

1 JULY 2022

COMPLETED ACQUISITION BY CERELIA GROUP
HOLDING SAS OF CERTAIN ASSETS RELATING TO
THE UK AND IRELAND DOUGH BUSINESS (*JUS-ROL*)
OF GENERAL MILLS, INC.

INITIAL SUBMISSION

STRICTLY CONFIDENTIAL
CONTAINS BUSINESS SECRETS

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1. INTRODUCTION

- 1.1 This is Cérélia's initial response to the CMA's Phase 1 Decision of 30 May 2022 (**Phase 1 Decision**) regarding the completed acquisition by Cérélia of the Jus-Rol brand (and related contracts) (the **Jus-Rol Business**) (the **Transaction**).
- 1.2 In this initial submission, Cérélia wishes to summarise a number of key concerns in relation to the Phase 1 Decision. This submission is not intended to address all aspects of the Phase 1 Decision with which Cérélia disagrees and is without prejudice to Cérélia's further, more detailed submissions in this regard which Cérélia intends to submit together with its observations on the CMA's Issues Statement in this case, once received.
- 1.3 This submission addresses the CMA's findings and reasoning in the Phase 1 Decision and explains why the Phase 1 Decision is fundamentally misconceived for three key reasons:
- (a) The CMA accepts but fails to give any evidential weight in the Phase 1 Decision to Cérélia's Transaction rationale (Section 2).
 - (b) The Phase 1 Decision mischaracterises an essentially vertical Transaction as horizontal by ignoring the fact that Cérélia and Jus-Rol operate at different levels of the supply chain and do not compete with one another (Section 3).
 - (c) The Phase 1 Decision grossly understates the competitive constraints faced by Cérélia from other dough-to-bake (**DTB**) co-packers both in the UK and Continental Europe and the ability of UK retailers, which enjoy significant bargaining power, to switch between such co-packers sufficiently easily and promptly to effectively constrain any incumbent co-packer's terms. Due to the opaque nature of upstream co-packing services, Cérélia has no visibility of the terms offered by competing co-packers in retailer negotiations and tenders. Indeed, Cérélia is generally not aware of which co-packers it competes with when negotiating co-pack terms with retailers. As such, the mere threat of switching by a retailer is an effective constraint on Cérélia. The effectiveness of switching threats is evidenced in the competitive terms Cérélia has been offering to retailers pre-merger and losses of co-pack business Cérélia has suffered over recent years (Section 4).
- 1.4 Cérélia is confident that following an in-depth investigation at Phase 2, the CMA will be persuaded that (i) Cérélia's motivation for entering into the Transaction is entirely pro-competitive, (ii) Cérélia and Jus-Rol operate at different levels of the supply chain and do not compete with each other, and (iii) the Transaction will not adversely affect the ability of UK retailers to source DTB co-pack services and Jus-Rol branded DTB products on competitive terms and at a competitive quality, such that there will be no SLC as a result of the Transaction.

- 1.5 Finally, by way of a broader comment, Cérélia submits that the Transaction will in fact lead to investment, innovation and category growth. In that regard, if approved, the Transaction will make a positive contribution to the UK economy at a time of wide-spread concerns regarding high inflation and low growth prospects. In contrast, continued delay in the approval of the Transaction has a direct negative impact on the day-to-day operations of the Cérélia and Jus-Rol business and invest in a reinvigorated Jus-Rol brand. As such, a type 1 error in this case (an unjustified intervention) carries particular economic consequence, not only for the Parties but also for the UK economy and, importantly, for consumers. The above issues are discussed in more detail in the remainder of this initial submission and will be developed further by Cérélia over the course of the CMA's Phase 2 investigation.

2. THE TRANSACTION RATIONALE IS PRO-COMPETITIVE

- 2.1 The Transaction concerns the acquisition by Cérélia of one of its customers, i.e. GMI's Jus-Rol brand.¹ As such, it is economically and commercially speaking purely vertical in nature. This is reflected in the Transaction rationale.
- 2.2 The Phase 1 Decision accurately summarised the Transaction rationale at paragraphs 13-14, noting that:

“Cérélia submitted that the Merger is motivated by its desire to increase the overall penetration and sales in the dough-to-bake category in the UK (which is smaller than in neighbouring European countries eg Germany and France). Cérélia further submitted that it intends to use the Jus-Rol brand as a vehicle for growing and marketing the dough-to-bake category in the UK.

