



COMPLETED ACQUISITION BY CÉRÉLIA GROUP HOLDING SAS (EITHER DIRECTLY OR THROUGH ITS AFFILIATES) OF CERTAIN ASSETS RELATING TO THE DOUGH BUSINESS OF GENERAL MILLS, INC (JUS-ROL)

GENERAL MILLS (GMI) RESPONSE TO CMA PROVISIONAL FINDINGS

1. Introduction

- 1.1 GMI has reviewed the CMA's Provisional Findings ("PFs"), including the underlying report and its appendices, and makes the comments set out below. Reflecting its position as a third-party manager, GMI has limited its comments to issues relating to its management of the Jus-Rol business to date, including negotiations with retailers and pricing, but the absence of comment should not be understood to be endorsement or agreement with the PFs. Defined terms have the meaning given to them in the PFs, unless stated otherwise.

2. Closeness of competition

- 2.1 GMI has addressed the closeness of competition between the Parties on numerous occasions, including in GMI's Response to the CMA's Working Papers (at paragraph 5), in comments made at the start of the Main Party Hearing and in the evidence given at that hearing. Cérélia has also addressed this issue, including in its Response to the CMA's Issues Statement (at Section 3) and in documents submitted to the CMA on 3 September 2022. GMI agrees with Cérélia's characterisation of the closeness of competition in those documents.
- 2.2 The CMA has adopted the Parties' submissions to some extent, in that it has accepted that competition, particularly at the tendering phase, is channel-specific (i.e. PL suppliers compete directly with other PL suppliers in tenders while branded suppliers compete directly with other branded suppliers). This means that there is no direct or "head-to-head" competition between Cérélia and JusRol in any tenders or bids for contracts to supply retailers.¹
- 2.3 However, the CMA has provisionally found that direct competition is not the only way in which suppliers of DTB products compete. According to the CMA, the Parties exert an implicit but material constraint on each other in the context of commercial negotiations with retailers, which arises from the ability of retailers to "trade off" the Parties in their (ongoing) negotiations.² In more detail, this constraint is characterised by the CMA as arising:
- 2.3.1 as a result of ongoing purchasing decisions whereby "*grocery retailers engage in a series of purchasing decisions which means there are several potential points of competition. In particular, for grocery retailers that opt to provide PL and branded DTB products, having selected a PL supplier, such retailers go on to consider both PL and branded channels in making ongoing purchasing decisions, for example as regards the relative quantities purchased in respect of each channel*";³
- 2.3.2 where retailers "*consider how to allocate shelf space (volumes) between PL and branded DTB products*"⁴ and "*adjust the balance of their purchasing volumes of DTB products in the PL channel and branded channel*";⁵
- 2.3.3 where "*the extent to which retailers can constrain the Parties by simply 'buying less' DTB product altogether, and devoting more shelf space to other products (eg butter, spreads and margarine category), appears to be limited*";⁶

¹ PFs [6.31(c)], [7.85] and [9.54]. Summary, [34].

² PFs [9.88], [9.286] and [9.324-9.327].

³ PFs [6.6] and [6.31(c)].

⁴ PFs [7.83(b)].

⁵ PFs [8.14].

⁶ PFs [9.259].



