Completed acquisition by Valeo Foods of Taurus 3 Limited

Decision on relevant merger situation and substantial lessening of competition

ME/6772-18

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 5 December 2018. Full text of the decision published on 21 December 2018.

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

SUMMARY

1. On 20 August 2018, Valeo Foods Group (**Valeo**) via its subsidiary Rowse Honey Limited (**Rowse**) acquired the whole of the issued share capital of Taurus 3 Limited (**Taurus**) (the **Merger**). Taurus 3 is the holding company of Tangerine Confectionery Limited (**Tangerine**). Valeo and Tangerine are together referred to as the **Parties**.

2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Valeo and Tangerine is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; and that the turnover test is met. The four-month period for a decision has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

3. The Parties are both active in the supply of sugar confectionery in the UK, although Valeo is a relatively smaller player. They primarily overlap in the supply of private label mints, boiled sweets, toffees, eclairs and fudge and gums and jellies to a range of customers (i.e. supermarkets, other grocery retailers and wholesalers).

4. In relation to the geographic frame of reference, the CMA assessed the impact of the Merger on a national basis (taking into account the constraint of suppliers located in continental Europe within its competitive assessment).

5. The CMA has assessed the impact of the Merger in the supply of:

   a) private label mints in the UK;

   b) private label boiled sweets in the UK;

   c) private label toffees, fudge and eclairs in the UK; and

   d) private label gums and jellies in the UK.

6. The CMA found that both Parties are significant suppliers of private label mints in the UK. The CMA found, however, that there is limited head-to-head competition between the Parties within this segment, in particular because there are significant supply and demand-side differences between the main type of private label mints that they each offer (mint imperials in the case of Valeo and mint humbugs in the case of Tangerine). The CMA's investigation also found that there are a number of alternative (albeit smaller) suppliers of private label mints in the UK currently supplying to customers in the UK, as well as certain well-established sugar confectionery suppliers, not currently supplying private label mints in the UK, to which customers would be able to switch in the event that the Parties imposed a price rise post-Merger.

7. The constraint exercised by alternative suppliers reflects certain features of competitive dynamics in relation to the supply of private label mints, including that: there is a high degree of supply-side substitutability between certain types of mint and other products, such as boiled sweets; the customers of private label suppliers are large and therefore attractive to alternative suppliers with available capacity; and, customers control the brand and therefore are typically not deterred from changing private label supplier because of (relatively minor) changes to the look and feel of the product. The CMA therefore believes that alternative suppliers will continue to provide an effective competitive constraint on the Parties post-Merger.

8. Additionally, the CMA found there was some constraint from branded sweet confectionery products, as customers (and consumers) can substitute branded products for private label products.

9. The CMA therefore concluded that the Merger will not result in a realistic prospect of a substantial lessening of competition (**SLC**) in the supply of private label mints.

10. With regard to the supply of (i) private label boiled sweets; (ii) private label toffees, fudge and eclairs, and (iii) private label gums and jellies, the CMA found that the increment to the combined shares of supply arising from the merger is very small [0-5]%. The CMA also found that several alternative competitors remain to sell these products to UK customers and provide an effective competitive constraint on the Parties. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC.

11. Accordingly the CMA believes that the Merger does not give rise to a realistic prospect of a SLC as a result of horizontal unilateral effects.

12. The Merger will therefore **not be referred** under section 22(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

13. Valeo is a European ambient food business with operations in Ireland, the UK, Italy and Czech Republic. It is active across a range of product categories including confectionery, biscuits, sponge cakes, honey, jam, canned vegetables, pasta and gluten-free products. Valeo is controlled by funds managed by CapVest Partners LLP (**CapVest**) and has the following relevant subsidiaries:

    a) Rowse, a subsidiary of Valeo, is the acquirer of the Target.

    b) Big Bear Confectionery (**BB**), a subsidiary of Rowse, is a supplier of branded and private label confectionery in the UK. It is principally a supplier of mint confectionery, where its brands include Fox's and XXX. BB's turnover in the UK in 2017 was £[✂] million, with private label confectionery accounting for £[✂] million of its revenue.

    c) Candy Plus a.s. (**Candy Plus**), a subsidiary of Valeo, is based in the Czech Republic and is principally a supplier of gums, jellies and liquorice confectionery across Northern Europe. Candy Plus had a turnover of approximately £[✂] million in the EEA and £[✂]million in the UK in 2017.

14. Tangerine is a manufacturer and supplier of sugar and chocolate confectionery in the UK, including a range of private label confectionery products and branded confectionery products (e.g. Barratt). Tangerine's worldwide turnover in 2017 was £[✂] million, of which £[✂] million was generated in the UK. Tangerine generated £[✂] from private label sales and £[✂] from branded sales.

Transaction

15. The Merger relates to the purchase by Valeo, via its subsidiary Rowse, of the whole issued share capital of Taurus.

16. Valeo told the CMA that its rationale for the acquisition of Tangerine was that [✂]. Valeo stated that the synergies resulting from the Transaction are estimated at £[✂] per annum.

Procedure

17. The Merger was considered at a Case Review Meeting.[1]

Jurisdiction

18. Each of Valeo and Tangerine is an enterprise. As a result of the Merger, these enterprises have ceased to be distinct for the purposes of section 23(1)(a) of the Act.

19. The UK turnover of Tangerine exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.

20. The Merger completed on 20 August 2018 and was first made public on the same date. The four-month deadline for a decision under section 24 of the Act is therefore 20 December 2018.

21. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

22. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 11 October 2018 and the statutory 40 working day deadline for a decision is therefore 5 December 2018.

Counterfactual

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

[1] See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, from paragraph 7.34.

merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.[2]

24. Valeo submitted that an appropriate counterfactual would be one in which BB is a weaker competitive constraint than at present compared to its rivals. It stated that BB is currently [✂] approximately £[✂] and had [✂] by the prior owners (i.e. prior to its acquisition by Valeo in December 2017).