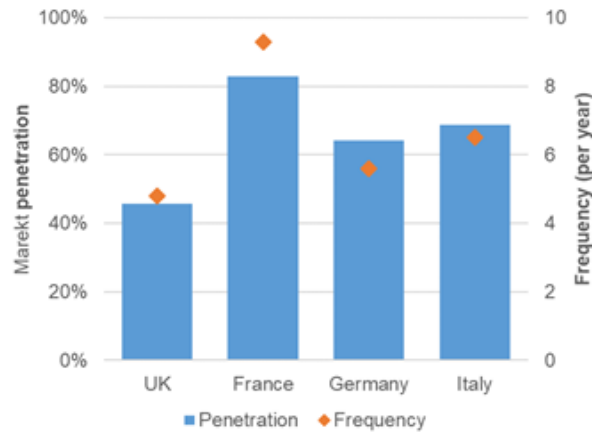
The CMA found that Cérélia's internal documents are broadly consistent with its stated rationale for the Merger.”²

- 2.3 The DTB segment is significantly smaller in the UK relative to comparable Continental European markets. Cérélia covered the reasons the UK DTB segment is underweight in the Issues Meeting and Issues Paper Response.³ The graph below compares the household penetration and frequency of purchase of DTB products in the UK with other comparable Continental European economies, and shows that the UK DTB segment lags behind in both measures of the DTB segment.

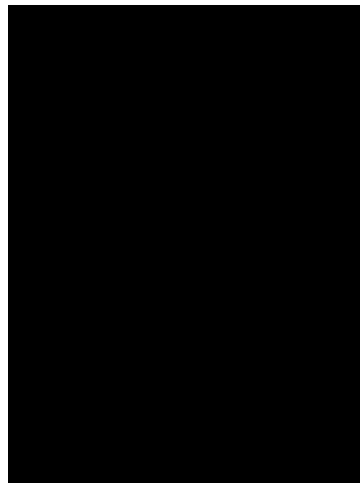
¹ It is only the Jus-Rol brand that is being acquired as part of the Transaction, with no employees or manufacturing capability.

² In this submission, unless otherwise stated, any emphasis added to quotes has been added by Cérélia for the purposes of highlighting significant sections of a quote.

³ Paragraph 3.2, Figure 1, Written Response to the Issues Letter, dated 11 May 2022 (*Issues Paper Response*).



- 2.4 One of the reasons for the underperformance of the DTB segment in the UK is a lack of investment in the category. In particular, as the owner of the Jus-Rol brand, GMI [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] In contrast, Cérélia [REDACTED]
- [REDACTED]



- 2.5 The CMA raised no concerns with the evidence submitted by Cérélia in relation to the underweight level of the DTB category (and the resulting upside potential for growth) and GMI's [REDACTED]. The CMA furthermore confirmed that Cérélia's "*internal documents are broadly consistent with its stated rationale for the Merger*".⁵

⁴ Paragraph 3.3, Figure 2, Issues Paper Response.

⁵ Phase 1 Decision, paragraph 14.

- 2.6 The deal rationale is also consistent with “real world” commercial evidence. Cérélia made significant investments into a new production facility in Corby over the past few years. The new production site became operational in 2020 and [REDACTED]. It would make no economic sense at all for Cérélia to pursue a commercial strategy which would lead to higher prices as this would directly lead to a material contraction of the DTB category, a niche and not a ‘must have’ category in the UK grocery sector.⁶ If Cérélia were to follow such a strategy, retailers’ input costs would rise, making it more likely that consumers would reduce their purchase of what is a discretionary item in response to a price increase. Cérélia’s significant investments into its Corby site would not generate sufficient returns if the DTB category significantly contracts in the UK. In order to facilitate category growth, investment into, and re-invigoration of the ailing Jus-Rol brand is required which, in turn, will drive private label demand and innovation, offering consumers more choice and inspiration at competitive prices.
- 2.7 Moreover, the acquisition of the Jus-Rol brand is indeed necessary to enable Cérélia to invest materially in growing the UK DTB segment, since as an upstream DTB co-packer there is an inherent limit to the level of investment Cérélia can dedicate to the DTB category.
- 2.8 First, as an upstream co-packer, Cérélia is not in control of the marketing, recipes or retail prices of any consumer-facing products. These are controlled by brand owners, including both consumer brand owners and retailers in relation to their respective private label brands. To the extent that Cérélia has sought to work with retailers to expand product ranges or develop new pack sizes, these can only be actioned if retailers, having regard to their private label brand and product ranging strategies, wish to pursue such changes and consent to such changes. Cérélia’s role in new product development as a co-packer is therefore very limited compared to that of a brand owner, and largely reactive.
- 2.9 Second, there is a limit to the amount that Cérélia (and individual retailers) would find it profitable to invest in new DTB products, given that the return on investment can only be achieved over a limited volume of product (i.e. the DTB private label offer of an individual retailer). In contrast, any investments made in the Jus-Rol brand, under Cérélia’s ownership and control, would deliver returns over a much larger volume of sales (potentially all Jus-Rol sales across all retailers that stock the brand). Acquisition of the brand will therefore deliver higher levels of investment and innovation by Cérélia, in turn bringing benefits to retailers and, ultimately, consumers.
- 2.10 This last point is important. While the CMA in Phase 1 has focused on identifying the potential dis-benefits to consumers arising from Cérélia’s acquisition of the Jus-Rol brand, it has given no weight at all to the benefits that can be expected to flow from Cérélia’s increased

