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

RESPONSE TO THE CMA'S ISSUES STATEMENT

CONTENTS

1. EXECUTIVE SUMMARY

1.1 This is Cérélia's response to the CMA's Issues Statement of 15 July 2022 (***IS***) regarding the completed acquisition by Cérélia of the Jus-Rol brand (and certain related assets)[1] (***Jus-Rol***)[2] (the ***Transaction*** or the ***Merger***).

1.2 The IS states that in the course of its investigation the CMA intends to assess whether the Merger may be expected to result in a significant lessening of competition (***SLC***) as a result of horizontal unilateral effects in the wholesale supply of dough-to-bake (***DTB***) products to grocery retailers in the UK.

1.3 In its Initial Submission of 1 July 2022 (***Initial Submission***), Cérélia outlined its views on why the CMA's Phase 1 Decision of 30 May 2022 (***Phase 1 Decision***) failed to reflect the actual competitive structures and dynamics of the markets in which the Parties operate. In this response to the IS, Cérélia does not intend to reiterate each of the arguments it made in its Initial Submission. Instead Cérélia focusses on demonstrating that there is no plausible theory of harm relating to the Merger regardless of the frame of reference applied. This is for the reasons summarised below and developed further in this response.

(i) An appropriate frame of reference is necessary to assess the competitive effects of the Merger

1.4 Any analysis of merger-specific competitive effects needs to be undertaken by reference to the relevant factual context, i.e. an appropriate frame of reference which reflects the commercial realities of the affected markets.

1.5 Cérélia is a contract manufacturer (also referred to as a "co-packer" or "co-manufacturer")[3] of DTB products which competes with other contract manufacturers of DTB products. In contrast, Jus-Rol - which is a customer of Cérélia's - operates a consumer brand (also referred to as a "consumer packaged goods brand" or a "CPG brand"), competing with other branded suppliers of DTB products (including other consumer brands and private label brands owned by retailers).

1.6 As noted at the Cérélia site visit on 28 July, the term "wholesale supply" is not a helpful frame of reference for the assessment of the merger-specific competitive effects of the Merger. It is

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[1] As set out in the Asset Purchase Agreement (***APA***) dated 24 November 2021, the Transaction relates to the UK and Ireland dough business of GMI only. Pre-Transaction, GMI historically made *de minimis* sales of Jus-Rol branded products [redacted]

[2] As the Target only comprises assets it does not carry out any activities itself; these activities are carried out by GMI. Accordingly, references to "Jus-Rol" should be read as references to GMI's activities or revenues in relation to the business activity associated with the Jus-Rol Business.

[3] Please see here for an explanation of the terms "co-packer" and "contract manufacturer": https://bernardlab.com/what-is-a-co-packer-co-manufacturer-co-man-and-outsourcing/ See also: https://www.graygrowth.com/what-is-a-co-packer-co-manufacturer-co-man-and-outsourcing/

an extremely wide lens which could apply to any number of commercial activities occurring at varying wholesale (i.e. B2B) levels of the DTB supply chain. For example:

(a) DTB manufacturers purchase flour and fats (as ingredients); retailers also purchase flour and fats (for sale to end consumers).

(b) Contract manufacturers, such as Cérélia, provide DTB contract manufacturing services to consumer brand owners and retail brand owners.

(c) Consumer brand owners and retail brand owners procure contract manufacturing services from contract manufacturers for DTB products.

(d) Consumer brand owners and retail brand owners market their respective brands to end consumers.

(e) Retailers procure consumer branded DTB products from consumer brand owners.

(f) Retailers make stocking decisions in relation to consumer brand DTB products and their own retail branded DTB products.

(g) Retailers make stocking decisions in relation to the Butter, Spreads and Margarine (***BSM***) category of which DTB is a sub-category.

1.7 "Wholesale supply" therefore conflates the array of competitive interactions and dynamics which take place across multiple B2B levels above retail supply to consumers, and which are crucial to a proper understanding of the competitive effects of the Merger. Nor is the term "wholesale supply" one which is used in the grocery industry – it is alien to Cérélia, and Cérélia believes is likely to be alien to UK grocery retailers. Retailers are much more likely to refer to Cérélia as a "contract manufacturer" and Jus-Rol as a "consumer brand" or "CPG brand" operated by GMI.

1.8 Cérélia notes that this Transaction is similar to *PepsiCo/Pioneer Foods*,[4] where the CMA investigated and granted unconditional Phase 1 clearance to the acquisition of a granola contract manufacturer (Pioneer Foods) which manufactured granola for UK retailer brand owners by a company which owned a leading consumer brand of granola (PepsiCo, which owns Quaker Oats and Scott's Porage Oats). In that case, the CMA did not refer to the vague concept of "wholesale supply" but instead (rightly) accepted that contract manufacturers and consumer brand owners operate at different levels of the supply chain and do not constrain one another.

1.9 Cérélia therefore submits that the appropriate frames of reference for the assessment of the merger-specific effects of the Merger should be: (i) the supply of DTB contract manufacturing

[4] ME/6872/19 *Anticipated acquisition by PepsiCo Inc. of Pioneer Food Group Limited*, full text decision (7 April 2020). (***PepsiCo/Pioneer Foods****)*.

services; and (ii) the supply of consumer facing (branded and retailer's own brand) DTB products. Within these frames of reference the CMA can explore and test the extent to which the two different activities may impose an indirect constraint on each other.

(ii) There is no pre-Merger competition between the Parties

1.10 The Parties' different positions in the supply chain, taken together with the fact that Pre-Merger Cérélia already contract manufactures [redacted] Jus-Rol products, means that, far from being close competitors, there is no pre-Merger competition between the Parties. In particular:

(a) Jus-Rol does not supply contract manufacturing services and the Parties do not compete at this level. As such, there is no scope for the Merger to create or enhance a position of market power at the contract manufacturing level. In other words, retail brand owners and consumer brand owners will continue to have the same DTB contract manufacturing options as they had pre-Merger.

[redacted]

(c) Cérélia does not own or operate a DTB brand and therefore does not directly constrain Jus-Rol. Instead, that constraint comes from other brand owners (including retailers with their own brand products). Contract manufacturers, such as Cérélia, at best, impose an indirect constraint on Jus-Rol. However, there are a number of contract manufacturers to choose from that can provide this service; no individual contract manufacturer is an unavoidable trading partner to any UK retailer.

1.11 As explained in more detail below, the absence of any direct competition between the Parties is corroborated by their internal documents as well as the significant differences in (a) the process by which grocery retailers select consumer brands and select contract manufacturers for their own brands; and (b) the factors which are considered by grocery retailers in selecting a consumer branded product and in selecting contract manufacturers for their private label brands.

(iii) Effective competitive constraints will remain post-Merger

1.12 Post-Merger, the Merged Entity will continue to be constrained in its contract manufacturing offer by a number of effective and credible contract manufacturers which would defeat any attempt by Cérélia to degrade or raise prices for this contract manufacturing offer. Any attempt to do so would simply result in retailers switching volumes to rival contract manufacturers.

Further, the knowledge that retailers will continue to have effective own brand DTB products will constrain any attempt by the Merged Entity to worsen the Jus-Rol offer.

1.13 Cérélia notes in this regard that UK retailers today are supplied by at least **six different DTB contract manufacturers**, including manufacturers based in the UK and in Continental Europe. The Merger does not have any impact on the ability of these contract manufacturers to provide services to UK retailers, in respect of their own label brands, and to consumer goods companies, in respect of their DTB brands.

1.14 Following [redacted] described below, [redacted] **of retailer private label products sold in the UK are manufactured by contract manufacturers other than Cérélia**. These third-party competitors have won [redacted] of business associated with the DTB manufacturing contracts that have been put out to tender by UK retailers in recent years – Cérélia estimates that it has won [redacted] of this business by volume in the last 5 years. [redacted]

1.15 The reality is that there are a numerous UK based and Continental European contract manufacturers retailers can use to manufacture their DTB private label products. As the evidence set out below demonstrates, barriers to switching are low and retailers can, and do, regularly switch contract manufacturers for their private label DTB products.