25. The CMA notes that while the available evidence supports the position that BB was [✂], the Parties have not submitted that BB would have exited the market or was a failing firm.[3] Also, BB was acquired by Valeo in December 2017, prior to the acquisition of Tangerine, and the CMA has not been provided with evidence indicating that, absent the Merger, Valeo would not have been able [✂]. The CMA therefore considers that there is no indication that evidence relating to the recent performance of the BB business is likely to overstate its competitive significance.

26. Given the above, the CMA considers the pre-merger conditions of competition to be the relevant counterfactual and will consider the nature of the competitive constraint from BB in the competitive assessment.

Frame of reference

27. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.[4]

28. The Parties overlap in the supply of branded and private label sugar confectionery in the UK.

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[2] *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).
[3] *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, paragraph 4.3.8.
[4] *Merger Assessment Guidelines*, paragraph 5.2.2.

Product scope

29. Valeo submitted that there is a single market for all sugar confectionery in the UK, with a substantial out-of-market constraint from chocolate confectionery and broader snacking products. In support of this, it submitted that on the demand side, consumers choose from a broad range of sweet and chocolate confectionery as well as broader snacking options.

30. The CMA considers that the available evidence does not fully support this frame of reference and therefore has considered possible segmentations of confectionery as set out below.

Sugar confectionery vs chocolate confectionery

31. The CMA has considered whether the frame of reference should be segmented to reflect differences between sugar confectionery products and chocolate confectionery products.

32. In previous cases examining the market for confectionery products[5], the European Commission (**EC**) has conducted its competitive assessment on the basis of separate frames of reference for:

a) chocolate confectionery products;[6] including block chocolate as well as confectionery bars containing other ingredients such as biscuit, caramel, nuts and other foodstuffs; and

b) sugar confectionery products, defined as "those that have sugar as the principal ingredient, usually combined with colouring matter and flavouring, and often combined with fruit or nuts."[7] Sugar confectionery products include boiled sweets, mints, gums and jellies and toffees, eclairs and fudge.

33. Valeo submitted that consumers choose from a broad range of sugar and chocolate confectionery including broader snacking options and that prices and promotions are the key driver of consumer decisions across a range of product types.

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[5] Case No COMP/M.5644 - Kraft Foods/Cadbury (2010) paras 13 and 25-27; Case No COMP/M.5188 - Mars/Wrigley (2008) paragraphs 11-14; and Case No COMP/M.4293 - Nordic Capital Fund VI/ ICA Meny (2006) paragraphs 11-13.
[6] In ME/1775/05 The completed acquisition by Cadbury Schweppes plc of Green & Black's Limited, the CMA's predecessor body also identified a separate frame of reference for chocolate confectionery.
[7] Case No COMP/M.5644 - Kraft Foods/Cadbury (2010).

34. The CMA has found limited evidence to support the position that sugar confectionery products and chocolate confectionery products are demand-side substitutes and findings in previous cases[8] indicate that these products satisfy different needs for consumers.[9] While both products may be purchased together by retailers, the CMA was told by a number of major retailers that it is unusual to switch shelf space between sugar confectionery and chocolate confectionery. The CMA also notes that, in terms of supply-side substitution, chocolate and sugar confectionery are not substitutable as they are manufactured on different production lines and switching production in the short-term would incur significant cost.

35. The evidence provided to the CMA did not indicate that it would be appropriate to depart from previous cases, and therefore sugar confectionery has been considered within a separate frame of reference from chocolate confectionery.

36. In relation to chocolate confectionery, the Parties' combined share of supply is [0-5]% and there is a range of competitors[10] and potential suppliers of these products. Moreover, no third parties raised any competition concerns in relation to the supply of chocolate confectionery in the UK. The CMA has therefore not considered chocolate confectionery further in this decision.

Branded vs private label

37. The CMA also considered whether branded sugar confectionery products should be segmented from private label sugar confectionery products. The CMA notes that Valeo submitted that the Parties have an estimated combined share of supply of [40-50]% in private label sugar confectionery, whereas they have an estimated combined share of supply of [5-10]% in branded sugar confectionery.[11]

38. In relation to branded sugar confectionery, the CMA found the Parties were not close competitors, with most of BB's sales being in boiled sweets and mints while most of Tangerine's sales were in different products, in particular liquorice, gums and jellies, marshmallows and sherbet. In products where there was some overlap in the Parties' activities (i.e. boiled sweets, mints and

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[8] Case No COMP/M.5644 - Kraft Foods/Cadbury (2010) paras 13 and 25-27; Case No COMP/M.5188 - Mars/Wrigley (2008) paragraphs 11-14; and Case No COMP/M.4293 - Nordic Capital Fund VI/ ICA Meny (2006) paragraphs 11-13.
[9] Chocolate products are typically consumed for hunger satisfaction or indulgence purposes, whereas sugar confectionery products are not. They are typically consumed for enjoyment and, in some cases, oral hygiene or breath freshening.
[10] Including Nestle, Mondelēz and Ferrero.
[11] The CMA was however able to put only limited weight on the shares of supply calculated by the Parties, see paragraphs 77-80.

liquorice), the CMA found that the branded sales of one or other of the Parties were very small and therefore that there was little competitive interaction between them in practice. The CMA also found that there were a number of larger suppliers of branded sweets including Mondelēz, Mars Wrigley, Haribo Dunhills, Nestle and Swizzels Matlow, and that customers did not raise concerns about the impact of the Merger in relation to branded products. For these reasons, the CMA has not considered branded sugar confectionery further in its assessment.

39. In considering the appropriate frame of reference, the CMA has therefore focussed on the extent to which branded sweets constraint private label sweets (and therefore whether the frame of reference for private label products should be expanded to include branded products).

40. The CMA (and its predecessor organisations) have considered the competitive interaction between branded and private label products in a number of previous cases. The cases show that whether the private label and branded products should be considered within the same frame of reference is a case-by-case assessment that depends on competitive dynamics in relation to the products at issue.[12]

41. In order to assess the interaction between private label and branded goods in the case, the CMA has considered demand- and supply-side substitutability.