- 2.3.4 where retailers may not "typically have recourse to pitting their PL supplier against their branded supplier";⁷
- 2.3.5 as a result of retailers having the ability to "flex their purchases across both channels to reflect price and quality needs"⁸ and to "weigh up the Parties' offerings against each other in order to get a better deal in negotiations, particularly in terms of price and quality".⁹
- 2.4 GMI considers that the above findings, and the CMA's entire theory of harm, rests on what the Parties have previously characterised as an indirect competitive constraint imposed by C erelia on Jus-Rol.¹⁰ However, as the Parties have previously explained, the real constraint on Jus-Rol in this scenario comes not from C erelia but from the retailer itself, given that the retailer is the owner/supplier of the PL brand with which Jus-Rol is competing for shelf space.¹¹ The retail brand owner is able to constrain Jus-Rol because it has the ability to "trade off" multiple contract manufacturers in procuring the best deal for its PL brand. It 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 PL products.¹²
- 2.5 Retailers rebalancing their portfolios between branded and PL DTB products is not evidence of competitive rivalry between C erelia and Jus-Rol. As GMI has previously explained, these are routine purchasing decisions made by retailers regarding inventory which are influenced by product demand. A retailer may be prompted to change their product portfolio, including as between branded and PL, for any number of reasons unrelated to "trading off" the Parties, including in response to performance-based range reviews, ranging decisions and the nature of the category requiring the retailer to manage a mix of PL and branded products.
- 2.6 As the CMA will have seen in GMI's retailer category and marketing presentations for Jus-Rol, Jus-Rol's commercial negotiations with retailers focus on justifying Jus-Rol's consumer appeal and rate of (retail) sale. Similarly, Jus-Rol's marketing efforts are directed at consumers. From GMI's perspective, it is consumers that drive what retailers buy. While the PFs recognise that (retail) derived demand constrains the extent to which retailers can flex volumes between Jus-Rol and their PL products, the CMA materially underestimates this constraint.
- 2.7 Furthermore, were a retailer to flex purchases across both channels in the manner suggested by the CMA, it would need to source supply separately in the PL channel (where Jus-Rol is not active) and the branded channel (where C erelia is not active). This means that such balancing takes place between Jus-Rol and the retailer's PL brand, not between Jus-Rol and the retailer's PL manufacturer. If "trading off" is a viable strategy in this context, which GMI doubts, GMI has never encountered it in practice from any retailer.
- 2.8 The first and only time GMI has ever encountered a reference to PL DTB products in the context of its commercial negotiations with retailers, was when a retailer [X]. As a preliminary point, this is clearly a cost benchmarking comment and not a "trading off" tactic. [X]. Further, the timing of the email chain, which is dated from 31 May 2022, is highly convenient (from [X]'s perspective), given that the height of the CMA's Phase 1 investigation took place in May 2022.
- 2.9 Leaving that aside, the email should be seen in the context provided by GMI in its response to the CMA's Working Papers, the key points of which are set out again below:

⁷ PFs [9.286].

⁸ PFs [9.88].

⁹ PFs [9.119].

¹⁰ As explained at the Main Party Hearing, GMI considers that it competes with retailers in their capacity as operators of their PL brands. To the extent downstream competition between Jus-Rol and retailers affect retailers' upstream supply terms with Cerelia, such a constraint is at best indirect. In GMI's negotiations with retailers, GMI does not perceive any competitive constraint from Cerelia.

¹¹ Ibid.

¹² Ibid, [3.9].



- 2.9.1 It was no threat to delist in favour of private label. This is consistent with Ms Fentiman's statement at the Main Party Hearing that *"we have never had a threat of, "If you do not do this, I will replace you with own label" ... It is just not a tension that exists."*
- 2.9.2 It refers to *"many manufacturers"* offering lower prices in the context of justifying an input cost price increase. As described in the Main Party Hearing, GMI is generally unaware of the capacity of manufacturers supplying brands (including retailer own brands) with co-manufacturing services, however, it would observe that this statement suggests that [§<] perceives there to be a range of options.
- 2.9.3 It relates to the underlying costs of a known GMI input, which [§<] separately obtains – *"the costs we are seeing from the supply base and more specifically where this product is produced is not aligned to what General Mills are presenting"* – rather than the brand value (i.e. the additional element supplied by the Jus-Rol brand in the value chain).
- 2.9.4 The premise of the [§<] buyer referencing co-manufacturing offers in the [§<] Email Chain was rejected by GMI, with focus on the underlying commodities at play.
- 2.9.5 The focus of the conversation then moves to the actual cost increases for GMI, and to GMI's potential promotional support – i.e. the reference to manufacturer's prices is of no relevance to the ongoing negotiation.
- 2.9.6 The [§<] buyer's response to notes on the margin [§<] is making on Jus-Rol products:
- 2.9.7 *"Whether you feel the margin is disproportionate or not on blocks is not relevant. The market has been priced where it is on these products at least the last two years and this is accepted rate on your brand in the market place. The market on singles has also reflects (sic) this regardless of the RRP on when [§<] change retails, which are at our discretion."*
- 2.9.8 Presumably, [§<] takes the same view in the retail pricing of its own brand dough-to-bake products, emphasising that it is the retailer who controls the end consumer competitive interaction between Jus-Rol and PL products.
- 2.10 In reaching its provisional finding that retailers "trade off" the Parties, the CMA has rejected the Parties' evidence and submissions on this point and, in so doing, the CMA has made clear its preference for the assertions by a limited number of large retailers, which are not supported with any pre-merger evidence, rather than the Parties' extensive submissions which find strong corroboration in their pre-merger internal documents.
- 3. Evidence cited by the CMA**
- 3.1 The evidence cited by the CMA does not support its provisional conclusion that the parties exert a material competitive constraint on each other. That is because the CMA's conclusion is based almost entirely on the subjective, qualitative evidence of *"key large retailers"* i.e. evidence created during, and given for the purpose of, the investigation after it was launched, even in circumstances where the CMA itself recognises that *"some third parties have an interest in the outcome of [the] inquiry"*.¹³ Furthermore, the feedback from large retailers directly contradicts the explanations and submissions of the Parties regarding the existence of any material constraint.
- 3.2 The competitive constraint, put at its highest by the CMA, is said to be *"implicit"*.¹⁴ In order for the constraint to affect the commercial behaviour of GMI during negotiations, though, it must follow that GMI is and was aware of the ability of retailers to "trade off" between different suppliers in different channels. However, the CMA has cited no evidence of GMI being aware that it was being traded off against C  r  lia (or any other PL manufacturer) in this way. Furthermore, while qualitative evidence given by key large retailers (which is unsupported