1.16 The constraints on Cérélia are further amplified by the concentrated nature of its customer base, which comprises sophisticated buyers who have high levels of production cost transparency. [redacted]

(iv) No plausible theory of harm under a horizontal or vertical 'lens'

1.17 The IS notes that the "*starting point is to focus on a theory of harm based on horizontal unilateral effects*",[5] i.e. on the direct competitive constraints which the Parties may impose on one another. At the same time the IS acknowledges that the relationship between the Parties pre-Merger and today is vertical.[6] The obvious tension between these two observations is then addressed with the comment that the key question for the CMA's assessment is whether the Merged Entity would be "*able and incentivised to exercise market power*" post-Merger and the

5 Para. 29 of the IS.

6 Para. 10 of the IS.

analysis should remain the same regardless of the "lens" through which the Merger is assessed.[7]

1.18 Cérélia remains of the view that the Merger is properly assessed as a vertical merger, and the CMA's framework for examining vertical mergers should be applied. Far from being competitors, Jus-Rol is Cérélia's biggest customer, meaning that – in the language of the CMA's Merger Assessment Guidelines – the services they provide are strategic complements and not substitutes. In this context, the appropriate question is not whether the Merger will remove an existing competitive threat to either of the Parties, but rather whether the Merger will enable and/or incentivise the merged entity to foreclose rivals.

1.19 Notwithstanding the above, the Parties set out in more detail below why the transaction will not give rise to competition concerns when assessed through either a horizontal or a vertical lens, i.e. whether the Merged Entity will not have market power which it could (ability) and would (incentives) exercise to the detriment of retailers and ultimately consumers.

(a) *No plausible horizontal theory of harm*

1.20 Applying a horizontal framework there is no plausible theory of harm based on: (i) raising prices, or degrading Jus-Rol products; (ii) raising prices, or degrading, Cérélia's contract manufacturing offer; or (iii) raising prices, or degrading, both Jus-Rol products and Cérélia's contract manufacturing offer.

1.21 First, in relation to raising prices of, or degrading, Jus-Rol products, a diversion of sales from Jus-Rol to private label products contract manufactured by Cérélia would not be profit enhancing. [redacted] The Merged Entity cannot do better than this because:

(a) Cérélia earns [redacted] margin [redacted];

(b) Cérélia [redacted] margins [redacted].

(c) If sales of Jus-Rol products were diverted to sales of retailer private label products manufactured by Cérélia, [redacted].

1.22 [redacted]

[7] Para. 29(b) of the IS.

[redacted]

1.23 There is therefore no route through which the Merger creates the ability for Cérélia to make greater profits by deteriorating the terms on which it supplies Jus-Rol.

1.24 *Secondly*, raising prices of, or degrading, Cérélia's contract manufacturing offer would not be a plausible horizontal theory of harm. When viewed through a horizontal lens, this could only occur if the Merger were to remove a constraint on Cérélia's contract manufacturing services to retailers that exists pre-Merger.[8]

1.25 However, as set out above, Jus-Rol does not exert a competitive constraint on Cérélia pre-Merger [redacted].

1.26 This follows from the fact that, pre-Merger, Cérélia is the contract manufacturer to GMI for Jus-Rol products in the same way that it provides contract manufacturing services to retailer brand owners for their private label products. This means that [redacted]

1.27 The question of whether Cérélia, even in circumstances where Jus-Rol does not currently impose a horizontal constraint on it, has the ability and the incentive to worsen its contract manufacturing offer to drive greater sales to Jus-Rol post-Merger (i.e. partial foreclosure) is addressed below.

1.28 *Thirdly,* a theory of harm that is based on Cérélia attempting to worsen the terms on which both Jus-Rol and private label brands are supplied to end consumers[9] is equally implausible.

1.29 It is noted that Cérélia has no ability to directly influence the price at which retailers sell their own brand products to end consumers. The price of retailer own label products is set by the retailer and beyond Cérélia's control. Accordingly, in order to influence the retailer's offer to consumers in respect of its own brand products, Cérélia would have to seek to worsen the terms of its upstream contract manufacturing services.

1.30 As set out above, the terms of Cérélia's offer to retailers is currently constrained by the existence of third-party contract manufacturers and the competing service that they can offer to

8 This is recognised in the CMA's merger guidelines which state that "*Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to raise prices or degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals*". CMA129, paragraph 4.1.

9 As noted in para. 29(c) of the IS.

retailers. Not by the Jus-Rol offer. Any deterioration of Cérélia's offer to retailers can be expected to lead to a loss of its contract manufacturing supply contracts. The fact that Cérélia might simultaneously worsen its offer with regard to Jus-Rol does not change this.

1.31 As such, it would not be profitable for Cérélia to attempt to worsen the terms on which it supplies Jus-Rol to retailers since this would inevitably lead to end consumers switching to the retailers' own brand products which would then be supplied not by Cérélia but by rival contract manufacturers.

1.32 Thus, a strategy of *combining a worsening of terms* for Jus-Rol with a worsening of Cérélia's contract manufacturing offer to retailers would in fact make the economics of deteriorating the Jus-Rol offer even more unprofitable.

(b) No vertical theory of harm

1.33 A vertical foreclosure theory of harm would have to rely on Cérélia having the ability and incentive to either: (i) refuse to supply Cérélia's contract manufacturing services to Jus-Rol's competitors, including retailer DTB brand owners (i.e. total foreclosure); or (ii) increase the price, or worsen the quality, of contract manufacturing services provided to Jus-Rol's competitors, including retailer DTB brand owners (i.e. partial foreclosure), in order to drive sales to Jus-Rol.

1.34 This theory of harm falls at the first hurdle since the Merged Entity will have no ability to weaken retailers' own brand DTB offers to consumers by worsening the terms on which Cérélia supplies contract manufacturing services. As set out above, and described in more detail below, there are many competing contract manufacturers that are either currently supplying, or that could supply, DTB contract manufacturing services to UK retailers. [redacted] of retailer private label products sold in the UK will [redacted], be manufactured by contract manufacturers other than Cérélia.

1.35 In these circumstances, Cérélia clearly has no ability to pursue an input foreclosure strategy – it would simply be defeated by retailers switching to alternative effective, credible DTB contract manufacturers.

1.36 For completeness, Cérélia notes that as pre-Merger Cérélia is already the manufacturer for [redacted] Jus-Rol's DTB products in the UK, no relevant concern regarding customer foreclosure arises in this case.

(v) Low barriers to entry and expansion

1.37 Cérélia submits that the barriers to entry and expansion in the DTB contract manufacturing market are low. These low barriers mean that:

(a) smaller manufacturers of DTB products – [redacted] – are well-placed to scale up these manufacturing activities; and

(b) a range of manufacturers in adjacent segments could readily step across into DTB contract manufacturing with minimal investment, in much the same way as [redacted] to start supplying DTB products to leading UK retailers in recent years.

1.38 The low barriers to entry and expansion are a direct result of DTB products being commoditised and easy to manufacture. In particular, as set out in more detail below, the equipment used in manufacturing DTB products is standardised and widely available (either first-hand or second-hand). The machinery is also versatile - these production lines are used by a wide array of manufacturers of baked products (e.g. croissant manufacturers, pie manufacturers etc.) – Cérélia estimates that there are [redacted] which can be used to manufacture DTB products and [redacted] across Europe as a whole.[10] Further, the DTB production process is highly scalable [redacted], meaning that a number of competitors can operate sustainably at different levels of output.

1.39 As is clear from the above, the Parties each provide retailers with very different offers. It simply does not help the assessment of this case to bundle together the services provided by contract manufacturers and the products supplied by consumer brand owners under the label "wholesale suppliers" to retailers (as noted above, "wholesale supplier" is not a term which is familiar to those in the grocery supply chain and does not reflect the complex dynamic at play in that supply chain).

1.40 Instead, it is critically important to analyse the specific role of each Party in the DTB supply chain. Upon doing so, it will become clear that there is and will remain effective competition in relation to each aspect of the supply chain, which means that the Merged Entity will remain constrained post-Merger. For these reasons, no SLC arises from the Merger.