Demand-side substitutability

42. Valeo submitted that:

a) branded and private label confectionery products compete side-by-side on retailer shelves, with consumers frequently switching from private label to branded products in response to in-store pricing and promotions. Valeo stated that there is not a category of private label retail customer which would not switch to purchasing branded products, whether in response to a lower price, a promotion or other factors such as a new product innovation. Further, private label supply represents only a small proportion of the overall supply of sugar confectionery (approximately 17%, according to figures from Mintel).

[12] For example, ME 6675/17 Anticipated acquisition by Hain Frozen Foods UK Limited of the Yorkshire Provender Limited, ME Anticipated acquisition by Associated British Foods Plc of Dorset Cereals Limited; ME/6598/16 Completed acquisition by Whitby Seafoods Ltd of the Scampi Processing Business of Dawnfresh Seafoods Ltd; ME/6737/18 Anticipated acquisition by Arla Foods Limited of Yeo Valley Dairies Limited; and ME/6761/18 Anticipated acquisition by Hempel Holdings (Germany) GmbH of J.W. Ostendorf GmbH & Co. KG.

b) private label products are priced by reference to branded products, indicating that there is some constraint from branded on private label.

c) the constraint from final consumers switching from private label to branded in response to price changes is augmented because retailers can also switch shelf space between branded and private label. In this context, Valeo provided six examples of retailer stocking decisions where branded products replaced private label products, or vice versa, through retailer shelf space switching.

43. The CMA found, however, that the available evidence did not fully support the Parties' position.

44. First, customers of the Parties provided mixed evidence on switching between private label and branded products. In particular:

a) The majority of the Parties' customers stated that end-consumers would switch between private label and branded sugar confectionery in the event of a price rise and more generally that they switch based on the price and quality of products.

b) However, some large supermarkets told the CMA that there is a sizeable proportion of end-customers who are very loyal to private label sugar confectionery products because they are generally substantially cheaper than branded products. This loyalty to private label is even stronger in certain sugar confectionery product categories which tend to have a more price-sensitive customer, such as mints and boiled sweets.

45. Valeo also submitted an analysis of [✂][13] which in its view showed that branded products are a particularly strong constraint on the supply of mints and an important constraint across boiled sweets, and toffee, fudge and eclairs.

46. The CMA considers that this evidence provides only very limited insight into the strength of demand-side constraints, in particular because:

a) The [✂] dataset [✂] is a 'black box' and it is not possible to fully understand how the dataset is constructed, or how to interpret it, and therefore assess whether the results are robust. In particular, it is unclear how robust the data for private label are since promotions for private label

[13] [✂]

products are less common than promotions for branded products[14] and may be across several products rather than for an individual product.

b) The [✂] shows the estimated effect on other products of a notional price decrease [✂]. Such a price change is larger than, and in the wrong direction to, the standard SSNIP test used by the CMA when considering market definition.[15]

c) The Parties' analysis found that, in response to a notional [✂] price decrease on individual private label products, diversion from branded products was material relative to diversion from other private label products.[16] However, the underlying data showed that the level of diversion was small: the estimated diversion from branded in response to a notional [✂] price reduction on private label represented only about [✂] of the baseline private label volume.[17] The CMA does not consider this to provide a robust basis to support the position that branded products impose a significant constraint on private label products.

47. Second, the CMA found that the available evidence in relation to correlation between the price of private label and branded products was also mixed. Some retailers told the CMA that they generally set their private label prices by reference to other retailers' private label prices. One retailer said that, while a 25% price differential between branded and private label products would usually be optimal, its price differential was often higher as it needs to price competitively against low pricing by discounters.

48. The CMA therefore did not consider there was sufficient evidence to find that private label retail prices were subject to a strong constraint from branded retail prices, which would then also constrain the price that retailers were willing to pay to private label suppliers.

49. Third, the CMA recognises that retailers' ability to switch shelf space from private label to branded represents an additional constraint, at least for some private label products, and has taken this into account in the competitive assessment.

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[14] Annex 10.07 to Final Merger Notice.
[15] *Merger Assessment Guidelines*, paragraphs 5.2.12.
[16] [✂].
[17] Although the estimated diversion is low, there may nevertheless be some overstatement of diversion since the Parties estimated diversion to a category or group of categories by summing the diversion to each individual product in the category or categories. This is because the same sales of other products may be diverted by price reductions on several individual products.

Supply-side substitutability

50. In relation to supply-side substitutability, Valeo submitted that private label products are made on the same production lines as their branded equivalents and in some instances are identical. For example, [✂].

51. The CMA notes that the Parties manufacture both branded and private label products and are able to switch supply between them. The CMA also found, however, that there appear to be very significant differences in the conditions of competition between the branded and private label segments (in particular because major branded suppliers do not compete within private label supply), which suggest that it would not be appropriate to aggregate branded and private label products within a single product segment.[18] Additionally, branded sugar confectionery suppliers told the CMA that entering private label is unattractive.

Conclusion on private label frame of reference

52. For the reasons set out above, the CMA has considered private label sugar confectionery products within a separate frame of reference (although the appropriate frame of reference can be left open because competition concerns would not arise on any plausible basis).

Different types of private label sugar confectionery products

53. The CMA considered whether the frame of reference should be further segmented to reflect the differences between different types of sugar confectionery product.

54. Kantar data submitted by Valeo treats different types of sugar confectionery products separately. Based on the segmentations used by Kantar, the Parties overlap in the supply of the following different private label sugar confectionery product types:

a) Mints;

b) Boiled sweets;

c) Toffees, eclairs and fudge; and

d) Gums and jellies.

[18] *Merger Assessment Guidelines*, paragraph 5.2.17.