⁶ See also *GMI/Saxby*, paragraph 43.

investment in the brand post-Transaction, which is evidenced in its internal documents and supported by its economic incentives post-Transaction.

- 2.11 Given the compelling body of evidence supporting its pro-competitive deal rationale, Cérélia was deeply disappointed that the CMA's Phase 1 Decision-maker failed to give proper (or indeed any) weight to the deal rationale. This is in particular disappointing as it runs directly counter to a number of key findings of a report recently prepared by E.CA Economics for the CMA covering an "Ex-post Evaluation of Vertical Mergers" which the CMA published on 31 March 2022 (the **E.CA Report**):

"At present, the "Rationale for the merger" section of the CMA's decisions appears to be largely formalistic, a 'copy and paste' of the parties' statements to the CMA with little to no weight given to it. We believe this to be a mistake...⁷We recommend that the CMA prioritises greater engagement with business evidence, along with the 2021 MAGs intention."⁸

- 2.12 We discuss why the Transaction must appropriately be considered a vertical merger in Section 3 of this submission.
- 2.13 Indeed, the above recommendation is also directly relevant in relation to the CMA's comment in footnote 69 of the Phase 1 Decision. There the CMA comments in the abstract that *"pursuing expansion of the dough-to-bake category in line with the Merger rationale would not preclude Cérélia from also seeking to divert sales from private label to Jus-Rol products".*
- 2.14 This observation in the Phase 1 Decision is entirely hypothetical and in fact incorrect – both factually and as a matter of economic logic. Any attempt by the merged entity to increase private label DTB co-pack prices or degrade DTB co-pack quality or service levels would directly and materially undermine the very rationale of the Transaction to grow the DTB category which the CMA accepts is supported by the evidence on its file. This would be the case because such a strategy would likely lead to higher retail prices and less shelf-space devoted to DTB products overall (as will be explained further in Section 4). There is also not a shred of evidence in Cérélia's internal business documents which would give any support to this (purely theoretical) theory of harm. Indeed, on the contrary, all of the available internal business evidence supports Cérélia's deal rationale, i.e. that the acquisition of the Jus-Rol Business will give Cérélia a 'tool' or 'vehicle' and additional incentives for further investment into category growth, in close cooperation with retailers.

⁷ E.CA Report, page 10.

⁸ E.CA Report, *ibid*.

3. THE TRANSACTION IS VERTICAL

- 3.1 From the outset, Cérélia made it clear in its submissions to the CMA that the Transaction was vertical in nature. The CMA dismissed this approach and instead chose to adopt a “*horizontal lens*”, under which it focussed on what it described as the “*impact of the Merger in the wholesale supply of dough-to-bake products to grocery retailers in the UK*”.⁹
- 3.2 By way of a preliminary comment it is noted that the CMA in its Phase 1 Decision relied on a ‘horizontal lens’ – focussing on the supply of DTB products to grocery retailers in the UK – for the purposes of the share of supply test in section 23 of the Enterprise Act 2002 to assert jurisdiction over the Transaction, as the target’s UK revenues fell below the turnover test under the Enterprise Act.¹⁰
- 3.3 It is acknowledged that the CMA has a wide discretion in applying the share of supply test and is not restricted by economic markets or considerations of closeness of competition when identifying a frame of reference for the application of the share of supply test. And, precisely because the frame of reference adopted for the purposes of assessing the share of supply need bear no relation to an economic market, it is essential that, the CMA does not simply “cut and paste” this horizontal frame for its substantive assessment of the likely competitive effects of the Transaction. For the reasons summarised below, in part because it adopted an unduly blinkered ‘horizontal lens’, the Phase 1 assessment failed to properly assess the actual competitive market conditions in which the merged entity competes and the incentives which flow from these.
- 3.4 The Phase 1 Decision erred in particular in failing to have regard to the following key facts, each of which should be factually uncontroversial. This error of assessment has a significant bearing on the analysis of the competitive effects of the Transaction, including the economic incentives of the merged entity:
- (a) There is no reduction in the number of providers of DTB co-pack services in the UK as a result of the Transaction, i.e. there is no increase in the level of concentration in this segment.
 - (b) There is therefore no change in the proportion of co-packing services provided to UK retailers by Cérélia as a result of the Transaction as Cérélia already manufactured almost all Jus-Rol products sold to UK retailers pre-Transaction.¹¹ This is because the Transaction only involves the acquisition of a downstream brand for which Cérélia

