in *Saria/Danish Crown/Daka JV*.[18] The Commission found, in line with its previous decisions, that:

> *"Products not fit for human consumption can be further broadly segmented according to the risk level of the materials and corresponding EU legislation into (i) category 1 and 2 (high-risk) materials and (ii) category 3 (low-risk) materials."*

The Commission further distinguished the markets for the collection of ABPs and the processing and supply of ABPs. With regard to the collection of ABPs, the Commission found that a differentiation could be made at least between the collection of Category 1 and 2 ABPs on the one hand and the collection of Category 3 animal by-products on the other hand. This was on the basis that:

> *"slaughterhouses receive a payment for the supply of the high-valued category 3 raw animal by-products. By contrast, the collection of low-value category 1 and 2 raw animal by-products is essentially a service for slaughterhouses. Therefore, rendering companies request a payment from slaughterhouses for the collection of these products. Slaughterhouses are at the same time obliged to ensure the correct disposal of these products under Article 4 of the Animal by-products Regulation and national health and hygiene obligations adopted in accordance with that Regulation."*

[17] Case ME/5214/11 – Anticipated Acquisition by Linergy Limited of Ulster Farm By-Products Limited, OFT decision of 15 March 2012, paragraph 32.

[18] Case No COMP/M.6285 – *Saria/Danish Crown/Daka JV*, decision of 29 June 2012.

The Commission also found that there were separate markets for the processing and supply of Category 1 and 2 animal by-products and the processing and supply of Category 3 animal by-products. However, the Commission declined to make any further sub-segmentation of those markets and ultimately left the market definition open.

11.2.2 **Relevant Geographic Market**

The OFT Decision was based to a significant extent on a conclusion that the relevant geographic market was limited to Northern Ireland. This conclusion was inconsistent with evidence that rendering plants in Northern Ireland process material originating in the Republic of Ireland, while customers in Northern Ireland send material to renderers in the Republic of Ireland and Great Britain.

In the case of Category 1 and Category 3 material, the relevant geographic market includes rendering plants in the Republic of Ireland and Great Britain. Even if there was a competitive overlap between the Parties (which is no longer the case), in a wider geographic market a merger would no longer reduce the number of competitors from three to two, as the OFT concluded in relation to the original proposal.

11.2.3 **Co-ordinated Effects**

The OFT held that there was insufficient evidence to support a conclusion that the original proposal would give rise to co-ordinated effects. There are no good reasons for reaching a different conclusion now. The Parties are no longer competitors while a wider geographic market means that there are a larger number of competitors. In these circumstances, a merger would be even less likely to give rise to co-ordinated effects.

On the output side, the products produced by rendering plants are internationally traded and Linergy and Ulster Farms are effectively price takers in such markets. Consequently there is no possibility that the Transaction could give rise to any co-ordinated effects on the output side.

11.2.4 **Unilateral Effects**

The response of Ulster Farm's principal customers to a price rise implemented by Ulster Farm in early 2012 (when two out of three of Ulster Farm's main meat processing customers switched to rendering plants in the Republic of Ireland) indicated that customers could switch to renderers in the Republic of Ireland in the event of a unilateral price increase post-merger. This episode demonstrated, contrary to the findings of the OFT Decision, that renderers in the Republic of Ireland would exercise a sufficient competitive constraint on the merged entity as to prevent a unilateral price increase, even if the Parties were still operating in the same product market (which is no longer the case). In other words, this episode demonstrates what would happen if the Parties sought to impose a unilateral price increase post-merger.

These issues were addressed in detail in the First Report. As explained, a copy of the First Report is attached in [✂].

11.3 **CMA's Theories of Harm in the Phase 1 Decision**

The CMA sets out theories of harm at paragraphs 105 to 200 of the Phase 1 Decision. In light of the Parties' comments above and generally in this Initial Submission and, in particular, the views of the Parties on the counterfactual and the definition of the relevant geographic market, theories of harm do not arise. The Parties are not competitors in fact or in the counterfactual and each of them operate in broad and

competitive markets, in Category 1 and 3 rendering, respectively, which encompass the island of Ireland and Great Britain and, in particular, Scotland and the North of England. Without prejudice to the Parties' position on the issues, the Parties would note the following on the theories of harm advanced by the CMA in Phase 1.

First, in the First Report, Pat Massey commented at Section 4.3, paragraphs 132 to 144, on competitive harm theories as advanced by the CMA in Phase 1. In addition, the Supplementary Report addressed in particular the theories of harm as had been advanced by the CMA in its Issues Letter and at the Issues Meeting. Reference is therefore also made to the comments contained in the Supplementary Report at Sections 3 to 4, paragraphs 30 to 60. The comments in both Reports counter the views expressed by the CMA. The comments contained in both Reports should be read in conjunction with, and, in part, in addition to, the comments contained in this submission.