1.41 In the remainder of this submission, Cérélia will 'unpack' the above points by:

(a) explaining the structure of the DTB supply chain and Cérélia's and Jus-Rol's respective roles in that supply chain (Section 2);

(b) explaining why there is no pre-Merger competition between the Parties (Section 3);

(c) describing the competitive constraints on each of the Merged Entity's businesses, which will remain unchanged post-Merger (Section 4);

10 [redacted]

(d) explaining why there is no plausible theory of harm arising from the Merger regardless of whether a horizontal or vertical lens is applied (Section 5); and

(e) describing the absence of barriers to entry and/or expansion for competing contract manufacturers (Section 6).

2. THE MARKET STRUCTURE AND THE PARTIES' ROLE IN THE DTB SUPPLY CHAIN

2.1 As set out in the IS, Jus-Rol and Cérélia both supply DTB products to UK grocery retailers. However, the fact that Jus-Rol and Cérélia have common customers (i.e. retailers) does not mean they supply the same products or services to these customers.

2.2 Cérélia supplies a manufacturing and production "service" to retailers, i.e. contract manufacturing. In contrast, Jus-Rol/ GMI supply a complete product: finished Jus-Rol branded DTB products. These Jus-Rol products are offered on a 'take it or leave it' basis – they are what they are. In contrast, Cérélia's central role as a contract manufacturer is to manufacture products to the precise specifications of retailers (including recipes, packaging, and weight/format). The fact that retailers may be looking for input and views on the product format or packaging, does not alter the fundamental relationship under which retailers ultimately instruct Cérélia what products to manufacture.

2.3 This distinction was recently assessed by the CMA in relation to another commoditised grocery segment, i.e. granola. In 2020, in *PepsiCo/Pioneer Foods*, where the CMA investigated and granted unconditional Phase 1 clearance to the acquisition of a granola contract manufacturer which manufactured granola for UK retailer brand owners (Pioneer Foods) by a company which owned a leading consumer brand of granola (PepsiCo, which owns Quaker Oats and Scotts's Porage Oats).

2.4 As noted in *PepsiCo/Pioneer*[11] in grocery segments where contract manufacturers are present, there are, at least two distinct levels of supply:

(a) **Upstream contract manufacturers**, such as Cérélia, which manufacture grocery products in accordance with the instructions of a brand owner (i.e. retailers and consumer brand owners). The products they manufacture are then marketed under the brand owner's label. Upstream contract manufacturers are selected through formal or informal tender processes.

(b) **Downstream brand owners**, such as GMI (which operates the Jus-Rol brand) and retailers (which operate their own distinctive proprietary private label brands), are companies active in the retail markets. These brand owners can either manufacture the product themselves or outsource production to an upstream contract manufacturer. Downstream brand owners provide recipe and quality specifications to their appointed contract manufacturers and take all pricing, branding and marketing decisions.

2.5 As the above description in *PepsiCo/Pioneer* makes clear, it is important to note that in selecting a contract manufacturer, a retail brand owner and a consumer brand owner are acting in the

[11] *PepsiCo/Pioneer*, para. 25.

same capacity; i.e. they are choosing the services of a manufacturer who will manufacture a product to be sold under the brand they own and market.

2.6 As the CMA is aware, in the UK, Cérélia is only active at the upstream contract manufacturing level. It manufactures DTB products for downstream brand owners, including retailers and, in respect of Jus-Rol products, GMI.

2.7 In contrast, Jus-Rol products compete in the downstream level with other DTB brands, including retailer private label brands and other consumer brands in the DTB segment. [redacted] Jus-Rol branded products are manufactured by third-party contract manufacturers [redacted]. GMI manufactures [redacted] [redacted][12] but does not manufacture DTB products for third-party brand owners in the UK.

2.8 Figure 1 below sets out the market structure and the Parties' position in the supply chain. As can be seen from the below, in Cérélia's view, activities downstream of contract-manufacturing can be split into two sub-levels: (1) brand operation and marketing, where both retailers and consumer brand owners are present; and (2) retailing to end consumers, the level at which consumer brand owners and retailer own brands compete to sell their products to end consumers. Cérélia is not present at either level downstream of contract manufacturing. This view of the supply chain is common and widely accepted in the grocery sector.[13]

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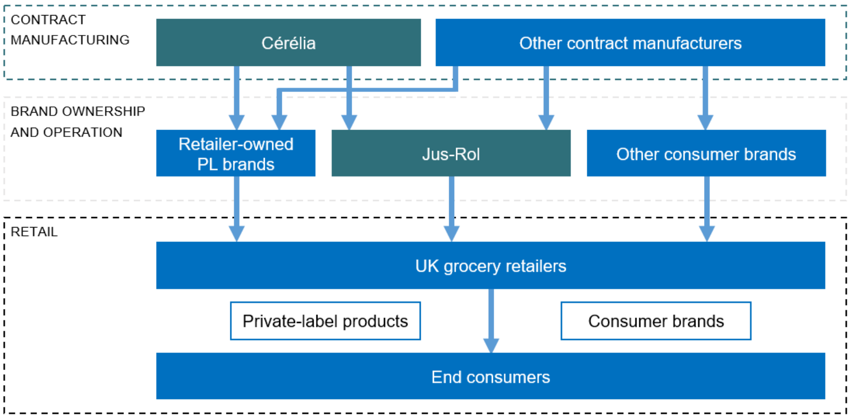
12 [redacted]

[redacted]

13 For more detail on the grocery supply chain and the respective roles of consumer brand owners (CPG companies), retailer brand owners and contract manufacturers see this description at: https://www.ericgardner.net/what-is-a-cpg-company-its-more-than-just-a-brand/

Figure 1: The Parties' Market Position



2.9 As Jus-Rol does not manufacture DTB products for third-parties, it cannot impose a constraint on Cérélia in the upstream contract manufacturing market. The question which remains is whether, as an upstream contract manufacturer, Cérélia imposes a constraint on Jus-Rol in the downstream market in which it operates as a brand owner.[14]

2.10 As set out in the Initial Submission, in the downstream market, retailers and consumer brand suppliers compete with one another for consumer attention and spend – these are the parties that make all decisions in relation to branding, marketing, pricing,[15] recipes and packaging of their products and that bear the financial and commercial risk in relation to targeting end consumers.

2.11 In contrast, upstream contract manufacturers such as Cérélia do not have any role in marketing or advertising the brand owners' products in the downstream market. Indeed, brand owners (like GMI) typically do not know which companies provide the contract manufacturing services for other branded products their consumer brand (e.g. Jus-Rol) competes with. [redacted]

2.12 Cérélia notes that some contract manufacturers (including Cérélia) offer their ideas and insights (for example, by sharing Kantar data), give feedback and collaboratively develop recipes with retailer brand owners. Such collaboration between contract manufacturers and retailer brand owners is a common feature across grocery categories.[16] However, this does not make contract

[14] The same questions was examined in *PepsiCo/Pioneer* in the context of a branded supplier of granola acquiring a contract manufacturer of granola. See *PepsiCo/Pioneer*, para. 36 onwards.

[15] [redacted]

[16] See, for example, paras. 39 and 40 of the *PepsiCo/Pioneer*. In that case the evidence received indicated that the contract manufacturer, Pioneer, shared its expertise, gave feedback and collaboratively developed recipes with brand owner customers. The CMA concluded that this did not mean that it competed with downstream brand owners.

manufacturers the owners (or co-owners) of brands. Brand owners retain ultimate control over their products: they give instructions to contract manufacturers and make the final decisions in relation to their products. [redacted].[17]

[17] [redacted]

3. NO PRE-MERGER COMPETITION BETWEEN THE PARTIES

3.1 The Parties' different positions in the supply chain, when taken together with the fact that Pre-Merger Cérélia already contract manufactures [redacted] Jus-Rol products, leads to three key conclusions.

3.2 ***First*, the Merger does not give rise to any change in concentration at the DTB contract manufacturing level of the supply chain and there is no scope for the Merger to create or enhance a position of market power at this level.** Pre-Merger, Cérélia[18] manufactured [redacted] of DTB products sold in the UK (including Jus-Rol products and certain retailer private label products) and the Merger does not change this.[19]

3.3 If the CMA is of the view that a share of supply of [redacted] (or less) is sufficient to confer a position of market power, it must be noted that this share of supply already exists in the relevant counterfactual, and is not a position created by the Merger.