⁹ Phase 1 Decision, paragraph 51 and footnote 68.

¹⁰ Phase 1 Decision, paragraph 33.

¹¹ Pre-Transaction, GMI [REDACTED], which have no private label equivalents in the UK, [REDACTED]
[REDACTED]
[REDACTED]

already supplies upstream manufacturing.

(c) As a DTB co-packer, Cérélia provides an upstream manufacturing service and competes on the basis of Cérélia's ability to meet customer requirements at a competitive price and quality. Cérélia competes against other co-packers which offer the same service to downstream brand owners (including retailer private label brands). In no sense does Cérélia compete with these brand owners. In this regard:

- While Cérélia offers some category insights in relation to recipes and packaging to distinguish itself as a knowledgeable co-packer, all decisions in relation to the products Cérélia co-packs ultimately rest with the brand owners, i.e. consumer brand owners and retailers with their own private label brands.
- Cérélia essentially has no involvement in the marketing of the downstream brand (including retailer own brands) it co-packs. In particular, Cérélia does not participate in in-store activation or promotions.
- The CMA commits a manifest error of assessment when it classifies retailer private label SKUs which Cérélia co-packs as "*Cérélia's products*" while classifying the DTB products which Cérélia co-packs as GMI, as "*Jus-Rol's products*".¹² The truth is that neither category of products are Cérélia's products.

(d) In contrast, downstream brand owners proactively develop, promote and market their respective brands. That means that they also take, at their sole discretion, all decisions in relation to the branding, marketing, recipe and packaging of their products, and bear all the financial and commercial risk in relation to brand marketing, innovation and promotional activity. Specifically:

- The Jus-Rol Business suggests recommended retail prices and makes significant promotional contributions to support retailer promotional activity. Jus-Rol also operates a range of brand-specific social media and marketing assets.
- Retailers promote their own brands in a similar fashion. Notably, retailers may incur significant marketing spend to promote specific categories of products within their private label brands. For example, Aldi was the headline sponsor of the Great British Bake-Off (**GBBO**) series from 2020 to 2021. In 2022, Sainsbury's became the new exclusive broadcast sponsor of the entire

¹² E.g. In the CMA's Issues Paper.

GBBO franchise under a multi-year deal with Channel 4.¹³ In this example, both retailers have and will use these marketing opportunities to specifically promote their private label brands in the home baking and DTB segments.

- 3.5 The Phase 1 Decision has therefore fundamentally misunderstood and mischaracterised the factual framework in which the Transaction takes place, which includes the current relationship between the merging parties and the roles of different actors in the supply chain for DTB products. The CMA's misunderstanding of the business evidence in this regard is apparent in Figure 1 of the Phase 1 Decision. Cérélia sets out below the correct factual illustration of the DTB product supply chain, compared against the original illustration in Figure 1 of the Phase 1 Decision.

Figure 1. CMA's Phase 1 view of the DTB supply chain:

