
CÉRÉLIA/JUS-ROL
RESPONSE TO PROVISIONAL FINDINGS
28 NOVEMBER 2022

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CÉRÉLIA/JUS-ROL

Response to Provisional Findings

1. Executive Summary

1.1 Cérélia sets out in this response to the CMA's Provisional Findings (**PFs**) why the PFs are based on fundamental errors of assessment and are not supported by the balance of the evidence in this case.

1.2 The PFs also disregard the CMA's own recent approach to the assessment of similar facts in *PepsiCo/Pioneer* (2020), without providing reasons why a different approach is, in the CMA's view, required.

The CMA's SLC is theoretical and evidentially unsound

1.3 In its analysis, the CMA failed to take account of relevant evidence, took account of irrelevant matters and ultimately presented manifestly inadequate reasons for its provisional SLC finding.

1.4 According to the CMA (i) certain retailers currently benefit from an implicit, unspoken threat that they can "rebalance" their dough-to-bake (**DTB**) purchasing volumes dynamically between GMI/Jus-Rol (consumer brand) and Cérélia-produced retailer private label (**PL**) products (the '**Implicit' Rebalancing Threat**); and (ii) this threat leads GMI/Jus-Rol and Cérélia (the **Parties**) to offer these retailers better terms. The PFs argue that the transaction leads to a loss of this threat which gives rise to the CMA's SLC. For the reasons set out in this submission, the PFs fail to establish on the balance of probabilities (ie with a likelihood of more than 50%) that the transaction will give rise to the provisionally identified SLC. Indeed, as will be shown in this submission, the CMA's SLC is a mere theoretical construct which – if tested against the reality of the Parties' commercial experience and the available evidence – is simply not plausible.

1.5 The CMA's provisional conclusion is evidentially unsound. In particular:

(a) The CMA's case is based exclusively on unsubstantiated assertions by two large retailers ([**Confidential**] and [**Confidential**]) which these retailers have failed to support with any business data or documentary evidence.

(b) There is *no* evidence that either retailer has ever communicated the 'Implicit' Rebalancing Threat to either Party (orally or otherwise). This contrasts starkly with evidence of their frequent express references to *other* threats ('outside options').

(c) The 'Implicit' Rebalancing Threat has never been understood by either Party, and is not mentioned in any of their internal documents. Any such 'Implicit' Rebalancing Threat, even if it were to exist, must therefore be ineffective, because it cannot have influenced the Parties' terms.

(d) Other retailers have not raised the SLC concern and the CMA's attempt to rely on the submissions of [**Confidential**] in support of the CMA's SLC are misguided.

1.6 The CMA's SLC is also contradicted by Cérélia's trading data, which the CMA has had since the middle of July 2022.¹ These data confirm that (i) [X] and (ii) [X]. Cérélia's pricing and volume data from 2016-2022 are set out in Section 2.C and **Annex 1**.

1.7 In its SLC analysis, CMA fails to properly reflect that upstream volume shifts are a function of downstream (retail) demand movements; what the CMA refers to as "derived demand". It is this derived demand which drives retailer order volumes vis-à-vis the Parties. Conversely, there is

¹ See Cérélia's response to the CMA's first Phase 1 s.109 Notice of 30 June 2022, in particular Annex S109.1.47.001 – Historic selling prices, S109.1.47.002 – Summary of tenders/ negotiations, and S109.1.47.001 – Historic volumes.

no evidence to support the CMA's claim that the observed volume shifts are the result of a "playing off" strategy by retailers, detached from retail demand dynamics.