3.4 In reality, as explained below, Cérélia did not have market power in the supply of DTB contract manufacturing services pre-Merger. This is because credible alternatives exist for any brand owner seeking to source upstream DTB contract manufacturing capability. But even if this were not the case, no lessening of competition for contract manufacturing services arises as a result of the Merger.

3.5 ***Second*, Jus-Rol does not constrain Cérélia's contract manufacturing terms in any way**. As highlighted above, Cérélia already manufactures [redacted] Jus-Rol DTB products as a contract manufacturer for GMI, in the same way that it provides contract manufacturing services for certain retail brand owners.

3.6 Therefore, in the pre-Merger scenario, [redacted] if its retail brand owner customers give priority to their own private label DTB products contract manufactured by Cérélia over Jus-Rol DTB products when stocking these products in their stores, or vice versa. Cérélia's primary interest [redacted]. This incentivises Cérélia to compete for contract manufacturing volumes and support category growth.

3.7 If a retail brand owner were to [redacted] when negotiating the terms of Cérélia's contract manufacturing services, [redacted] pre-Merger. Instead, the constraint on Cérélia

18 Including SKUs manufactured by Cérélia France for sale in the UK.

19 These figures are based on data from 2021. [redacted]

unambiguously comes from the threat that retailers will switch to a rival contract manufacturer to meet their own brand DTB requirements.

3.8 ***Third***, **Cérélia imposes (at most) an indirect constraint on Jus-Rol**. Any competitive constraint imposed on a consumer brand by a contract manufacturer results from retail brand owners' ability to stock their own private label products on their shelves in place of the consumer brand's products. The real constraint on Jus-Rol in this scenario thus comes from the retailer itself (as the owner/supplier of the private label brand with which Jus-Rol is competing for shelf space), contrary to the CMA's conclusion in the Phase 1 Decision.

3.9 The retail brand owner is able to constrain Jus-Rol [redacted]. As such, contract manufacturers, such as Cérélia, at best, impose an indirect constraint on Jus-Rol. However, retail brand owners can choose from a number of contract manufacturers for this service; no individual contract manufacturer is an unavoidable trading partner, or fulfils a gatekeeper role for the existence of competitive DTB private label products.

3.10 In short, given the structure of the market and the Parties' position within it, the Parties cannot be regarded as direct, or close, competitors. The facts of this case do not allow for a different conclusion.

3.11 Cérélia notes in this regard that the fact that retailers are buying directly from each of GMI and Cérélia does not detract from this conclusion: retailers are acting in a different capacity in each case. When buying contract manufacturing services from Cérélia retailers are acting as brand owners (just like GMI) seeking to get the best deal they can from the range of contract manufacturers, so that the retailers can in turn offer the best own brand product to end consumers. Having obtained the most cost-effective contract manufacturing deal, retailers subsequently make stocking decisions, choosing which brands to put on shelves (including the Jus-Rol brand, other consumer brands and their own private label brand).

The Parties' internal documents corroborate the fact that they do not regard one another as competitors

3.12 The absence of competition between Cérélia and Jus-Rol is also demonstrated by the Parties' internal documents.

3.13 There is no evidence in the Parties' internal documents that they monitor each other. GMI's internal documents [redacted]

[redacted]:[20]

[redacted]

[redacted]

[redacted]

(d) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(iii) [redacted]

3.15 As noted above, [redacted] Jus-Rol confirmed that it typically does not know [redacted] which contract manufacturer is manufacturing retailer private label products. [redacted] While Jus-Rol branded products compete with retailer private label products at the retail level, it does not follow that Jus-Rol in any way competes with the contract manufacturers who manufacture those products.

3.16 On the other hand, Cérélia's internal documents focus on retailers as its customers rather than on end consumers. For example, Cérélia's customer presentations[21] focus on *retailer* performance in the DTB segment and how retailers can optimise their product range in the DTB segment.

[20] See Annex 20.d, slide 20 submitted in response to the Enquiry Letter in Phase 1.

[21] See Annex 24a documents submitted in response to the Phase 1 Enquiry Letter.

3.17 Cérélia notes that there are some limited references [redacted] in Cérélia's internal documents [redacted].[22] It is important to put these documents in their proper context: as the CMA is aware, [redacted] Jus-Rol products were manufactured by Cérélia UK.[23] [redacted].

3.18 [redacted] as explained to the Inquiry Group at the site visit on 28 July 2022, [redacted]l Jus-Rol products are currently manufactured by Cérélia UK at its plant in Corby.

3.19 [redacted]

Retailer interactions

3.20 Retailers negotiate the purchase of DTB consumer brands and the procurement of DTB contract manufacturing services separately. As such, the Parties have never tendered or bid against each other when competing for retailer contracts. It is therefore important to acknowledge as a 'base line' that there is no direct, or 'head to head', competition between the parties in the context of any retailer negotiations.

Negotiations to procure contract manufacturing services

3.21 Retailer negotiations around contract manufacturing are carried out by way of formal or informal tenders. These discussions focus on the ability of the contract manufacturer to carry out the instructions of the retailer at a competitive price (in particular, as the product will carry the retailer's brand and contributes to the overall brand image of the retailer, the retailer will also set strict guidelines and requirements when assessing the manufacturer to protect the retailer own brand against any quality or safety issues). Retailers will typically refer to the quotes

22 For example, [redacted].

23 [redacted]

received from rival contract manufacturers [redacted].[24]

3.22 In other words, retailers have the power to periodically test the contract manufacturing market, gather insight into the cost of manufacturing their products, discipline price outliers, and keep contract manufacturing prices low.

Negotiations to procure Jus-Rol products

3.23 [redacted]

3.24 [redacted]

3.25 The price transparency afforded to retailers through the tender process for procuring contract manufacturing services – which is further supplemented by retailers' in-house commodity price tracking functions – existed before the Merger and will continue to exist following the implementation of the Merger. Indeed, it is a key aspect of competition which will constrain the Merged Entity [redacted] post-Merger.

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[24] The CMA is referred to [redacted].

4. EFFECTIVE COMPETITIVE CONSTRAINTS WILL REMAIN POST-MERGER

4.1 The IS states that the CMA will consider "*the current and future remaining competitive constraints post-Merger on the* Merged *Entity from alternative suppliers of DTB products*". Cérélia made comprehensive submissions at Phase 1 that demonstrated that a range of competitive threats will remain post-Merger. In particular it should be noted that:

(a) **UK retailers today are supplied by at least six different DTB contract manufacturers**, including manufacturers based in the UK and in continental Europe.

(b) [redacted] **retailer private label products sold in the UK are manufactured by contract manufacturers other than Cérélia.**

(c) **These third-party competitors have** [redacted] **DTB contract manufacturing volumes put out to tender by UK retailers in recent years** – Cérélia estimates that [redacted] in the last five years; [redacted].

(d) Importantly, a number of these contracts [redacted], **reflecting an absence of material barriers to entry/expansion** – as discussed in greater detail below.

4.2 This diversity of suppliers is all the more noteworthy considering that DTB is a small segment, with a concentrated customer base - effectively, there are only six large retailers (Tesco, Sainsbury's, Morrisons, Asda, Lidl and Aldi) and three smaller retailers (M&S, Co-op and Waitrose) which market their own brand of DTB products.

4.3 The small size of the segment is illustrated by the fact that in 2021, [redacted]kt of DTB products were contract manufactured for retail brand owners' private label brands. **The entirety of these volumes could be manufactured on** [redacted] **production lines**.

4.4 The intensity of competition is facilitated by the fact that entry and expansion are easy in this market, given the relative simplicity of the production process and the fact that there are many contract manufacturers operating in related markets that already employ the standard machinery required.

4.5 Below we provide further details of the diversity of existing competitors for DTB contract manufacturing services and the ease with which retailers can switch between these competitors. Section 6 provides further evidence on the absence of barriers to entry and expansion for new competitors.