Second, the Parties would comment as follows on the particular comments made by the CMA at paragraphs 105 to 200 of the Phase 1 Decision.

TOH1

Paragraph 113 of the Phase 1 Decision states that the Parties submitted that Category 1 prices increased after Ulster Farm closed its plant in October, 2012 but that this was because of a drop in output prices. This is not an entirely accurate description of what was said in the Supplementary Report, which indicated that the rise in price coincided with a decline in the net contribution from the sale of processed materials.

The CMA provides Figures 1 and 2 at paragraph 115 on average gate fees and MBM and tallow prices.

Figures 1 and 2 in the Phase 1 Decision [✂].

At paragraph 116, the CMA states that output prices are only one of the factors which affect the profitability of rendering, and that the Parties have not provided sufficient information on Linergy's other costs to form a view on how its margins evolved over time.

The output prices are the most significant variable factor in rendering and directly affect the policy on setting prices. Other factors tend to remain fairly constant and [✂].

The Parties would note that the CMA comments at paragraph 117 are purely speculative.

Paragraphs 118 to 120 dismiss the usefulness of evidence in relation to the Parties' market shares for reasons which are considered later.

Paragraph 121 bullet point 2 states:

"*More than 80% of the merging parties' business would be unconstrained by a NI renderer post-merger, and a substantial majority of the remaining proportion of the merging parties' business would need to switch to Foyle Proteins in response to a SSNIP in order to make it unprofitable*."

The accuracy of the statement appears questionable. As previously noted, [✂]% of Linergy's business comes from meat plants in the Republic of Ireland so the point of the business not being subject to a constraint from another renderer in Northern Ireland is irrelevant. In fact, it is not clear whether the CMA is referring here to 80% of the

Parties' total business or to 80% excluding shareholder customers, which was a distinction made previously. This lack of clarity makes it difficult to understand what point the CMA is making here. The issue is would it be profitable to raise prices post-merger and that depends on whether sufficient sales would be lost to other sources, wherever they might be located, as to render the price increase unprofitable .

Paragraph 125 states that several parties told the CMA that the Parties had been each other's closest competitors, with one stating that there would be little if any competition on price post-merger as the Parties would control the majority of disposal facilities for both Category 1 and Category 3 material. Such comments are inconsistent with CMA arguments that the Parties had already acted as though they had merged and with claims by the CMA that prices might already be above competitive levels.

In addition, none of the comments made at paragraph 125 take into account the fact that the renderer typically pays the transport costs and it is not a cost which is passed on to the supplier or transparent to the supplier. Therefore, the assertion that Foyle Proteins would not quote competitive rates due to the transport costs that they and not the supplier would suffer is all speculation. However, this is not consistent with Foyle Proteins' trading activities, as it is very active in trading with a supplier in the Republic of Ireland. In particular, it processes a lot of fallen stock from the Republic of Ireland and also is currently processing material from [✂] which operates from numerous sites in the Republic of Ireland. The nearest of these sites is in [✂].

It is worth noting that paragraph 126 states that the CMA does not know whether Foyle Proteins would have capacity to serve a new large customer, although the issue of whether Foyle Proteins has spare capacity has obvious implications for its ability to constrain the Parties. One might have expected the CMA to address such an important issue. The approach is consistent with the CMA's approach to market evidence generally, where, as noted throughout this submission, the CMA overstates/does not challenge evidence which may support its conclusions but challenges/underplays evidence which contradicts its conclusions. The same comment would apply to issues addressed in the paragraphs that follow paragraph 126 (see below). Furthermore, the evidence on Foyle Proteins' spare capacity is readily available and the company would have [✂] Linergy (the Parties understand that Foyle Proteins actually commented to the CMA that it has spare capacity). [✂].

Paragraph 130 states that both the Parties and third parties had identified recent examples of customers switching a portion of their Category 1 supply from the Parties to a renderer in Scotland. It states that one customer had told the CMA that it had been approached by a Scottish renderer offering better prices than Linergy. Nevertheless, paragraph 131 states that "*the CMA believes that the balance of the evidence found during its investigation shows that competition from renderers in Scotland will not be sufficient to constrain the Parties post-Merger*." It then goes on to outline this evidence.

First, the CMA states that most customers that had switched to a renderer in Scotland had only switched some of their supply. This ignores the fact that it is only necessary for customers to switch some of their business in order to render any unilateral price increase unprofitable. Thus, the CMA argument is economically incorrect. The CMA further states:

"*One renderer told the CMA that they believed at least one of these customers used the Scottish renderer to obtain better prices from Linergy*."

This clearly demonstrates that, contrary to the CMA's assertions, Linergy is subject to competitive constraints from renderers in Scotland and that the option of switching to such renderers provides customers with a degree of countervailing buyer power.