- 1.6 The CMA also fails to reflect in its analysis the impact of the Parties' pre-merger vertical link, ie the fact that C er lia produced both retailer PL and GMI/Jus-Rol SKUs, which is highly relevant for the CMA's SLC. This link meant that [X].
- 1.7 The CMA's SLC is therefore a purely theoretical construct, shaped by the submissions of two retailers made during the course of the investigation and which are not supported by any documentary or other business evidence. The SLC is in fact wholly disconnected from how competition works in the market.
- 1.8 Moreover, even on its own terms, the CMA has materially overstated the significance of the SLC:
 - (a) The SLC's scope, in retailer and product terms, would be narrow, affecting only a small proportion of the market, ie it is limited to retailers which procure functionally equivalent DTB SKUs from GMI and C er lia and it is limited to those SKUs.
 - (b) The magnitude of any SLC's effects (for affected products) would also be very limited:
 - (i) The SLC can be defeated by switching; once the relevant retailer has switched co-packers, any SLC disappears.
 - (ii) Upstream volume movements are severely limited by the need for retailers to procure what shoppers want to buy (derived retail demand).
- 1.9 It follows that, when considered in the round, the CMA's "lessening of competition" would even on the CMA's own analysis, not be "substantial".
- 1.10 Many of the CMA's errors of assessment can be traced back to the CMA's initial decision to adopt a horizontal frame of reference when the transaction is plainly vertical in nature and ought properly be assessed by reference to a vertical frame of reference. This is a fundamental error that has resulted in the CMA:
 - (a) Incorrectly identifying competitive tension between the Parties where none exists;
 - (b) Incorrectly assessing the impact of the transaction on the Parties' incentives; and
 - (c) Unduly disregarding the significance of the pre-merger "channel-specific" constraints which third-party competitors place on each of C er lia and Jus-Rol and which the CMA accepts are unaffected by the transaction.
- 1.8 For these reasons, the CMA's SLC is evidentially unsound and, even on the CMA's case, any "lessening of competition" identified by the CMA is not in fact "substantial".
- 1.9 Should the CMA reach a final conclusion that the transaction has resulted or may be expected to result in an SLC, ie that an SLC is more likely than not to occur, the CMA must reflect the limited scope of the SLC in its assessment of the effectiveness and proportionality of any potential remedies.

The CMA's investigation is procedurally unfair

- 1.11 C er lia is also concerned that the CMA's investigation to date has been tainted by significant procedural unfairness, including:

- (a) The CMA’s denial, on four separate occasions, of Cérélia’s requests for an ‘economist call’, to engage with the CMA staff more deeply on key issues in this case²; and
 - (b) The CMA’s refusal to disclose critical elements of key retailer evidence to allow Cérélia to properly understand the actual practical manifestation (or real “gist”) of the CMA’s SLC and to provide informed comments.³
- 1.12 The above examples are without prejudice to the other procedural unfairness points raised by Cérélia in this case and which are covered in separate correspondence with the CMA.⁴
- 1.13 Looking ahead, Cérélia trusts that the Inquiry Group remains open to the possibility that, at the end of its assessment process, the evidence in its totality, when viewed objectively in the round, supports the conclusion that no SLC arises. The transaction should then be cleared unconditionally.
- 1.14 In the remainder of this submission, Cérélia addresses the points covered above in more detail.⁵
- 2. The CMA’s provisional SLC is unsound**
- 2.1 The CMA’s SLC derives from the CMA’s *interpretation* of comments made by two large grocery retailers ([**Confidential**]) to the CMA (the **2 Retailers**).⁶
- 2.2 The evidence before the CMA does not support the SLC for the reasons explained in this section:
- (a) The SLC is exclusively based on the assertions of limited retailers, which are manifestly unreliable.
 - (b) The SLC is contradicted by evidence from other market participants.
 - (c) The SLC is also contradicted by actual business practice and trading data.
 - (d) The SLC fails to reflect the Parties’ pre-merger vertical relationship.
- A. The PFs are exclusively based on manifestly unreliable assertions**
- 2.3 The evidential bedrock of the SLC the CMA identified is the submissions of the 2 Retailers, or rather, the CMA’s *interpretation* of these submissions. There are a number of serious problems with the CMA’s reliance on these submissions.
- 2.4 First, the assertions of the 2 Retailers should be given limited weight as neither of the 2 Retailers was able to:

² Requests were made on the following dates: 22 July 2022, 5 August 2022, 18 August 2022 and 30 August 2022.

³ Amongst other things, Cérélia is therefore not afforded the opportunity to explain to the CMA how its information requests may have resulted in misleading responses. For example, the CMA’s third party questionnaires would have rested on an inaccurate and confusing premise if any of them provided the definitions of “wholesale” and “retail” given in the final slide of the CMA’s Alternative Competitive Constraints working paper, as these equated Cérélia’s supply of co-packing services with Jus-Rol’s supply of final products.

⁴ See, for example, Willkie Farr & Gallagher’s email to the CMA dated 2 September 2022; Willkie Farr & Gallagher’s letter to the CMA dated 6 October 2022; and Cérélia’s letter to the CMA dated 6 October 2022; Willkie Farr & Gallagher’s email to the CMA dated 10 November 2022.

⁵ Any emphasis added to quotes has been added by Cérélia, unless otherwise indicated.