(i) There are a diverse range of contract manufacturing competitors

4.6 Notwithstanding the niche nature of the DTB segment, Cérélia faces significant competition in contract manufacturing from a diverse range of suppliers, with larger and smaller players based across the EEA and UK capable of competing effectively for – and in many cases already supplying – retailer contracts in the UK. A description of these contract manufacturers is set out in the Final Merger Notice but is also outlined below for ease of reference.[25]

(a) **Henglein** is a German contract manufacturer which contract manufactures [redacted]

(b) **Bells** is a Scottish manufacturer which operates its own brand ("Bells") and provides contract manufacturing services in relation to DTB products from its BRC Grade AA++ production facility in Scotland. [redacted]

(c) **Cranswick** [redacted].

[25] Given the opaque nature of the contract manufacturing sector, Cérélia does not regularly monitor its competitors and has little visibility on which contract manufacturer is servicing which retailer. [redacted]

[redacted]

[redacted]

(d) **Wewalka** is headquartered in Austria and describes itself as the largest family-owned global producer of fresh dough. [redacted]

(e) **Shire Foods** is an English manufacturer of DTB and other pastry products. In addition to marketing DTB products under the Shire and Fraser's brand (available in Iceland stores), Shire also contract manufactures DTB products for the Mrs. Appleby's brand. Shire Foods has been in operation for over 50 years and manufactures products from a BRC Grade AA production facility in Warwickshire.

(f) **Dorset Pastry** is based in West Dorset in the UK and sells a range of premium sweet and savoury pure butter puff and short crust ingredient pastry to retailers, wholesalers and foodservice customers in the UK. It operates the "Dorset Pastry" consume brand but also supplies DTB contract manufacturing services. [redacted]

(g) **Hellenic Dough** currently contract manufactures [redacted]. It also supplies products under the brand Arabatzis in the UK, its own label of pastry products.

4.7 In addition to those contract manufacturers of DTB products which currently supply contract manufacturing services to customers in the UK, there are other large European manufacturers which could easily supply these services to UK retailers. These contract manufacturers include:

(a) [redacted]

[redacted] [redacted]

26 [redacted]

(c) [redacted]

[redacted]

4.8 The figure below sets out the location of DTB suppliers across the UK and Continental Europe.

[redacted]

[redacted]

[redacted]

4.9 In addition to the above suppliers there are a wide range of DTB manufacturers which supply branded DTB products to retailers or foodservice operators in the UK, including [redacted]. As demonstrated by [redacted], each of these suppliers are capable of supplying contract manufactured DTB products to UK retailers and some of them have done so in the past.

(ii) Retailers can, and do, regularly switch DTB contract manufacturers

4.10 As the CMA is aware, [redacted]

[redacted]

4.11 [redacted]

4.12 [redacted]

4.13 This [redacted] example is illustrative of a familiar theme for Cérélia: namely, strong competition from other contract manufacturers, and retailers running competitive tender processes (whether formal or informal) [redacted]. The competitive tension is made all the more real by the fact [redacted].

4.14 For example, [redacted].

4.15 Sometimes, retailers may decide to make a switch even more quickly (leading to an even more abrupt loss for the existing contract manufacturer). [redacted]

[redacted] See [redacted]

[redacted][28]

4.16 The same competitive dynamic applies with respect to tenders for new DTB products. [redacted]

4.17 The developments above mean that, [redacted] Cérélia [redacted] **supply** [redacted] **of all private label DTB volumes** sold by grocery retailers in the UK. This means that [redacted] of private label DTB volumes will be supplied by alternative contract manufacturers, [redacted] [redacted] [redacted] [redacted] [redacted] [redacted].[29]

4.18 The fact that [redacted] private label DTB volumes [redacted] supplied by alternative contract manufacturers (and a sizeable proportion of that from EU-based contract manufacturers) is in itself sufficient to demonstrate that Cérélia does not have market power in the upstream contract manufacturing market. This is even more apparent when one considers [redacted]

4.19 However, [redacted], Cérélia's share of private label contract manufacturing is [redacted], demonstrating the ease with which retailers can switch DTB contract manufacturing volumes to a wide range of contract manufacturing competitors.

4.20 Figure 4 below sets out, in graphic form, the wins and losses of retailer private label contract manufacturing volumes Cérélia has experienced since it acquired the BakeAway business in

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28 [redacted].

29 In contrast, in *PepsiCo/Pioneer*, where the CMA found that no competition concerns arose, Pioneer Foods manufactured 80 – 90% of private label granola and only two competing contract manufacturers are noted in the decision. (See paras. 99 – 100).

2016. As can be seen from the figure below, [redacted] [redacted].[30]

[redacted]

[redacted]

4.21 **Figure 5** below illustrates the speed with which Cérélia, and its contract manufacturing competitors, have won and lost share in recent years.[31]

[redacted]

[redacted]

[30] Volumes lost may not be precisely the same as volumes won, even for the same retailer, as volumes ordered may change (e.g. through growth in the retailer's sales, and order volumes) over time. [redacted]

[31] In line with the response to question 50 of the S109 Notice, the chart assumes that, everything else equal, [redacted].

4.22 Two obvious conclusions should be drawn from the discussions on retailer switching above. First, there is fierce competition among DTB contract manufacturers, and Cérélia has no market power in the contract manufacturing segment. Second, the constraint on Cérélia's contract manufacturing activity is imposed by other contract manufacturers, not Jus-Rol [redacted] – instead, as one would expect, the negotiations focussed on whether Cérélia's offer was more competitive than that of rival contract manufacturers [redacted].

(iii) Barriers to switching are low

4.23 A key driver of the competitive threat from other contract manufacturers is that the barriers to customers switching their contract manufacturing supplier are low. As indicated above, in practice customers can work with two contract manufacturers for a period of time [redacted].

4.24 More generally, there are no significant barriers to customers switching.

(a) Supply-side substitutability among different DTB products is high, and all contract manufacturers can provide contract manufacturing services for the full range of products (whether or not already supplied at any given time). To the extent a customer were to have any doubt about a supplier's ability to provide any particular product, as above, [redacted]

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32 [redacted]

(b) Switching need not take material time. Tender processes (whether formal or informal) are in large part in the hands of the customer (to the extent they are used at all, rather than simply switching without holding a tender process, as in the example of [redacted] given above). Further, for suppliers who have already been accredited, audited and set up in the administrative systems of the relevant retail customer as an existing supplier (i.e. they supply other products or services to the retailer and therefore have gone through the retailer's audit process), the time to switch can be even lower than for entirely new manufacturers.

(c) Competing manufacturers face no material technical, logistical or economic barriers to expansion and so could readily – and rapidly – scale up their activities to accommodate the additional production volumes (for further details on this lack of barriers to entry expansion, please refer to Section 6 below).

(d) Customers (i.e. the retailer private label owners) can port their products' recipes and packaging requirements from one contract manufacturer to another. As such, from the end consumer's perspective, nothing need change when a retailer switches between contract manufacturers.

(e) Finally, transportation can be outsourced to third-party providers, [redacted]. Such companies manage daily deliveries to UK grocery retailers on behalf of customers, meaning that a contract manufacturer's customer reach can be as far as it wishes.

4.25 The clear evidence in this regard is the list of real-life examples of customer switching that Cérélia has already provided, a dynamic that puts Cérélia under significant competitive pressure every single day.

(iv) European contract manufacturers face no material disadvantages

4.26 As is evident from the discussion above, retailer brand owners and third-party consumer brand owners (including Jus-Rol) source DTB contract manufacturing services from contract manufacturers not just within the UK, but also from those located in Continental Europe. This has not changed since Brexit.

4.27 Based on an assessment of current and recent supply patterns in the UK, having a UK manufacturing base is far from essential. Based on Cérélia's experience, UK manufacturing does not confer a material advantage when competing for UK customers. For example:

(a) Henglein supplies products manufactured in Germany [redacted];

(b) Wewalka supplies pizza dough products manufactured in Austria [redacted];

(c) GMI continues to supply UK retailers with Jus-Rol's [redacted] manufactured at GMI's factory in Inofita, Greece;

(d) Cérélia France has itself manufactured [redacted] Jus-Rol products ([redacted]) for export to the UK; and

(e) a proportion of other contract manufacturer products and consumer branded DTB products (e.g. Picard, JR Feuilles and Krousta) are also currently manufactured outside the UK.