55. Valeo submitted that distinctions within sugar confectionery are not appropriate given high levels of both demand- and supply-side substitutability. On the demand side, consumers choose from a broad variety of sweets and frequently switch their purchases between different types of confectionery, rather than repeatedly purchasing the same product or confectionery type. For example, a consumer might purchase a gums and jellies product one week and a foams and mallows product the next. To support this position, Valeo submitted an analysis of [✂] which it argued demonstrated constraints across technology categories (in particular as between mints and boiled sweets, but also toffee, fudge and eclairs and boilings). As set out in paragraph 46, the CMA considers that this analysis provides only very limited insight into the strength of demand-side constraints and has therefore placed little weight on this evidence.

56. On the supply side, Valeo submitted that production lines can make a range of products and are frequently switched (once a week or more) between different products, for example between different types of boiled sweets (fruit boiled sweets and mints) or between different gums and jellies products. Valeo submitted that the ability to switch production is supported by the ready availability of second-hand equipment to set up production lines for new product types, with many sugar confectionery manufacturers using old equipment in practice (e.g. [✂]).

57. Some retailers told the CMA that end-customers do not tend to switch between different sugar product types because of strong consumption preferences, in particular for traditional UK-specific products such as mints and boiled sweets.

58. However, other retailers said that customers do switch between different types of sugar confectionery. These retailers, which tended to be smaller retailers, most frequently said that this was in response to promotions/price and to try new products (or avoid getting ‘bored’).

59. The Parties’ internal documents also provided some support for the position that different sugar confectionery product types are “different eating experiences” or consumed by different types of customers (albeit not necessarily segmented neatly between the four product types set out in paragraph 54 above). For example:

a) [✂].[19]

[19] Annex 12.1 to RFI1.

b) [✄].[20]

c) [✄]. [21]

d) [✄].[22]

e) [✄]. [23]

60. In relation to supply-side substitution, the CMA's investigation indicated that some sugar confectionery manufacturers specialise in particular technologies, for instance Vidal in gums and jellies and Ashbury in toffees. Generally different production lines are required for different product types and it is not easy to switch between certain product types. Competitors confirmed that switching from gums and jellies to boiled sweets is very difficult as gelatine-based confectionery requires specialised machinery. For instance, gums and jellies are produced by depositing the product into a starch mould, heated in ovens for 24 hours and then demoulded and packaged, whereas boiled sweets are deposited into Teflon moulds, cooled, demoulded and are often twist wrapped. Specialised hard candy such as humbugs and sherbet fruits require different production processes, they are formed into an extruded rope which is cut and wrapped at the same time. Even within certain product types there are different production methods for different products.

61. The CMA notes that the same boiling equipment that is capable of high temperature sugar and glucose solution cooking is also used to make a variety of high boil sweets, such as boiled fruit sweets, sherbet lemons, soft and chewy mints and boiled mints. The differences between these technologies lies only in the flavouring and colouring added to the basic sugar solution. Thus, capacity devoted to boiled sweets can readily be moved to supplying many (but not all) mint products. The CMA has taken this into account in assessing the extent of the constraint.

62. Given the above evidence, the CMA has assessed competition for each sugar confectionery product type within a separate frame of reference. However, the CMA has taken into account constraints from other sugar confectionery product types in the competitive assessment below. As part of this, the CMA has taken into account the ability of suppliers to quickly and easily switch resources between products, for example between boiled sweets and mints.

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[20] Annex 12.1 to RFI1.
[21] Annex 12.12 to RFI1.
[22] Annex 12.6 to RFI1 .
[23] Annex 38.4 to RFI1.

Different types of mints

63. As described above, the CMA found a number of material demand- and supply-side differences between different types of private label sugar confectionary products. While the CMA has analysed the effects of the Merger by reference to the four broad product categories identified in the Kantar data (i.e. mints, boiled sweets, toffees, eclairs and fudge, and gums and jellies), the CMA found that these differences also exist, to some extent, within those product categories. This is particularly the case in relation to mints which, as explained below, are the main focus of the CMA's competitive assessment.

64. In particular, the CMA received some evidence that different types of mints have different purposes for end-consumers, with some mints, such as extra-strong mints, being primarily used for breath freshening purposes and other mints, such as Butter Mints , being considered to be similar other boiled sweets and are consumed for their sweet taste. There are also some supply-side differences in the manufacturing processes of different types of mints, with different production lines being required to manufacture each of boiled, panned and pressed mints.

65. The CMA therefore considered whether the frame of reference for mints should be segmented further into different types of mints. The CMA found that the Parties' portfolio of mint products are somewhat different and that there would likely be relatively limited head-to-head competition between the Parties within narrower segments based on types of mint products. Additionally, information from third parties did not suggest that the CMA should segment further into different types of mints.

66. The CMA has therefore considered all mints within the same frame of reference, but has taken into account differences between types of mints in the competitive assessment. However, the appropriate frame of reference can be left open, because competition concerns would not arise on any plausible basis.

Geographic scope

67. Valeo has submitted that the relevant geographic market is national in scope, but that it is appropriate to consider competitive constraints from manufacturers outside of the UK. Valeo noted that there are some regional preferences for sugar confectionery types; for example, boiled sweets are popular in the UK and liquorice is popular in Scandinavia.

68. Generally, previous OFT and EC cases involving confectionery products have defined the geographic frame of reference as national in scope.[24]

69. The evidence provided to the CMA did not indicate that it would be appropriate to depart from previous cases. Some third parties identified some potential barriers that could affect the ability of suppliers based in Continental Europe to supply to the UK, such as: capability and expertise in producing sugar confectionery for UK-specific tastes, exchange rate movements and the uncertainty around the UK leaving the European Union. The extent to which these issues affect customers' purchasing decisions has been taken into account within the CMA's competitive assessment. The CMA notes, however that there are a number of European sugar confectionery manufacturers currently supplying UK-based customers and there is an insufficient basis to conclude, based on available evidence, that they will not be able to do so in future.