The CMA cites a third party which had told it that it might not be commercially viable for smaller meat plants to supply renderers in Scotland and cites one firm as having been approached by a renderer in Scotland expressing concerns as to whether its volumes would be sufficient. [✂].

The CMA cites views from various parties who expressed the view that it was not commercially viable for renderers in Scotland to source material in Northern Ireland. There is ample evidence of customers actually switching supply to renderers in Scotland and such behavioural evidence should be given greater weight than statements claiming that such behaviour is not commercially viable.

Paragraph 132 repeats the CMA's earlier claim that the increased level of shipments to Scotland may be as a result of the Transaction. It states that "*the increased flows to Scotland are unlikely to have prevented unilateral horizontal effects arising from the Merger, but may represent a consequence of those effects*." No grounds are put forward to support the claim that such increased flows are unlikely to have prevented any unilateral effects. The CMA simply asserts that this is the case. This statement makes no economic sense. The CMA is claiming that meat plants may have switched material to Scottish renderers following a unilateral price increase post-merger although it has cited no evidence of such a unilateral price increase having occurred. The statement is also inconsistent with the CMA's earlier claims that the switching might have been prompted by news of the proposed merger.

Paragraph 157 relies on similar arguments in respect of Category 3 material.

One of the reasons why the CMA chooses to ignore the importance of Ulster Farm's failed attempt at a price increase in early 2012 is stated to be because the price increase was unusually large and therefore did not provide evidence as to how customers would have reacted to a smaller price rise (i.e. a SSNIP) (paragraph 135). The price increase was unusually large compared to the previous price which this customer was receiving. However, compared to the market rate at the time, the price increase only brought the price in line with market rates.

TOH2

At paragraph 137, the CMA states that, with the exception of some instances of internal supply, the CMA had not identified any examples of NI customers switching a portion of their Category 1 materials from the Parties to a renderer in the ROI. The CMA also comments that third parties indicated several reasons why it may be unattractive for ROI renderers to compete with NI renderers, including euro/sterling exchange rates, regulatory restrictions, and transport costs.

This then does not take into account the fact that other NI based meat processors are supplying material to ROI renderers, just that they did not switch supply from the Parties. This point has been made in other areas, for example, in relation to [✂].

At paragraph 140, the CMA dismisses a [✂] (referred to above) which described a [✂] The fact that the MOU was in place and a merger was being contemplated bears no relevance to the fact [✂] was considered a competitor.

Paragraph 145 refers to previous submissions by the Parties indicating that Ulster Farm accounts for only [✂]% of all Category 3 material originating in Northern Ireland. Clearly the fact that the vast bulk of Category 3 material originating in Northern Ireland was processed elsewhere demonstrates conclusively that the market was wider than Northern Ireland.

Paragraph 146 raises a very important technical point. The CMA argues here that the Parties may have overestimated the total amount of Category 3 material produced in Northern Ireland and thereby understated Ulster Farm's market share. Originally, the Parties said that Ulster Farm accounted for [✂]% of Category 3 material. The CMA in paragraph 73 of its Issues Letter stated that Linergy may have overestimated the total size of the market. Pat Massey then asked Linergy to re-estimate its market share taking the CMA's figures, which it did, and this indicated that Ulster Farm's market share was [✂]%. The CMA has now come up with a new reason for arguing that Linergy's estimate of total Category 3 is overstated.

The Parties would also note that the figures involved could fluctuate from meat processor to meat processor as this is not an exact science. The parties are confident that the data they have submitted is accurate and correctly represents the portion of the animal which goes for could go for rendering.

Paragraph 147 acknowledges that Northern Ireland meat plants send Category 3 material to renderers outside of Northern Ireland but states that this is because there is only one Category 3 plant in Northern Ireland so the only alternatives are outside of Northern Ireland. It then states: "*This does not mean that the constraint exercised by these renderers on UFBP is as strong as the constraint which Linergy would have exercised on UFBP in the counterfactual*." There is no economic basis for this conclusion. It is pure speculation.

Paragraph 153 is quite important;

"*Some Linergy board minutes indicated that, notwithstanding the difference in facilities, it considered itself to compete with UFBP for Category 3 material:*

- *Linergy board minutes dated 3 July 2012 stated:* [✂].
- *Linergy board minutes dated 27 September 2012 stated: '*[✂].

This paragraph is significant for two reasons.

First, as already stated in the Supplementary Report of 8 July, 2015, Linergy operates a Category 1 plant and could not match the prices which a Category 3 plant could pay for Category 3 material. Thus, suppliers switched Category 3 material from Linergy to Ulster Farm because [✂]. Linergy had been [✂] and Ulster Farm was [✂] – a price difference of £[✂]. Given the [✂] involved, this does not establish that the Parties were each other's closest competitors. One would have to observe the response of customers to a much smaller price change in order to arrive at such a conclusion. Consequently, this episode does not constitute evidence of closeness of competition between the Parties. The CMA at paragraph 135 dismisses the fact that Ulster Farm customers switched to renderers in the Republic of Ireland when Ulster Farm increased its prices precisely because the price increase was large. The CMA treatment of these two episodes is entirely inconsistent.