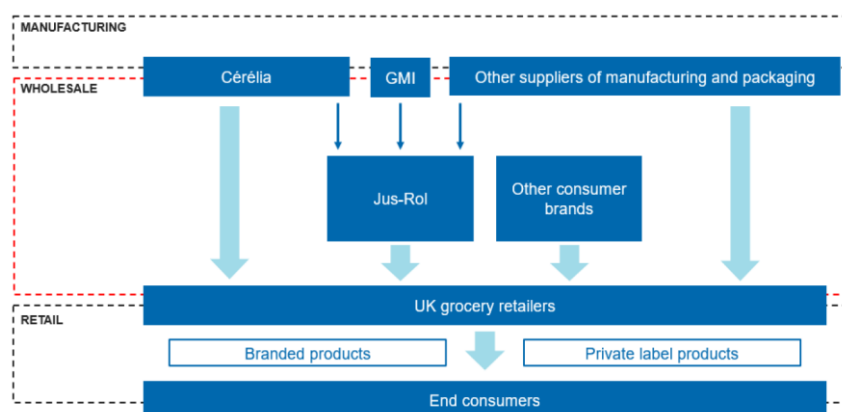
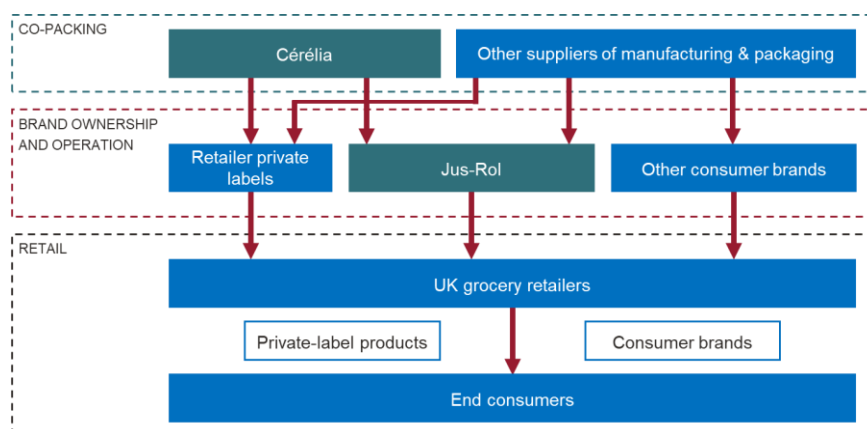


Figure 2. Cérélia's corrected illustration of the DTB supply chain:¹⁴



¹³ <https://www.channel4.com/press/news/sainsburys-sponsor-channel-4s-great-british-bake-franchise#:~:text=Sainsbury's%20to%20sponsor%20Channel%204's%20The%20Great%20British%20Bake%20Off%20franchise,-News%20Release&text=Channel%204%20today%20announces%20supermarket,of%20the%20show%20to%20date>

¹⁴ In relation to upstream co-packing, the figure focuses on the provision of open market third-party co-packing services and excludes self-supply by vertically integrated brand owners (e.g. GMI's limited canned volumes pre-Transaction).

- 3.6 As can be seen from the figures above, the Phase 1 Decision failed to properly distinguish the distinct activities of (i) manufacturing and (ii) brand management at the wholesale level of the supply chain. This explains to a significant extent the confused reasoning of the Phase 1 Decision which purports to adopt a ‘horizontal lens’ while at the same time focussing on an essentially vertical foreclosure theory of harm.
- 3.7 This confusion is apparent from the Phase 1 case team’s references to retailer private label products as “Cérélia’s products”. Cérélia merely manufactures DTB products as a co-packer, just as it manufactures GMI’s Jus-Rol products, which the Phase 1 Decision properly refers to as Jus-Rol products. The CMA’s failure to acknowledge the fact that retailer private label brands are brands in their own right, which are carefully and strictly managed by retailers as brand owners, is reflected in the misguided schematic supply chain illustration in the Phase 1 Decision, also referred to at Figure 1 above.
- 3.8 The Phase 1 Decision then brushes aside and gives no weight to business evidence which contradicts the CMA’s ‘horizontal lens’ analysis, namely the following key facts:
- (a) The Parties have never tendered or bid against each other for a retailer contract.¹⁵ This should not be contentious given that GMI/Jus-Rol do not supply third party DTB co-pack services in the UK.
 - (b) The Parties do not perceive each other as directly competing with each other and do not monitor each other’s performance in their internal documents.¹⁶
 - (c) Retailers never threaten to shift volumes to Jus-Rol when negotiating DTB co-pack terms with Cérélia and always refer to rival (UK or Continental European) co-packers as outside options.¹⁷
- 3.9 That said, certain sections of the Phase 1 Decision evidence the ‘cracks’ in the CMA’s ‘horizontal lens’ reasoning. In particular:
- (a) The CMA acknowledges in the Phase 1 Decision that the Parties impose only an *“indirect constraint at the wholesale level”* on one another.¹⁸ This position is clearly inconsistent with the view that the Parties are close (direct) competitors at the wholesale level. For the notion of close competitors to have any meaning it must relate to competitors which not only compete directly with one another but do so

¹⁵ Phase 1 Decision, paragraph 64(b), which the CMA does not dispute.