70. On a cautious basis, the CMA has considered the appropriate geographic frame of reference to be UK-wide, but has taken into account the constraint from continental-based European suppliers to the extent relevant within the competitive assessment.

Conclusion on frame of reference

71. For the reasons set out above, the CMA has assessed the impact of the Merger in the following frames of reference:

- The supply of private label mints in the UK.
- The supply of private label boiled sweets in the UK.
- The supply of private label toffees, eclairs and fudge in the UK.
- The supply of private label gums and jellies in the UK.

72. However, given that the CMA has identified no competition concerns on any basis, it has not had to conclude on the appropriate frame of reference.

[24] For example *Cadbury Schweppes plc of Green & Black's Limited* (2005), COMP/M.4824 *Kraft/Danone Biscuits*; COMP/M.2072 *Philipp Morris/Nabisco*

Competitive assessment

Horizontal unilateral effects

73. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.[25] Horizontal unilateral effects are more likely when the merging parties are close competitors. The CMA has assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in the supply of:

    a) private label mints in the UK;

    b) private label boiled sweets in the UK;

    c) private label toffees, eclairs and fudge in the UK; and

    d) private label gums and jellies in the UK.

74. In order to assess the likelihood of the Merger resulting in unilateral effects, the CMA has considered:

    a) shares of supply;

    b) the closeness of competition between the Parties; and

    c) competitive constraints from alternative suppliers.

Horizontal unilateral effects in the supply of private label mints in the UK

Shares of supply

75. Valeo submitted that the Parties' combined share of the supply of private label mints is [50-60]%, with an increment of [20-30]% arising from the Merger.

76. Valeo based the Parties' shares of supply on Kantar data, but suggested that this data significantly under-represented the totality of sugar confectionery sales in the UK as a result of widely recognised under-reporting within Kantar's consumer panel, particularly outside of the supermarket channel. In particular, Valeo argued that the Kantar data:

[25] *Merger Assessment Guidelines*, from paragraph 5.4.1.

a) underestimates all sugar confectionery retail sales in the UK at around £0.8 billion, whereas data compiled by GlobalData estimates total sugar confectionery sales in the UK to be worth £2.1 billion; and

b) does not report private label sales by manufacturer.

77. Valeo therefore made a number of adjustments to the Kantar data which it considered appropriate in order to arrive at a more accurate estimate of the total market size.[26]

78. The CMA considers that, given the adjustments which Valeo has made to the data, there is a degree of uncertainty which limits the weight that can be put on the shares of supply submitted by the Parties, other than where the relative shares of supply are supported by other sources of evidence.

79. The CMA therefore sought to obtain information on private label mint sales from other suppliers of sugar confectionery to the UK market. The CMA did not receive responses from all other suppliers and therefore was unable to fully verify the Parties' market shares. The CMA was, however, able to verify that there were a number of other suppliers (as described further below).

80. The CMA notes, in any case, that market shares often have limited weight in markets characterised by a small number of large customers that tender periodically (such as the markets at issue) and has therefore focussed its assessment on whether there are other suppliers with the ability to compete for customers' contracts.

Closeness of competition

81. In order to assess the closeness of competition between the Parties, the CMA has considered:

a) the Parties' offerings;

b) BB's [✂]

c) customer switching data; and

d) third party views.

[26] The Parties adjustments were a) combining the total private label market size with the Parties' own private label sales data; b) scaling up the Kantar data by a factor of approximately 2.7 while retaining the relative proportions of sales across technology categories, and between branded and private label within each technology; c) adjusting the split between branded and private label based on the split from a Mintel report. Furthermore, the various data sources covered slightly different time periods, ranging from the calendar year 2017 to the year ending July 2018.

Differentiated offerings of the Parties

82. Valeo submitted that the private label mints products offered by BB and Tangerine are highly differentiated and that there is limited overlap between the products that BB and Tangerine produce.

83. In 2017, BB and Tangerine manufactured [✄] and [✄] private label mint products respectively. Valeo told the CMA that:

a) only two products (Mint Humbugs and Mint Assortment[27]), representing [✄]% of total revenues for BB's private label mint product range, overlapped with Tangerine products;

b) there was no overlap between the Parties in relation to the supply of the other types of private label mints that one or the other supplies (i.e. Everton Mints, Chewy Mints, Clear Mints, Butter Mints or Extra Strong Mints);

c) while both BB and Tangerine manufacture a Mint Imperial product, there are differences in their respective products. BB offers a traditional sugar panned mint imperial with a compressed powder centre, whereas Tangerine offers a less traditional variation which is softer and chewier, made from a boiled sweet initially which is then sugar panned; These differences are reflected in the market performance of the products

(i) BB's mint imperials accounted for over [✄]% of its private label sales, whereas mint imperials were a relatively small proportion ([✄]%) of Tangerine's private label sales;

(ii) [✄] retailers currently purchase Tangerine's Mint Imperial [✄] (as described above).

(iii) [✄].

84. One retailer [✄] told the CMA that it did not consider BB to be an alternative supplier of private label mints, although other retailers did not confirm differences in the types of mints supplied by the Parties.

85. The CMA notes that the demand- and supply-side differences in relation to different technologies also apply, at least to some extent, to different types of mints. For example:

[27] While both Parties produce mint imperials they do not consider this to be an overlap for the reasons set out in paragraph 83 (c).

a) On the demand side, different types of mints have different purposes for end-consumers, with some being used for breath freshening purposes and other mints, such as Butter Mints , being used, in a similar way to other boiled sweets (e.g. they are consumed for their sweet taste);

b) On the supply side, there are differences in the manufacturing processes for different types of mints, for example different production lines are required to manufacture each of boiled, panned and pressed mints

86. Accordingly, while all mints have been considered within the same frame of reference, the product differences described above limit the extent of head-to-head competition between the Parties' products.