The second point about paragraph 153 which has not been made previously is the fact that the quotes contained therein are completely inconsistent with the CMA claim that, since the Parties signed the MOU, the Parties had acted as though they had already merged and had internalised the effects of their actions on one another. The quotes show the opposite. They show Linergy recognising that, following SAPI's acquisition of Ulster Farm, it [✂] and [✂]. It should be noted that the minutes relate to meetings which occurred sometime after the MOU had been signed. As with another example cited, this evidence clearly contradicts the CMA hypothesis that the MOU caused the Parties to act as though they were already merged. Again as pointed out, that hypothesis

is key to the entire CMA case as without it the CMA counterfactual argument simply collapses.

Finally, Linergy would note that the comments were in relation to the fact that Linergy [✂], as opposed to a suggestion [✂]. Linergy [✂].

Paragraph 156 states that the CMA found evidence of one customer sending Category 3 material to a renderer in the Republic of Ireland. The customer indicated that this was because the renderer offered a better price but the CMA states that it did not believe that the data provided by the customer supported this statement. Faced with a customer stating that it switched to a renderer in the Republic of ireland because the latter offered a better price, the CMA concluded that the customer was mistaken in believing that the price was better. Again, this illustrates the unbalanced approach taken by the CMA to market evidence.

Previous reports addressed the points made at paragraphs 159 to 161 but these comments have been ignored.

TOH3

The Supplementary Report noted that, since Ulster Farm closed its Category 1 plant, Linergy had introduced a discount on the price charged to farmers for processing fallen bovine animals where the farmer delivered the fallen animal within a certain time. Table 3 in that Report showed that the effect of this discount was that the price charged to farmers who delivered animals within the specified time had declined since the closure of the Ulster Farm Category 1 plant. Such evidence is totally inconsistent with the CMA claim that the merger would lead to a unilateral price increase in the case of fallen stock. This evidence was completely ignored in the Phase 1 Decision.

TOH 1-3: Countervailing Factors

The Phase 1 Decision contains no analysis of the potential for countervailing buyer power in the case of Category 1 and Category 3 material. This is despite extensive evidence of customers switching material to rendering plants in Scotland and the Republic of Ireland cited above, which the CMA has effectively dismissed.

The Phase 1 Decision also contains no adequate analysis of the potential for entry to undermine any price increase. The discussion at paragraphs 180 to 184 is confined to a consideration of the impact of past entry. There is no analysis of the potential for new entry or expansion by existing competitors to offset any price increase. The Supplementary Report pointed out that there were a number of entry possibilities:

- [✂];
- [✂];
- [✂]; and
- [✂].

[✂].

[✂].

Vertical Issues

Paragraph 197 states that cross border cattle flows are unlikely to be sufficient to render a foreclosure strategy unprofitable. As pointed out in the two Reports, this analysis is incorrect. The issue is not the current level of cross border cattle flows but whether, in the event that Linergy sought to foreclose the market, sufficient additional cattle volumes would be lost to meat plants in the Republic of Ireland as to render such a strategy unprofitable.

11.4 Summary

Given the evidence and economic arguments provided by the Parties on the counterfactual and the relevant geographic market, in particular, theories of harm cannot arise as a result of the Transaction. In addition, and without prejudice to this, the Parties have further illustrated above the fact that the CMA fails to establish such theories of harm on the evidence which it adduces and adopts an approach in its economic analysis which is fundamentally flawed.

12. Conclusion

The Phase 1 Decision is based on a number of theories and hypotheses, which are:

- economically flawed;
- internally inconsistent; and
- at odds with generally accepted economic theory.

In particular, the Decision rests on a purely hypothetical counterfactual which depends entirely on the proposition that Ulster Farm would not have closed its Category 1 plant and Linergy would have built a new Category 3 plant had the Parties not signed the MOU. The evidence in the case does not support this proposition.

Instead, the evidence shows that the Parties took their respective decisions on their rendering businesses independently for the commercial and regulatory reasons explained by the Parties and without reference to the MOU. In these circumstances, the operations of the Parties do not overlap, either in fact or in the appropriate counterfactual. Furthermore, the Parties have shown in this Submission that they each compete in markets for rendering which encompass the island of Ireland and Great Britain, in particular, Scotland and the North of England, markets which are highly competitive. In these circumstances, there can be no likelihood that the Transaction would give rise to an SLC.

In summary, the evidence and economic theory clearly supports the position of the Parties.