⁶ Another large retailer ([**Confidential**]) notes that they would prefer to continue dealing with two separate entities (for cost comparison purposes). First, they did not raise the “playing off” concerns based on implicit volume shifting threats which were raised by the other two retailers. Second, as Cérélia already manufactured that retailer’s PL volume as well as Jus-Rol, this ability was already limited pre-merger and not sufficiently concerning for that retailer to switch PL supplier.

- (a) recall a single specific instance where a threat to rebalance DTB volumes between PL and Jus-Rol was communicated⁷ to either Party, despite having suggested that such threats could at times have been communicated orally⁸;
 - (b) produce a single internal document which referenced (or otherwise evidenced) the existence of this allegedly significant competitive ‘lever’ for price negotiations. This should have been of particular concern to the CMA given its acknowledgement that *“this is a market in which the customers are relatively sophisticated and are likely to maintain a paper trail”*,⁹ or
 - (c) identify any actual effects of the alleged ‘Implicit’ Rebalancing Threat (ie specific instances which led to the extracting of better terms from either Party).
- 2.5 In evaluating the 2 Retailers’ comments, the CMA must bear in mind that retailers may have an instinctive commercial preference for the *status quo*. However, a mere preference is not evidence of significant merger-specific competition concerns.
- 2.6 The complete absence of any corroborating evidence from either of the 2 Retailers is even more concerning (and surprising) given the assertion by one ([**Confidential**]) that this *“leverage has taken place in every negotiation over the last few years”*.¹⁰
- 2.7 A further ‘red flag’ for the CMA should have been the 2 Retailers’ admissions that while they *could* have made the threats express (eg orally) they never needed to because they obtained competitive terms without any need to do so:
- (a) [**Confidential**] confirmed that *“this type of leverage has not tended to be necessary in practice, as it had not experienced unjustified cost inflation or (in respect to Jus-Rol) reduction in promotional funding”*;¹¹ and
 - (b) [**Confidential**] confirmed that *“it had not particularly needed to do so in negotiations”*.¹²
- 2.8 Even assuming such a threat would have been meaningful, the obvious explanation is that it was unnecessary to make any express oral rebalancing threats because other competitive constraints – including the “primary” and “channel-specific competition” identified by the CMA – were already delivering competitive terms.
- 2.9 The alternative explanation which the CMA prefers – that it was an unspoken, implicit threat which constrained the Parties – is inconsistent with the Parties’ incontrovertible evidence that such a threat was never communicated, perceived or otherwise understood.
- 2.10 Indeed, the PFs do not even begin to attempt to answer the question why the largest UK retailers (being sophisticated and powerful buyers) would not (ever) have articulated a threat which they considered was a significant lever in price negotiations. This reluctance is implausible when set against the extensive evidence available to the CMA that [X]. If Jus-Rol were another credible constraint, why would retailers not say so in negotiations with C er lia? The simple answer – which the CMA chooses to ignore in the PFs – is that this threat did not exist. On any view, it is implausible and hence not credible. That is why it was not made by the 2 Retailers, or indeed any other UK retailers.

⁷ PFs, para. 9.83(c) ([**Confidential**]) and 9.76(b) ([**Confidential**])

⁸ The PFs reference at para.9.82 a single document from [**Confidential**] which the PFs cite as support for the SLC. Curiously, this document was produced during the CMA’s present investigation and in any event does not corroborate the alleged “rebalancing” threat. Given the document concerns GMI, it is properly addressed by GMI in its response to the PFs.

⁹ PFs, footnote 505.

¹⁰ PFs, para. 9.76.

¹¹ PFs, para.9.83(c).

¹² PFs, para.9.83(a).

2.11 Given the above, it was incumbent on the CMA to approach the submissions made by the 2 Retailers with great caution, and to test these critically both with the 2 Retailers and by reference to other sources of evidence.

2.12 However, there is no evidence in the PFs that the CMA has done so.¹³ Cérélia's requests for targeted disclosure to it of key retailer evidence to allow Cérélia to understand the alleged practical operation of the CMA's SLC as put to the CMA by the 2 Retailers and to comment on this were also all rejected by the CMA.¹⁴

B. *The assertions relied on are contradicted by other market participants*

2.13 There is a consistent and compelling body of evidence from other credible sources which directly contradict the CMA's SLC.