¹⁶ Phase 1 Decision, paragraph 75. The Parties refer to aggregate market and share developments based on third-party data.

¹⁷ Indeed, it would make no sense for a retailer to threaten to shift volumes to Jus-Rol: [REDACTED] Cérélia manufactures almost all Jus-Rol products, as previously noted, and [REDACTED]

¹⁸ Phase 1 Decision, paragraph 68.

particularly closely. By the CMA's own admission in the Phase 1 Decision, the Parties are only indirect constraints on one another, so they cannot be close competitors – and indeed they are not. The CMA's Merger Assessment Guidelines (CMA129) (*MAGs*) confirm that horizontal mergers are mergers “*where the firms compete head-to-head*”¹⁹. In the present case, it is clear and accepted in the Phase 1 Decision that there is no such “*head-to-head*” competition between Cérélia and the Jus-Rol Business.

- (b) The central concern raised by the Phase 1 Decision is that the merged entity may have the ability and incentive to raise DTB co-pack prices or degrade its DTB co-pack quality and service levels “*with the aim of diverting sales from private label to the Jus-Rol brand*” at the retail level.²⁰ As a matter of simple economic logic this is a vertical theory of harm, i.e. whether Cérélia as a provider of an input for retailer private label products has the ability and incentive to divert sales to its own downstream retail brand by degrading its co-pack services to retailers.

- 3.10 Looking ahead, for the reasons discussed in this section, Cérélia submits that the assessment of the Transaction in the Phase 1 Decision would benefit from an express acknowledgement that the Parties do not directly compete with one another and are not close competitors. Any focus on an increment in ‘wholesale sales’ to retailers for jurisdictional ‘share of supply test’ purposes should not distract from these simple, important facts when considering the substantive merger-specific effects of the Transaction.

4. CÉRÉLIA IS EFFECTIVELY CONSTRAINED BY RIVAL CO-PACKERS

- 4.1 The principal concern in the Phase 1 Decision is that post-merger, Cérélia will have the ability and incentive to degrade its private label offer in order to drive sales to Jus-Rol to earn a better margin.²¹ Cérélia agrees that, conceptually, this is a potentially plausible theory of harm which merits assessment by the CMA. That said, for the reasons set out below, this concern is unfounded.
- 4.2 In order for this theory of harm to stand, the CMA must be satisfied, on the balance of probabilities, that the evidence available to the CMA supports the conclusion that the threat by retailers of switching co-packers is ineffective when negotiating co-pack terms with Cérélia post-merger, such that by pursuing an input foreclosure strategy, Cérélia could harm the private label offerings of UK retailers.
- 4.3 The CMA's MAGs note that: “*Even where the merged entity would have the ability to foreclose its rivals, it may not have the incentive to do so. This is because while foreclosure*

¹⁹ MAGs, paragraph 1.10.

²⁰ Phase 1 Decision, paragraph 4.

²¹ Phase 1 Decision, paragraph 53.

may result in additional profits downstream, it may also result in costs such as a loss of sales upstream. If these costs are greater than the benefits, the merged entity will not have the incentive to engage in input foreclosure.”²² The relevant “upstream sales” in the present case are Cérélia’s DTB co-pack services to UK retailers.

4.4 The MAGs further clarify that the *“purpose of the incentives analysis is to predict the merged entity’s behaviour, and it may be possible to understand this directly from its past conduct, business strategy and deal rationale.”*²³

4.5 Cérélia made comprehensive submissions to address this point in the course of the CMA’s Phase 1 review and presented a body of consistent and compelling evidence (including internal documents and written communications with retailers) that shows that retailer threats to switch to other co-packers are credible and effective in disciplining Cérélia in its negotiation of co-pack terms with retailers. Indeed, these threats are always effective in constraining Cérélia and are frequently acted upon, for example by [REDACTED].²⁴ [REDACTED]²⁵ prefer rival co-packers for their private label DTB product range.

4.6 In addition, at the Phase 1 Issues Meeting, Cérélia also provided the case team with copies of written correspondence between Cérélia [REDACTED] [REDACTED] [REDACTED]. This correspondence was compelling evidence that confirmed all of Cérélia’s key arguments regarding the presence of competitive rival co-packers that are entirely credible alternative options for UK retailers:

(a) **References to more competitive rival co-packers:** [REDACTED]

[REDACTED]
[REDACTED] Not only does this demonstrate the competitiveness of rival co-packers, it also illustrates how retailers benchmark Cérélia’s terms against terms offered by other co-packers.