4.28 Moreover, the market reality is that in 2021 (i.e. post-Brexit), [redacted] **DTB products consumed in the UK were manufactured outside the UK**. Cérélia notes in this regard that European contract manufacturers such as Henglein [redacted] and Wewalka [redacted] not only continue to supply UK retailers post-Brexit [redacted]. As set out above, [redacted].

4.29 Furthermore, these are large and credible competitors. Henglein's [redacted]. Today Henglein exports [redacted]. Similarly, Wewalka's [redacted]

4.30 In its Phase 1 Decision, the CMA expressed reservations about the strength of the competitive threat posed by Continental European contract manufacturers to Cérélia's UK contract manufacturing services. In particular, the CMA expressed concerns in relation to:[33]

(a) Brexit-related frictions (e.g. frictions at borders);

(b) the use by Continental European contract manufacturers of certain ingredients [redacted];

(c) costs [redacted];

33 CMA Phase 1 Decision, paragraph 96.

(d) a preference in the UK to source British products; and

(e) the ability of Continental European contract manufacturers to meet certain technical requirements and manufacturing standards.[34]

4.31 Cérélia submits that none of these potential concerns stands up to scrutiny.

(a) *Brexit-related frictions*

4.32 While in its immediate aftermath Brexit did cause some additional administrative burden, this initial disruption was soon resolved. In Cérélia's experience the situation was largely 'back to normal' within a matter of weeks and has remained so since then.

4.33 Brexit has not created any material barriers to Continental European DTB suppliers providing contract manufacturing services to UK retailers. There is currently tariff-free access for DTB products from the EU to the UK and, as set out above, Continental European contract manufacturers are continuing to supply UK retailers today [redacted].

4.34 Further Continental European contract manufacturing services remain popular for a large range of UK grocery retailer products, including products similar to DTB products. For example, Cérélia itself currently provides contract manufacturing services [redacted]

(b) *Use of* [redacted]

[redacted]

[34] With respect to Henglein, the CMA further noted that Henglein [redacted]

(c) *Transport costs and timing*

4.36 Transport only accounts for a small proportion of total input costs for DTB products, irrespective of whether these products are produced in the UK or Continental Europe. In particular, transport costs [redacted] per unit to the cost of producing DTB products. The difference between the cost of transporting products from Continental Europe and the cost of transporting products from local facilities in the UK is modest. Cérélia estimates that transport costs account for [redacted] for the DTB products manufactured in Corby. [redacted]

4.37 Minor differences in transport costs can be offset by other cost advantages of Continental European suppliers, [redacted]. As a case in point, [redacted].

4.38 Finally, using DTB manufacturers based in Continental Europe would [redacted] add [redacted] to the overall delivery time needed from the manufacturing site to the retailers' depots in the UK. For example, it takes on average [redacted] for Cérélia's DTB products [redacted] to be transported [redacted] to the UK, [redacted]. As DTB products have a typical shelf life of 28 - 35 days, this does not create any difficulties in terms of meeting retailers' shelf life requirements.

(d) *Supply chain risks*

4.39 [redacted]. For example, [redacted].

(e) *Preference to source British*

4.40 Cérélia is unaware of any retailer DTB brand marketing itself as 'Made in Britain'. Furthermore, it is difficult to maintain that retailer preference to source British-made products constitutes a high barrier to entry in circumstances where: (i) a material proportion of DTB products consumed in the UK is manufactured outside the UK; and (ii) EU-based contract manufacturers [redacted].[35]

(f) *Technical and supply requirements*

4.41 Cérélia is likewise unaware of any specific differences in technical and supply requirements between the UK and EU countries. As an example, [redacted]. A BRC or IFS certification would be accepted by any UK retailer as evidence of a manufacturer's ability to meet its technical requirements. [redacted].

(v) Concentrated customer base of sophisticated buyers who have high levels of production cost transparency

4.42 Cérélia's retail brand owner customer base [redacted] of Cérélia's sales of DTB contract manufacturing services are made to [redacted] retailers. [redacted].

4.43 [redacted]

4.44 In contrast, [redacted] Cérélia's retail customers has access to a wide range of DTB contract manufacturers [redacted]. They also maintain in-house teams that track commodity prices. Taken together, the contract tendering process and their own internal commodity cost tracking contribute to buyer sophistication and give retailers a high level of cost transparency.

4.45 Retailers' buyer power in the context of DTB product was specifically acknowledged by the OFT in *GMI/Saxby*[36] where it found that, even though the parties in that transaction were each other's

[35] See also PepsiCo/Pioneer, para. 56, "*Therefore, there do not appear to be significant barriers for retailers to use non-UK-based contract manufacturers. Rather the choice to solely use UK-based contract manufacturers is a commercial preference*."

[36] Anticipated acquisition by General Mills UK Limited of Saxby Bros Limited (2006) (***GMI/Saxby***).

closest competitors, the merger would not result in unilateral effects, given the strong buyer power of retailers:

> '[…] *evidence suggests that the supermarkets and other larger retailers possess a significant degree of buyer power. Though the merger removes the most direct constraint that the supermarkets have for each of the merging parties, given the ease of switching suppliers, together with the possibility of exerting power through portfolio effects and sponsoring entry, it is considered that sufficient buyer power will remain post-Merger'.*[37]

4.46 The above factors explain why Cérélia [redacted].

4.47 Looking forward, as set out in the Initial Submissions, the DTB category in the UK is significantly smaller than the category in comparable jurisdictions (e.g. France, Italy) and the acquisition of Jus-Rol is driven by Cérélia's ambition to use the brand as 'vehicle' to drive growth in the DTB category across the UK.

4.48 [redacted]

4.49 As the CMA is aware, Cérélia has also [redacted].

4.50 It would make no economic sense at all for Cérélia to pursue a commercial strategy [redacted] as this would directly lead to a material contraction of the DTB category, which it is trying to grow through this series of investments.

[37] GMI/Saxby at para 55.

5. NO PLAUSIBLE THEORY OF HARM ARISING FROM THE MERGER

5.1 The IS notes that the CMA wishes to examine "*the ways in which the merger could result in a loss of competition, including any changes in the incentives of the Merged Entity to increase prices or otherwise deteriorate their offering following the merger*".[38]

5.2 Cérélia submits that, for the reasons set out below, there is no plausible theory of harm in relation to the Merger, regardless of whether a horizontal or vertical lens is applied. In this section, Cérélia first considers potential theories of harm through a horizontal lens, demonstrating that post-Merger Cérélia has no incentive or ability or raise prices or otherwise deteriorate: (i) the Jus-Rol offer; (ii) Cérélia's contract manufacturing offer; or (iii) both the Jus-Rol offer and Cérélia's contract manufacturing offer. Cérélia then demonstrates that, when more realistically considered as a vertical merger, the Merger does not give rise to any foreclosure effects.

(i) Theory of Harm based on raising Jus-Rol prices or deteriorating the Jus-Rol offering

5.3 There is no plausible theory of harm that involves Cérélia putting through post-Merger price increases on Jus-Rol, or otherwise degrading the Jus-Rol offer to retailers. [redacted]

5.4 Applying a standard horizontal lens, the theory of harm would be that Cérélia would benefit from this strategy because, post-Merger, it would earn additional margins on any sales of Jus-Rol that divert to retailer own brand products as a result of price rises, or the degradation of, Jus-Rol products.

5.5 Typically, this is a straightforward issue to assess, and if there is some degree of diversion between the merging parties' sales, there could be scope for an SLC. However, in this case the analysis, and the conclusions of this analysis, are fundamentally changed by the fact that Cérélia currently also contract manufactures Jus-Rol products on behalf of GMI (and will continue to contract manufacture Jus-Rol products post-Merger).

5.6 We first observe that, as is standard for any business, GMI pre-Merger sets prices and terms for Jus-Rol [redacted]. It follows that [redacted].

38 Paragraph 35.

[redacted] For a strategy of increasing Jus-Rol's prices to be profitable post-Merger, the diversion of sales from Jus-Rol to retailer own brand products contract manufactured by Cérélia would therefore have to be profit enhancing for Cérélia. [redacted]

(a) Cérélia earns a [redacted] margin [redacted].