BB [✄]

87. Valeo submitted that BB has, in recent years, provided a limited competitive constraint on Tangerine in relation to the supply of sugar confectionery. In support of this position, Valeo told the CMA that:

a) BB has two factories [✄], to manufacture sugar confectionery. In private label mints, BB [✄], while Tangerine has five factories [✄].

b) BB is currently [✄] and before it was acquired by Valeo on 29 December 2017 there were questions raised with regards to [✄].

c) BB has experienced some loss of [✄] with customers. [✄].

d) [✄]

88. The CMA reviewed BB's internal documents and financial records which show [✄]

89. [✄]

a) [✄]

b) [✄]

90. Additionally, in response to the CMA's market testing, a number of customers also commented on problems with BB [✄]. One described BB as [✄] with regard to private label sugar confectionery, with another retailer telling the CMA that [✄].

91. Overall, the available evidence provides some support for the Parties' submission that BB has been facing [✄], which may be expected to impact on its competitiveness in the future absent the Merger.

Customer switching data

92. Valeo submitted that retailers use tender processes to obtain private label supply and that tenders are typically run on an annual basis. Valeo submitted switching and tender data for the last two years to the CMA.

93. The CMA notes that the switching and tender data provided by the Parties was fairly limited and the full list of names of participating bidders was missing from most of the tender data. The Parties' tender data showed, however, that they have bid against each other in at least two tenders in the last two years.

94. The CMA also gathered information from the Parties' customers and competitors in order to build up a more comprehensive dataset of tendering activity. The data provided by retailers also confirmed that, where tenders were requested, the Parties have both bid for the same private label mints contracts in the last two years.

95. The CMA notes that there are substantial limitations in the dataset available to it and, on this basis, has placed only limited weight on this evidence. In addition, retailers told the CMA that they preferred long relationships with suppliers and bilateral negotiations on contracts (which the CMA considers means that tenders are likely to provide only a limited insight into competitive interactions between the Parties and other suppliers). The CMA has therefore placed more weight on the suppliers identified by retailers as alternative suppliers of private label mints.

Third Party views

96. During its investigation the CMA received information from ten customers in relation to private label mints. These customers represent approximately 90% of the Parties' combined revenue in private label mints and cover the vast majority of purchasers of private label mints in the UK.

97. In response to the CMA's questions on the subject, five of the ten customers stated that the Parties are each other's closest competitors. Two of these customers also believed that alternative suppliers did not have the capacity to supply products to them.

98. The CMA notes, however, that most of the customers who identified the Parties as close competitors did not raise concerns regarding the Merger and were able to identify alternative suppliers of private label mints. Some customers identified suppliers such as Walkers and Crawford & Tilley's as closer competitors to the Parties than the Parties are to each other.

Competitive constraints

99. Unilateral effects are more likely where customers have little choice of alternative suppliers or where these alternative suppliers cannot compete effectively. Given that the overall shares of supply are larger in mints than in the other product types and the increment arising from the merger is also larger, the CMA assessed the alternative suppliers for private label mints.

Alternative UK suppliers

100. Valeo submitted that there are a number of alternative suppliers of private label mints based in the UK and continental Europe and identified its closest competitors in private label mints as: Walkers, Crawford & Tilley, Kinnerton, Joseph Dobson & Sons and Stockley's.

101. The CMA's investigation identified the following alternative suppliers of private label mints in the UK:

a) Walkers is a confectionery company which sells a wide range of sugar and chocolate confectionery products. It was named as a supplier of private label mints by four large customers/retailers.

b) Crawford & Tilley (owned by Maxilin Group) is a specialist in boiling techniques and sells a range of mints. It was named as an alternative supplier of private label mints by two large customers/retailers.

c) Joseph Dobson & Sons is a specialist in boiling techniques and sells a range of mint products including mint imperials. [✄]. Joseph Dobson & Sons [✄].

d) Stockley's is a sugar confectionery manufacturer which acquired Maxilin Group on 30 October 2018.[28] Stockley's [✄]. It was named by one large retailer as a supplier of mints.

e) Nisha's is a manufacturer of a range of snacking products and sugar confectionery. It is a specialist in panned sugar confectionery products. Nisha's [✄]. It was named by one large customer of the Parties as a supplier of mints.

f) Golden Casket is a confectionery manufacturer and distributor which states that it is constantly investing in machinery and plant. Golden Casket [✄]. Golden Casket currently supplies two large retailers in the

[28] "Exciting new acquisition of Maxilin Flyers" https://stockleys-sweets.co.uk/blogs/news/exciting-new-acquisition-of-maxilin-flyers

UK and was named by one additional customer of the Parties as an alternative supplier of mints.

g) Crilly's is based in County Down, Northern Ireland and mainly supplies large customers in the Republic of Ireland. Crilly's has previously won large contracts in the UK,[29] and was also named by two large customers as a supplier of private label mints.

102. The CMA's investigation confirmed that all of these suppliers have the ability to supply private label mints and the majority of these suppliers have excess capacity for manufacture of private label mints. The CMA therefore believes that there are credible and significant competitors to the Parties, who would be able to increase production and supply private label mints in response to increased demand for their products.

Alternative European suppliers

103. The Parties submitted that CCI, Katjes and Vidal, all of which are based in continental Europe, are generally their largest competitors across Europe across different sugar confectionery product types. The CMA's investigation also identified a number of large European suppliers that currently supply the UK. Some of these competitors confirmed to the CMA that they have substantial excess capacity for the manufacture of mints. These European suppliers include:

a) Fortuin, which claims to be the market leader in the supply of mints in the Netherlands and is known for its wide range of mint pastilles. Fortuin is active in a range of mint products including compressed mints and mint crumbles. The CMA understands that Fortuin has recently started to supply private label mints in the UK. Fortuin [✂].

b) Cloetta claims to be a leading confectionery supplier in the Nordic Region and the Netherlands. It is active in sugar confectionery, chocolate confectionery, nuts, pastilles and chewing gum. The CMA understands that Cloetta currently supplies private label mints in the UK.

c) CCI states that it sells its products in more than 30 countries with a strong focus on northern and western Europe. It has five production facilities across Germany and the Netherlands. [✂].