(b) **Threats to switch and multi-source:** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²² MAGs, paragraph 7.16.

²³ MAGs, paragraph 7.19(a).

²⁴ See for example paragraph 6.6 of the Issues Letter Response.

²⁵ [REDACTED] private label DTB range is frozen only.

²⁶ Issues Meeting Exhibit – BakeAway correspondence with [REDACTED]

- 4.7 Notwithstanding the clear, contemporaneous evidence provided to the case team, the Phase 1 Decision dismissed the significance of [REDACTED] threats as they had “*not been followed through*” and “*related only to a small part of Cérélia’s business*” [REDACTED].²⁷
- 4.8 Contrary to the CMA’s views, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- 4.9 It is clear from [REDACTED] that Cérélia has no ability to harm retailers (and ultimately consumers) in the offer of co-pack services as retailers have credible alternatives to which they can switch in short order. It is also clear that retailers are willing and able to support rival co-packers by incrementally adding volume through a multi-sourcing strategy.
- 4.10 Cérélia does not know [REDACTED]
[REDACTED]. Cérélia trusts that the Phase 2 case team will critically assess [REDACTED] (as well as other examples of switching and threats to switch provided by Cérélia) and will compare the ample facts to any contradictory third-party feedback received in Phase 1, giving due consideration to real-life communications and documented evidence of retailer switching.
- 4.11 Finally, it is noted that Cérélia faces significant constraints from Continental European co-packers of DTB products which are active in the UK as well as in larger, more developed DTB co-packing markets in Continental European countries. The Phase 1 Decision itself refers to three European co-packers which are currently active in the UK and have established relationships with UK retailers.²⁸ It is clear that Brexit has not diminished the competitive significance of these co-packers, each of which has significant range, expertise and manufacturing capabilities in Continental Europe that can be leveraged to expand their UK DTB co-packing services. The CMA also has evidence on its file which confirm that such Continental Co-packers continue to tender for and win DTB co-pack contracts in the UK post-Brexit. These Continental European co-packers therefore continue to exercise a significant competitive constraint.

Cérélia has no incentive to degrade Jus-Rol

- 4.12 It is noted that the Phase 1 Decision does not raise any substantiated concerns that the merged entity may have the ability and incentive to raise Jus-Rol prices and/or degrade Jus-Rol’s quality.²⁹ Cérélia agrees with this conclusion which is supported by the facts of the case.

²⁷ Phase 1 Decision, paragraph 102.

²⁸ Phase 1 Decision, paragraph 21 and Table 2.

- 4.13 For the reasons set out in Cérélia's submission in Phase 1, it would not be profit maximising, and make no commercial sense for Cérélia to raise prices of, or degrade, Jus-Rol post-merger. Furthermore, to pursue a strategy post-merger that would drive sales away from a brand that Cérélia owns and controls to a brand (private label or other third party brand) which it does not own and control would make no commercial sense and run entirely counter to the Transaction rationale. Any such strategy would degrade the relevance and visibility of Jus-Rol which Cérélia plans to use as a 'vehicle' to drive category growth across the UK.

Cérélia has no ability or incentive to degrade its DTB co-packing services

- 4.14 This leaves the question whether Cérélia will have the ability and incentive to degrade its private label DTB co-pack offer to UK retailers in order to drive sales to Jus-Rol in order to earn a better margin (i.e. an input foreclosure strategy). In this regard, the CMA noted that this concern may be particularly significant in relation to large retailers.

- 4.15 Cérélia submits, as it did at Phase 1, that it will have no ability or incentive to pursue such a strategy. For the reasons articulated above, including in particular [REDACTED], this theory falls down at the first hurdle since Cérélia unambiguously does not have the ability to harm the private label brands given the credible alternatives that are plainly available to UK retailers seeking DTB co-packing services.