(b) Cérélia [redacted] margin [redacted].

(c) If sales of Jus-Rol products were diverted to sales of retailer private label products contract manufactured by Cérélia, [redacted]

5.8 There is therefore no route through which the Merger creates the ability for Cérélia to make more profits by deteriorating the terms on which it supplies Jus-Rol. In fact, just as is the case for GMI pre-Merger, doing so would be profit reducing.

[redacted]

[redacted]

(ii) Theory of harm based on Cérélia deteriorating contract manufacturing terms

5.11 There is similarly no plausible horizontal theory of harm that involves Cérélia worsening its contract manufacturing offer to retail brand owners post-Merger. As is the case above, there is no profitable opportunity that Cérélia could exploit by doing so.

5.12 Applying a standard horizontal lens, the theory of harm would be that Cérélia would benefit from such a move since, post-Merger, it would earn additional margins on any sales of private label branded products that divert to Jus-Rol products as a result of the degradation of the private label offer.

5.13 For such an effect to arise, when viewed through a horizontal lens, it must be the case that the merger removes a constraint on Cérélia's contract manufacturing services to retailers that exists pre-Merger.[39] However, as set out in paragraphs 3.5 - 3.7 above, Jus-Rol does not exert a competitive constraint on Cérélia pre-Merger [redacted].

5.14 This follows from the fact that, pre-Merger, Cérélia is the contract manufacturer to GMI for Jus-Rol products in the same way that it provides contract manufacturing services to retailer brand owners for their private label products. This means that Cérélia [redacted]. Cérélia is instead disciplined by the threat of losing its retail contracts to rival contract manufacturers.

5.15 In summary, there is no plausible mechanism whereby the Merger will allow Cérélia to profitably worsen its contract manufacturing terms to retailer brand owners as a result of a horizontal loss of competition.

5.16 The question whether Cérélia, even in circumstances where Jus-Rol does not currently impose a horizontal constraint on it, has the ability and the incentive to worsen its contract manufacturing offer to drive greater sales to Jus-Rol post-Merger (i.e. partial foreclosure) is addressed below.

(iii) Theory of harm based on a deterioration of both Jus-Rol and private label products

5.17 A theory of harm that is based on Cérélia attempting to worsen the terms on which both Jus-Rol and private label brands are supplied to end consumers equally falls down based on the facts above.

5.18 To be clear, the mechanism available to Cérélia to put in place such a strategy is not that associated with a standard horizontal merger.

[39] This is recognised in the CMA's merger guidelines which state that "*Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to raise prices or degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals*". CMA129, paragraph 4.1.

(a) In relation to retailer own brand products, Cérélia has no ability to directly influence the own brand offer of retailers and so would have to seek to worsen the terms of its upstream contract manufacturing services.

(b) In relation to Jus-Rol, Cérélia would be able to more directly influence the offer to end consumers for the products that appear on retailers' shelves, which it would do through increasing the price it charges the retail customer.

5.19 As set out above, the terms of Cérélia's offer to retailers is currently constrained by the existence of other contract manufacturers and the competing service that they can offer to retailers. It is <u>not</u> constrained by the Jus-Rol offer. Given this, any deterioration of Cérélia's offer to retailers can be expected to lead to a loss of its contract manufacturing supply contracts. The fact that Cérélia might simultaneously worsen its offer with regard to Jus-Rol does not change this dynamic. Cérélia will still expect to lose volumes to rival contract manufacturers if it seeks to worsen its contract manufacturing terms.

5.20 Nor would it be profitable for Cérélia to attempt to worsen the terms on which it supplies Jus-Rol to retailers since this would inevitably lead to end consumers switching to the retailers' own brand products which would now be supplied not by Cérélia but by rival contract manufacturers. Thus, a strategy of *combining a worsening of terms* for Jus-Rol with a worsening of Cérélia's contract manufacturing offer to retailers would make the economics of deteriorating the Jus-Rol offer even more unprofitable.

5.21 It is important to note that, given that the Merger [redacted].

5.22 As the current contract manufacturer for Jus-Rol and for retailer private label products, Cérélia could simultaneously worsen the terms it offers to GMI for Jus-Rol, and the terms it offers to retail buyers for private label products, achieving better margins across the board (and without the need to go through a costly merger). However, the fact is that this isn't a profitable strategy because GMI and the retailers (i.e. Cérélia's customers) would simply choose an alternative contract manufacturer to work with.

5.23 Thus, there is no profitable strategy created by the Merger that would allow Cérélia to either worsen the terms on which it supplies Jus-Rol or its contract manufacturing services to retailers.

(iv) No vertical foreclosure if the Merger is examined as a vertical merger

5.24 As noted in the CMA's Merger Assessment Guidelines, non-horizontal mergers do not involve a direct loss of competition between the merger firms.[40] Instead, a common concern is that they may result in the foreclosure of current or potential rivals.

5.25 Because pre-Merger Cérélia is already the manufacturer of [redacted] Jus-Rol's DTB products in the UK, no relevant concern regarding customer foreclosure arises in this case. Instead, the only conceivable concern would need to be one of input foreclosure, which is considered below.

The Merger does not give Cérélia the ability or incentive to pursue an input foreclosure strategy

5.26 In assessing the potential for an input foreclosure theory of harm, the CMA considers whether three cumulative conditions are satisfied:[41]

(a) Would the merged entity have the ability to use its control of inputs to harm the competitiveness of its downstream rivals?

(b) Would it have the incentive to actually do so, i.e. would it be profitable; and

(c) Would the foreclosure of these rivals substantially lessen overall competition?

5.27 In other words, in order for input foreclosure to be a concern, Cérélia would have to have the ability to either (i) refuse to supply Cérélia's contract manufacturing services to Jus-Rol's competitors, including retailer DTB brand owners (i.e. total foreclosure); or (ii) increase the price or worsen the quality of contract manufacturing services provided to Jus-Rol's competitors, including retailer DTB brand owners (i.e. partial foreclosure), in order to drive sales to Jus-Rol. Further, consistent with the CMA's decisional practice, any partial foreclosure strategy must **substantially** competitively weaken retailer own-label products which compete with Jus-Rol products.[42] [43]

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40 CMA Merger Assessment Guidelines, paragraph 7.1.

41 MAGs, paragraph 7.10.

42 Case ME/6902/20, Anticipated acquisition by SDE Group of Innserve Limited, at para 80 and footnote 31.

43 Cérélia also notes that the CMA has in previous, similar cases, not found vertical foreclosure concerns even at very high levels of concentration. For example, in *PepsiCo/Pioneer*, where the CMA found that no input foreclosure concerns arose even where Pioneer Foods manufactured 80 – 90% of private label granola and only two competing contract manufacturers are noted in the decision. (See paras. 99 – 100).

5.28 Cérélia submits that it has neither the ability nor the incentive to pursue an input foreclosure strategy post-Merger.[44] Cérélia also notes that the Issues Letter in Phase 1 acknowledged that no input foreclosure concerns were likely to arise in this case.[45]

(a) No ability to foreclose Jus-Rol's downstream rivals

5.29 As set out above in Section 4, the main competitive constraint on Cérélia's contract manufacturing offer pre-Merger indisputably arises from competition from rival contract manufacturers – and not from Jus-Rol. In its Phase 1 Decision, the CMA cast doubt on the ability of rival contract manufacturers to match Cérélia's offer. Cérélia expressly disagrees with this view and refers the CMA to Section 4 above and in particular the headline facts set out in paragraph 4.1, which speak for themselves in evidencing the strength and credibility of the threat that these competitors pose to Cérélia's contract manufacturing services to UK retailers.

5.30 [redacted] retailer private label products sold in the UK [redacted].

5.31 In addition, Cérélia's customers are sophisticated buyers (being major supermarket chains), adept at using the options at their disposal to obtain the most competitive price available: running highly competitive tendering processes (albeit sometimes informally) to get price offers from a range of contract manufacturing suppliers. UK retailers have made it clear to Cérélia in recent tenders [redacted].

5.32 Retailers have also demonstrated a willingness to switch all or part of their supply requirements when awarding contracts, including to "test out" potential new sources. They can and do switch volumes to contract manufacturers, including to those have either to date supplied contract manufacturing services to retailers on a smaller scale or who have predominantly supplied contract manufacturing services in continental Europe.