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[29] 'Newry company 'sweet' on £1m contract with Poundworld ://www.irishnews.com/business/2015/08/05/news/newry-company-sweet-after-securing-1-million-contract-with-poundworld-212635/

d) BackIIBasics is a confectionery supplier based in Denmark and claims to have a 100% focus on private label. It states that it sells to supermarket chains in Europe and the US. [✄].

104. An internal document of Valeo notes the increased importance of European suppliers: [✄].

105. The CMA believes that the suppliers described above are credible alternative suppliers of private label mints that would be able to increase the production and supply private label mints in response to increased demand for their products.

Out-of-market constraint from suppliers of boiled sweets

106. Valeo submitted that suppliers of boiled sweets could easily switch their production lines to start producing boiled mints.

107. As described above, the available evidence indicates that there is some supply-side substitutability between different types of boiled products. Competitors of the Parties confirmed that the differences between these technologies lies only in the flavouring and colouring added to the basic sugar solution and that switching between making different boiled products is relatively easy.

108. The CMA notes that the main overlap between the Parties at the product level within mints arises in relation to mint humbugs. As mint humbugs are boiled mints, the CMA notes that suppliers of boiled sweets are likely to provide an additional constraint on the Parties in relation to the most likely area of head-to-head competition between them.

Customers' negotiating power

109. Valeo submitted that the Parties' private label customers have sophisticated buying teams who would be able to resist price increases. These customers procure both branded and private label products from Tangerine and BB and are therefore in a position of negotiating strength. In particular, Valeo submitted that:

a) Retailers can tender a broad range of products or limited number and there are many examples of the Parties winning and losing SKUs.

b) Suppliers do not know who they are competing against. This means that they have an incentive to remain price competitive to avoid risking the loss of business.

c) The customers have sophisticated buying teams which may use "open book" pricing models.

d) Framework agreements tend to have a 12/13 week notice period, therefore switching between different suppliers is easy.

110. Valeo also submitted that customers are aware of input prices for their products and can use procurement experts to challenge cost assumptions (and provided evidence from their internal documents of past events of this nature). As described above, the Parties also provided evidence that retailers have, on occasion, replaced private label products with branded products and vice versa.

111. The CMA considers there are features of the supply of private label mints that make customers likely to be able to resist a price increase. First, customers buy in relatively large quantities and, if faced with price increases, are able to offer the contract to alternative companies with the ability to supply the product in the UK even if they do not currently supply. Second, in contrast to branded products, a change of supplier for private label products does not cause a change in the look and feel of the product and thus risk disappointing the final consumer with possible adverse effect on the customer's own competitive position. Third, customers may be able to replace private label products with branded products, even if these do not appeal to exactly the same final consumers; hence, the constraint from branded products may be greater than that derived just from switching by final consumers in response to passed-through price increases. While the Parties and the CMA have not been able to quantify these effects, the direction of the effect in all cases is to make it less likely that the Parties are able to impose price increases, post-merger.

112. As noted above, most of the customers who responded to the CMA's questionnaire did not have concerns about the effect of the Merger on competition.

Conclusion on horizontal unilateral effects

113. For the reasons set out above, the CMA found that, while the Parties are both significant suppliers of private label mints in the UK, their portfolio offering within mints are differentiated and there are a number of alternative suppliers available to customers. The CMA believes that these alternative suppliers will continue to provide an effective competitive constraint on the Parties; and there is some additional constraint from branded products (which represent approximately three-quarters of all mints sold in the UK). The CMA therefore

believes that the Merger will not result in a realistic prospect of a substantial lessening of competition in the supply of private label mints.

Horizontal unilateral effects in the supply of private label boiled sweets in the UK

Shares of supply

114. Valeo submitted that the Parties' combined share of the supply of private label boiled sweets is [30-40]%, with an increment of [0-5]% brought about by the Merger.

115. As set out in paragraphs 77-80, the CMA considers that the adjustments that Valeo has made to the third party market data gives rise to a degree of uncertainty which limits the weight that can be put on the shares of supply submitted by the Parties, other than where the relative shares of supply are supported by other sources of evidence.

116. The CMA therefore sought to obtain information on private label boiled sweet sales from other suppliers of sugar confectionery to the UK market. The CMA did not receive responses from all other suppliers and therefore was unable to verify the Parties' market shares. The CMA was however able to verify that there were five suppliers which were larger than BB, of which two were much larger than BB.

Closeness of competition

117. In order to assess the closeness of competition between the Parties, the CMA has considered:

    a) the Parties' offerings: Valeo submitted that the [✂] of each Party's production facilities are differentiated. In order to make boiled sweets, BB uses [✂]. Tangerine uses [✂] to manufacture boiled sweets. Valeo also submitted that the Parties each supply different customer channels with Tangerine focusing on the supermarket channel through which it generates nearly [✂]% of its sales. BB generated less than [✂]% of its sales through the supermarket channel and focuses on the bulk channel[30]. The CMA notes that Tangerine produces nine different product types within boiled sweets, whereas BB only produces two product types, namely a) blackcurrant and liquorice and b) chocolate limes. For [✂]% of

[30] Bulk suppliers are those who purchase sweets in bulk and re-sell them to retailers.

Tangerine's sales, BB does not currently overlap and moreover BB does not have the capability to make products [✂].

b) Valeo's submission on BB's [✂]; as discussed in paragraphs 87-90 the CMA has received evidence showing that BB was in some [✂].

c) Third party views: Third parties generally stated that they considered BB and Tangerine to be close competitors, however a number of customers noted that Tangerine produced much higher quality products and offered a wider breadth of manufacturing capability than BB. This was consistent with the view in some internal documents that the [✂] compared to Tangerine's.

118. Given the above evidence, the CMA believes that the Parties are not each other's closest competitors in the supply of private label boiled sweets.