¹³ PFs [6.31(e)] and [9.87].

¹⁴ PFs [9.84] and [9.87].



by documentary or quantitative evidence) indicates they perceived an ability to "trade off" the Parties, there are no examples of retailers in fact having exercised that ability. The sole instance cited in the PFs, and addressed at paragraph 2.8 above, does not in fact support this finding.¹⁵

3.3 The evidence provided by a few key large retailers and cited by the CMA to support the existence of the supposed material constraint is predominantly qualitative and, once interrogated, overwhelmingly weak:

3.3.1 Where a large retailer [§<] states that [§<],¹⁶ that is accepted by the CMA at face value, without any documentary or quantitative evidence of what this meant in practice, when it happened, whether it happened in practice at all or whether it is stated only as a hypothetical possibility. In any event, the retailer's [§<] submission may be referring to [§<].

3.3.2 Where a large retailer [§<] submits that the price differential between branded and PL products was key in separate negotiations and provided an objective, independent benchmark in supplier negotiations,¹⁷ again this is accepted by the CMA at face value and without further supporting evidence. In any event, GMI considers that the CMA has misconstrued the retailer's submission, which relates to cost comparison rather than "trading off" between the Parties.

3.3.3 Where a large retailer [§<] acknowledges that its leverage to "trade off" Jus-Rol against Cérelia is "*mitigated*" by the fact that Cérelia produces the majority of the Jus-Rol products it buys, but asserts nonetheless that "*use of this leverage has taken place in every negotiation over the last few years*",¹⁸ that is accepted by the CMA at face value (save for the document addressed at paragraph 2.8 above) while GMI's submission that it has never perceived this leverage is ignored. It is also inconsistent with the retailer's [§<] later comment that "*this type of leverage has not tended to be necessary in practice, as [the retailer] had not experienced unjustified cost inflation or ... reduction in promotional funding.*"¹⁹

3.4 The CMA states that it has sought supporting documentary evidence from third parties and, where it is not available, it has taken this into account when evaluating the evidence.²⁰ However, it is not clear to GMI how the CMA has done so in light of the above examples. In an attempt to explain away the lack of supporting documentary evidence, the CMA cites the "*oral or unspoken nature of the dealings*" between suppliers and retailers and the "*implicit nature of the commercial tension or leverage*".²¹ This is clearly circular reasoning and does not account for the absence of internal documents that would have surely been created by large retailers when assessing and internally discussing negotiations with respect to the Parties. Furthermore, it is not enough for the CMA to refer to the "*oral ... nature of the dealings*" in this context where key large retailers admitted that the type of leverage referred to by the CMA had not been raised during negotiations because it had not been necessary to do so.²²

3.5 The documentary evidence provided by large retailers and cited by the CMA to support the existence of the material constraint is also weak and, in some cases, the cited documents do not support the interpretations placed on them by the CMA:

3.5.1 The example of an email from one retailer [§<] to a General Mills account manager in 2020, which shows the retailer [§<],²³ contains nothing to indicate that [§<]. [§<].

¹⁵ PFs [9.82].

¹⁶ PFs [9.76(a)].

¹⁷ PFs [9.76(b)].