- 4.16 Cérélia will make detailed submissions on this point in the course of the Phase 2 investigation but, for now, wishes to emphasise the following key facts:

- Following [REDACTED], Cérélia's share of retailer DTB co-packing is [REDACTED] Cérélia's share of the category alone, i.e. [REDACTED] of the category volumes are supplied by other co-packers, should give the CMA comfort that Cérélia has no ability to degrade its co-packing offer to harm retailers and ultimately consumers.
- Cérélia's retailer customer base is highly concentrated. Excluding Jus-Rol, [REDACTED] of Cérélia's sales are to just [REDACTED] retailers. Each of these retailers are sophisticated buyers who have a high level of cost transparency. As illustrated by [REDACTED], a full or even partial loss of any of these customers can result in a dramatic loss of share overnight.
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- Cérélia has recently lost significant volumes and tenders to a range of alternative co-packers. In addition to [REDACTED], in 2021 Cérélia lost [REDACTED] and [REDACTED].
- Barriers to switching are low – the best illustration of this is that retailers large and small ([REDACTED]) have all switched away from Cérélia (and, previously, to Cérélia) over recent years. This analysis is consistent with the OFT's findings in *GMI/Saxby* which cleared the merger of two leading DTB brands by relying on DTB capacity expansion (on the private label side). The OFT's findings in that case were later confirmed as correct, as evidenced by the significant growth of private label (and private label co-packing) volumes over the years following the *GMI/Saxby* decision. Further, it is not necessary to switch the entirety of a retailer's DTB volumes in one go [REDACTED], it is possible to switch volumes incrementally. The Phase 1 Decision confuses the basic procedures that a co-packer and customer must engage in (e.g. health and safety procedures and recipe validation) with high barriers to switching. Cérélia does not argue that switching suppliers is effortless, however this does not mean that a retailer's normal internal processes constitute actual barriers to switching.
- DTB is a niche sub-category which sits within the butter, spreads and margarine category (which is 18 times bigger than the DTB sub-category). It is not a priority for retailers and retailers can, and previously have, reduced the shelf space of the DTB in favour of other products such as butter. As such, retailers have the ability to not only switch volumes to alternative co-packers, but also to contract the size of the DTB category altogether. As overall distribution and stocking decisions are led by retailers' wider retail strategy and margin expectations, retailers would tend to favour higher-margin categories over a niche segment that does not deliver attractive retail margins.

4.17 It is therefore clear that not only are rival co-packers not viewed in practice by retailers as inferior to Cérélia (as suggested in the Phase 1 Decision), they are in fact viewed as [REDACTED] in many cases. Given this, any attempted worsening of its terms to retailers by Cérélia, would simply result in retailers switching to alternative co-packers with no impact on their downstream private label offering in store and no downstream switching to Jus-Rol products.

4.18 Thus, in the knowledge of the above very real risks to its co-pack business, Cérélia would have no incentive to seek to degrade its co-pack offer to retailers. Moreover, as stated above, such a strategy would run entirely counter to Cérélia's rationale for the Transaction. As noted

above, the MAGs expressly recognise that when assessing the post-merger incentives of a merged entity “it may be possible to understand this directly from its past conduct, business strategy and deal rationale”.³⁰ Cérélia submits the available evidence in relation to its pre-merger conduct, business strategy and deal rationale are all entirely consistent with the conclusion that it would have no incentive to seek to degrade its co-pack offer to retailers post-merger.

- 4.19 Based on the above simple business evidence, it is not possible to credibly maintain that Cérélia has any ability or incentive to degrade its DTB co-packing terms in order to drive sales to Jus-Rol. The reality is, Cérélia is a small supplier to large, sophisticated retailers which can severely impact Cérélia’s business at very short notice, by awarding their DTB co-packing volumes to alternative co-packers.

Barriers to Entry and Expansion are low

- 4.20 Finally, there are numerous suppliers in adjacent segments (foodservice and other suppliers of baked or ready-to-eat pastry, pie and pizza dough-based products) which could easily expand into co-packing DTB products for retailers because they currently produce dough-based products on their existing production lines. In many cases, these suppliers are already supplying UK retailers with other private label products and, as such, have already been approved by retailers and are familiar with retailer private label requirements. The Phase 1 Decision itself indicates that certain foodservice DTB suppliers could “immediately” start supplying DTB SKUs to retailers.³¹ The recent market entry by [REDACTED], demonstrates just how easily a supplier in an adjacent segment can redeploy existing dough manufacturing equipment to offer DTB co-pack services to retailers.

5. CONCLUSION

- 5.1 In conclusion, regardless of the frame of reference for assessing the Transaction, given the available evidence, there is no factual or economic basis for any concern that it would give rise to an SLC in relation to the wholesale supply of third party branded DTB products and/or DTB co-pack services to UK retailers, on the balance of probabilities or indeed at all.

³⁰ MAGs, paragraph 7.19(a).

³¹ Phase 1 Decision, paragraph 119(b).