Competitive constraints

119. The CMA's investigation has identified a number of alternative suppliers to the Parties including: CCI, Bristows, Stockley's, Golden Casket and Joseph Dobson & Sons. Crilly's and Crawford & Tilley's were both identified by customers as suppliers of private label boiled sweets.

120. BB's tender data identifies CCI, Kinnerton, Crawford & Tilley's and Stockley's as alternative suppliers that have competed against the Parties for boiled sweets contracts on at least two occasions.

121. As stated in paragraph 116, there were five suppliers which were larger than BB. Given the above, the CMA considers that each of the above mentioned suppliers are credible, substantial competitors to the Parties.

Conclusion on horizontal unilateral effects

122. For the reasons set out above, the CMA believes that given the small increment arising from the Merger and the number of credible alternative suppliers remaining, the Merger does not give rise to a realistic prospect of an SLC in the supply of private label boiled sweets.

Horizontal unilateral effects in the supply of private label toffees, eclairs and fudge in the UK

Shares of supply

123. Valeo submitted that the Parties' combined share of the supply of private label toffees, eclairs and fudge is [50-60]%, with an increment of [0-5]% arising from the Merger.

124. As set out in paragraphs 77-80, the CMA considers that the adjustments that Valeo has made to the third party market data gives rise to a degree of uncertainty which limits the weight that can be put on the shares of supply submitted by the Parties, other than where the relative shares of supply are supported by other sources of evidence.

125. The CMA therefore sought to obtain information on private label toffees, eclairs and fudge sales from other suppliers of sugar confectionery to the UK market. The CMA did not receive responses from all other suppliers and therefore was unable to verify the Parties' market shares. The CMA was however able to verify that there were four suppliers which were larger than BB, of which one was much larger than BB.

Closeness of competition

126. Valeo submitted that the [✂] of each Party's production facilities are differentiated. Similarly to boiled sweets, in order to make toffee, fudge and eclairs, BB uses [✂] Tangerine uses [✂] to manufacture boiled sweets.

127. As discussed in paragraphs 87-90 the CMA has considered the submissions and evidence it has received showing that BB was in some [✂].

128. The CMA received limited evidence from third parties commenting on the closeness of competition between the Parties in relation to toffees, eclairs and fudge. However customers commented that Tangerine provides a better product range and higher quality product across all sugar confectionery product types.

129. No third parties raised any competition concerns in relation to the supply of toffees, fudge and eclairs in the UK.

Competitive constraints

130. The CMA's investigation has identified a number of alternative suppliers to the Parties including Baronie (Ashbury), Stockley's, Bristows of Devon and CCI

The CMA considers that each of these are credible, substantial competitors to the Parties.

Conclusion on horizontal unilateral effects

131. For the reasons set out above, the CMA believes that given the very small increment (around [0–5]%) arising from the Merger and the number of credible alternative suppliers that will remain to constrain the Parties, the Merger does not give rise to a realistic prospect of an SLC in the supply of private label toffees, eclairs and fudge.

Horizontal unilateral effects in the supply of private label gums and jellies in the UK

Shares of supply

132. Valeo submitted that the Parties' combined share of the supply of private label gums and jellies is [30-40]%, with an increment of [0-5]% arising from the Merger.

133. As set out in paragraphs 77-80 the CMA considers that the adjustments that Valeo has made to the third party market data gives rise to a degree of uncertainty which limits the weight that can be put on the shares of supply submitted by the Parties, other than where the relative shares of supply are supported by other sources of evidence.

134. The CMA therefore sought to obtain information on private label gums and jellies sales from other suppliers of sugar confectionery to the UK market. The CMA did not receive responses from all other suppliers and therefore was unable to verify the Parties' market shares. The CMA was however able to verify that there were three suppliers which were larger than BB, of which two were much larger than BB.

Closeness of competition

135. Valeo submitted that on the basis BB [✂] the transaction is not capable of resulting in any meaningful loss of competition in relation to gums and jellies. Additionally, Valeo noted that Tangerine competes much more closely with a number of other suppliers than it does with [✂]/BB.

136. The CMA received limited evidence from third parties commenting on the closeness of competition between the Parties in relation to gums and jellies. However, customers commented that Tangerine provides a better product range and higher quality product across all sugar confectionery product types.

Competitive constraints

137. Valeo submitted that there are a number of alternative suppliers for gums and jellies including Vidal, CCI and Katjes in particular.

138. The CMA's investigation has confirmed that there a number of large alternative suppliers to the Parties including Vidal, CCI, Kervan Gida and Katjes. Vidal and Katjes in particular were identified by a number of customers as competitors to the Parties in the supply of gums and jellies.

139. Valeo submitted a number of internal documents which show that Tangerine monitors [competitor] closely in the supply of private label gums and jellies. These include:

   a) [✂]

   b) [✂]

   c) [✂]

   d) [✂]

140. Valeo's internal documents consistently identify [competitor A, competitor B, competitor C and competitor D] for gums and jellies.

141. The CMA notes that BB's tender data identifies that [✂] have competed against the Parties for gums and jellies contracts on at least two occasions.

142. The CMA believes that each of these are credible, substantial competitors to the Parties.

143. No third parties raised any competition concerns in relation to the supply of gums and jellies in the UK.

Conclusion on horizontal unilateral effects

144. For the reasons set out above, the CMA believes that given the very small increment arising from the Merger and the number of credible alternative suppliers remaining, the Merger does not give rise to a realistic prospect of an SLC in the supply of private label gums and jellies.

Barriers to entry and expansion

145. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA

considers whether such entry or expansion would be timely, likely and sufficient.[31]

146. Valeo submitted that entry can be readily achieved through investment in new capacity, repositioning of existing branded competitors and sponsored entry by retailers.

147. However, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

Decision

148. Consequently, the CMA does not believe that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.

149. The Merger will therefore **not be referred** under section 22(1) of the Act.

Colin Raftery
Senior Director, Mergers
Competition and Markets Authority
5 December 2018

[31] *Merger Assessment Guidelines*, from paragraph 5.8.1.