¹⁸ PFs [9.76(c)].

¹⁹ PFs [9.83(c)].

²⁰ PFs [6.31(d)(iv)].

²¹ PFs [6.31(d)(iv)], [9.84].

²² PFs [9.83(a), 9.83(c)].

²³ PFs [9.85(a)].



- 3.5.2 The same is true for the internal email between GMI staff in 2019 which describes one retailer [X].²⁴ GMI explained in its response to the Working Papers that this was a "ranging" decision taken by the retailer, where ranging decisions often takes place in the context of a delisting across Butters, Spreads and the Home Baking range.²⁵ Furthermore, when asked by the CMA, [X]. It is unclear how the CMA can rely on this email as evidence of retailers replacing Jus-Rol products with equivalent PL products when [X]. This is especially so given that the retailer may be referring to [X].
- 3.5.3 As for the 2021 category review referred to by the CMA,²⁶ it is unclear how the [X] recommendation that the retailer [X] could be evidence of a retailer replacing Jus-Rol products when that suggestion was rejected by the retailer [X]. That outcome also appears to be inconsistent with the CMA's general findings that retailers' inventory decisions are largely driven by customer demand.²⁷

4. The CMA's inconsistent approach to evidence and submissions

- 4.1 GMI has made clear in its previous submissions and responses to the CMA that it never perceived itself to be subject to any constraint from PL manufacturers in negotiations with retailers. Similarly retailers have never referred to PL manufacturers in commercial negotiations with GMI, with the exception of the single instance addressed at paragraph 2.8 above.²⁸
- 4.2 GMI has explained that it does not recognise C er elia, or any other co-manufacturer supplying contract manufacturing services to brands (whether PL or otherwise), to be a competitor of the Jus-Rol business or as providing any appreciable constraint upon it. As stated by Ms Fentiman at the Main Party Hearing, GMI often does not know who the co-manufacturer for a PL brand is and it would not "*give us any real advantage if we were to know*".²⁹ GMI's submissions reflect its direct experience of the market and the events in question. Nonetheless, the feedback provided by large retailers is preferred by the CMA for reasons that are not properly explained.³⁰
- 4.3 The CMA treats documentary evidence, and the absence thereof, in an uneven manner and, most concerningly, gives little weight to GMI's submissions regarding documentary evidence. GMI recognises that the CMA attaches greater evidentiary weight to documents created before the Merger and that the number of pre-merger GMI documents available was reduced by way of GMI's retention policies (notwithstanding the fact that GMI provided the CMA with a large number of pre-merger marketing documents and category presentations which addressed GMI's commercial approach to negotiations with retailers).³¹ However, GMI has in good faith explained the background to and circumstances surrounding the documentary evidence that is in existence (such as those documents addressed at paragraph 3.5 above) based on its direct experience at the relevant time and those submissions have not been accepted by the CMA.
- 4.4 On the other hand, the submissions made by retailers regarding their alleged practice of "trading off" the Parties are accepted wholesale, despite the fact that those submissions are not supported by documentary evidence and are made after the announcement of the Merger and the CMA's inquiry. This is an inconsistent approach which cannot be justified by

²⁴ PFs [9.85(b)].

²⁵ See GMI Response to the CMA Working Papers [5.2.3].

²⁶ PFs [9.85(c)].

²⁷ PFs [7.6].

²⁸ See, for instance, paragraph 5 of GMI's Response to CMA Working Papers and paragraph 3 of C er elia's Issues Statement Response.

²⁹ GMI's Response to CMA Working Papers [5.1.1].

³⁰ PFs [9.87].

³¹ PFs [9.69].



the allegedly "*implicit*" nature of the constraint³² or the "*oral or unspoken nature of the dealings*", for the reasons given in paragraph 3.4 above.³³

- 4.5 For the reasons given above, GMI is surprised and disappointed that the CMA has on multiple occasions ignored its evidence and submissions on relevant issues, which are corroborated by a consistent body of documentary evidence provided by the Parties, in circumstances where GMI has provided that evidence and those submissions in good faith and where GMI is a relatively neutral player in the proceedings (as it no longer has any commercial interest in the outcome of the CMA's investigation). GMI therefore invites the CMA to re-examine the evidence and its analysis before reaching any conclusions in the Final Report.

³² PFs [9.84].

³³ PFs [6.31(d)(iv)].