5.33 Further, rival contract manufacturers do not face any material barriers to expansion that would prevent them from stepping in to replace Cérélia: on the contrary – for reasons set out in detail in Section 6 below, [redacted].

44 For the avoidance of doubt, just as Cérélia would not be able to harm retailers' private label offerings as a result of worsening its terms (a partial input foreclosure strategy), the same would apply in relation to a strategy that involved Cérélia refusing to supply contract manufacturing services for retailers' private label products (a total foreclosure strategy).

45 Paragraph 37. "The CMA is also considering whether the Merger may lead to competition concerns as a result of vertical effects, in particular input foreclosure in relation to the supply of manufacturing and packaging to grocery retailers in the UK. However, at this stage of its investigation, the CMA is minded to conclude that the Merger does not give rise to competition concerns in relation to this theory of harm.

5.34 In these circumstances, Cérélia clearly has no ability to pursue an input foreclosure strategy – it would simply be defeated by retailers switching to alternative effective, credible DTB contract manufacturers.

(b) No incentive to foreclose

5.35 Given that there is no ability for Cérélia to harm the private label offering of retailers, it is not necessary to consider the incentives that it would have to do so. The test for an input foreclosure theory of harm falls at the first hurdle.

5.36 Nevertheless, for completeness, Cérélia offers three observations that affect its post-Merger incentives.

5.37 *First*, it would be wrong to think of the Merger through the lens of a "standard" vertical merger where the upstream firm has at least some incentive to increase the costs of competitors of the downstream firm it is merging with:

(a) It is a common assumption when assessing vertical mergers that the merged entity will have at least some incentive to raise the prices it charges third-parties for its upstream services – even if only by a very small amount – due to the scope for profit recapture that previously did not exist (i.e. following the merger, the upstream firm internalises the benefits of any business that flows to the downstream business it is merging with in a way that it did not do before the transaction).

[redacted] However, this is categorically not the case here given the [redacted]

5.38 *Second*, if a retailer were to switch private label supplier, the end consumer would still be purchasing a product that is based on the same recipe as when manufactured by Cérélia, it would come in the same packaging, and the price need not be changed to any meaningful degree. Thus it is highly unlikely that the result of retailer's switching to use rival contract manufacturers would have any noticeable impact on the product purchased by end consumers, in turn giving them no reason to switch away from the retailer's private label DTB product to Jus-Rol. Thus, in this case, the scope for profit recapture by Jus-Rol is extremely limited.

5.39 *Third*, the loss of private label manufacturing contracts [redacted].

Cérélia has invested in its capability and capacity at Corby with a view to growing demand for DTB products in the UK and to being a leading supplier in that market. As set out clearly in Cérélia's internal documents, Cérélia sees the Merger as a way to increase the volume of its sales in the UK by investing in the DTB category. It categorically does not seek to undermine this with a speculative input foreclosure strategy that carries enormous risk and runs counter to the rationale of the Merger.

6. BARRIERS TO ENTRY AND EXPANSION ARE LOW

6.1 Cérélia notes that in *GMI/Saxby*, the OFT found that the costs of entry and expansion into the DTB are relatively low[46] and there are a number of suppliers which could enter or expand their activities in relation to co-packing dough-to-bake products for UK-based customers. The fundamental production process for DTB products has not changed since *GMI/Saxby* and, as a result, barriers to entry and expansion remain low.

6.2 For the reasons outlined in Section 4 above, Cérélia's contract manufacturing services to UK retailers already face strong competition from a number of large and well-resourced existing competitors. A number of these competitors operate at a considerably larger scale than Cérélia's UK operations, manufacturing a wide range of DTB products for sale in various European countries. [redacted] Cérélia does not consider that any of these rivals would therefore face barriers to expanding their activities to meet additional demand.

6.3 As outlined above, in addition to these large existing providers of DTB contract manufacturing services, Cérélia faces competition from:

(a) smaller manufacturers of DTB products [redacted] who would be well-placed to scale up these manufacturing activities; and

(b) a range of manufacturers in adjacent segments who could readily step across into DTB contract manufacturing with minimal investment [redacted].

(i) No material barriers to small suppliers scaling up their DTB contract manufacturing activities

6.4 In its Phase 1 Issues Letter, the CMA reported feedback from customers that [redacted].

6.5 Cérélia does not have any direct visibility as to the capacity of its rival UK-based suppliers [redacted]

46 GMI/Saxby at para 41.

[redacted]. Notwithstanding this, these suppliers pose a real competitive threat since they could rapidly and affordably scale up capacity to meet demand. This is because:

(a) **The DTB production process is highly scalable.** [redacted] This means that manufacturers can incrementally scale up their DTB production capacity by adding production lines as demand requires. [redacted]

(b) **The equipment used in manufacturing DTB products is standardised and widely available.** Cérélia uses the same equipment to manufacture DTB products as is used for a broad range of food manufacturing processes. This equipment is readily available "off the shelf" from a number of suppliers. [redacted], meaning that the supply chains for these lines are well established. In addition to this, the equipment can readily be bought second-hand [redacted].

(c) **New production capacity can be brought on stream in a matter of months.** All of the equipment that makes up a DTB production line can be ordered and installed on site in just 9 - 12 months. Similarly, the staff needed to operate the line can be hired and trained in parallel with this, so that production can start as soon as the equipment has been installed.

(d) **The same equipment can be used to produce a wide range of DTB products.** [redacted]

[redacted] **It would be profitable for a manufacturer to add capacity to meet growth in demand for these services, and the investment would not represent a significant**

risk. Cérélia estimates that the total cost of an entirely new production line (bought first-hand) would amount to £[redacted] million. If this new line were required to meet the supply DTB needs of a leading UK retailer ([redacted]kt per annum), [redacted]

(ii) ***No material barriers to manufacturers in adjacent segments stepping across into DTB contract manufacturing***

6.6 As noted above, dough manufacturers that are active in adjacent segments (e.g. manufacturers of finished croissants, pies, sausage rolls etc.) would be well-placed to move across into DTB contract manufacturing if the opportunity arose. This is because the same standard equipment is used to produce the dough in these adjacent segments as for DTB and could be readily adapted to serve this purpose. Moreover, this equipment is already installed at a wide range of locations.

6.7 For example, as noted above, Cérélia estimates that there are [redacted] which can be used to manufacture DTB products (and [redacted] across the EU). Moreover, since the production process is similar, these manufacturers could use their existing staff to operate these DTB lines with limited training. In addition to this, many of these manufacturers would already have well-established commercial/ supply chain relationships with UK retailers through their existing food manufacturing activities.

6.8 Nor would capacity constraints pose a material barrier to manufacturers in these adjacent segments stepping across into DTB contract manufacturing in this way. On the contrary, if these manufacturers were operating at full capacity, they could readily add an additional production line in exactly the same way as set out above for existing DTB manufacturers. The logistics and economics of this investment (in terms of costs, timing, break-even period, etc.) would be largely identical for these suppliers to those described above for existing DTB manufacturers.

6.9 The competitive threat from manufacturers in these adjacent segments is not theoretical. On the contrary, as noted above, [redacted]. Further, the Phase 1 decision notes that certain manufacturers in the foodservice segment could start supplying SKUs to retailers “immediately”. As such, the challenge that these entrants pose to Cérélia and other existing contract manufacturers is very real.

7. CONCLUSION

7.1 It is clear from the above that the Parties' respective offers to retailers are fundamentally different – Cérélia offers a contract manufacturing service and Jus-Rol offers a finished product. Not only are the Parties not therefore close competitors, in fact, they do not compete at all.

7.2 The same number of credible and effective competitors will continue to constrain the Merged Entity post-Merger, as that which constrained Cérélia pre-Merger. To the extent necessary, further competition is facilitated by the low barriers to entry and expansion. As such, the Merged Entity will have no ability or incentive to deteriorate the offer for either Jus-Rol products or Cérélia's co-manufacturing services post-Merger.

7.3 For these reasons, there is no plausible theory of harm in relation to the Merger and no SLC arises from the Merger.