I The Parties do not recognise the SLC

2.14 The Parties have provided the CMA with compelling evidence that the 'Implicit' Rebalancing Threat was never communicated to them (or otherwise understood by them):

(a) Both GMI and Cérélia independently confirmed that no threat to 'rebalance' volumes between them in the absence of better commercial terms was ever communicated to them by retailers, or otherwise perceived by them;

(b) The Parties' internal documents corroborate this. It is therefore not possible that any "implicit" threat could have caused either Party to offer retailers better terms because they were not aware of it;

(c) Similarly, of the "several thousand" internal documents¹⁵ the CMA gathered from the Parties, the CMA has identified no evidence that the implicit competitive tension was understood by the Parties or otherwise existed¹⁶;

(d) In contrast, Cérélia provided the CMA with many documents in which [REDACTED]. These documents further confirm that [REDACTED];

(e) The evidence also demonstrates that retailers routinely negotiate with Cérélia and Jus-Rol in writing (typically by email). In these circumstances, the total lack of documentary evidence as to the alleged implicit tension is significant, [REDACTED].¹⁷

(f) As set out in greater detail below, the conduct which would give rise to the CMA's SLC are inconsistent with the transaction rationale, and not in Cérélia's interests.

2.15 The CMA erroneously interprets these documents as being in support of the SLC and ignores the Parties' detailed submissions in relation to their actual context and meaning.¹⁸

2.16 For example, the CMA repeatedly wrongly relies on references in Jus-Rol documents to PL competition as evidence that the Parties compete upstream. This confuses competition between the Parties (which did not exist) with retail competition, where Jus-Rol competes with

¹³ It was evident from the Working Papers disclosed by the CMA in late August that the CMA had not critically tested or challenged the submissions of the 2 Retailers at any point up to the end of August 2022. Cérélia therefore urged the CMA to do so. The PFs disclose that the CMA then engaged in further discussions with the 2 Retailers after the MPH, but the limited disclosures made in the PFs do not allow Cérélia to form any view as to whether the CMA has in fact critically evaluated the previous and subsequent submissions of the 2 Retailers. The superficial and logically flawed summaries of retailer concerns in the PFs suggest the CMA did not do so.

¹⁴ By email from Willkie Farr & Gallagher to the CMA on 10 August 2022 and 26 September 2022; by letter from Willkie Farr & Gallagher to the CMA on 10 November 2022, and again by email from Willkie Farr & Gallagher to the CMA on 21 November 2022.

¹⁵ PFs, para. 6.31(d)(i).

¹⁶ PFs, para.6.31(d)(iii).

¹⁷ See for example Cérélia's response to Question 47, 48 and 54 of the first Phase 2 s.109 notice, and the underlying internal documents.

¹⁸ Cérélia's response to the AIS; Annex AIS.09.a - Cérélia internal documents; GMI response to the AIS.

retailer PL brands. See, for example, where the PFs note that: “We identified documents that showed GMI referencing C r lia’s PL activities.”¹⁹ The PFs then cite an internal GMI presentation dated March 2020 in which, according to the PFs, “[Confidential]”. The document makes in fact no reference to C r lia or its “PL activities” at all. GMI is referring to retailer PL competition at the retail level – [Confidential]. This observation is incapable of supporting the CMA’s SLC.

- 2.17 On a related point, the PFs note that: “the Parties do not appear to consider each other extensively in their internal documents”.²⁰ GMI does not in fact reference C r lia / BakeAway in internal documents which analyse Jus-Rol’s competitors.²¹ C r lia considers Jus-Rol principally in the context of its category reviews, which are aimed at understanding category developments (e.g. growth projections) more generally, and which cover both consumer brands and retailer PL brands. These reviews support [X].

II Other retailers have not raised the SLC

- 2.18 The vast majority of UK retailers do not share the concern raised by the 2 Retailers:²²

- (a) [Confidential] other UK grocery retailers²³ consulted by the CMA did not raise the ‘Implicit’ Rebalancing Threat concern; and
- (b) Particular weight should be given to the submissions by [Confidential], another leading retailer, [Confidential]. [Confidential] did not raise any competition concerns in relation to the transaction²⁴, given that: “the Parties did not compete because they ‘do not provide like-for-like products’”.²⁵ [Confidential] further confirmed that it is possible to switch DTB PL co-packers within 6-9 months, if needed.²⁶ [Confidential] submissions are validated by its own switching experience, and should therefore be afforded significant weight.

- 2.19 Similarly, in *PepsiCo/ Pioneer* (2020), no retailer mentioned the existence of or raised any concern about competitive tension between co-packers and consumer brand owners – including presumably [Confidential] and [Confidential]:

“Respondents to the CMA’s investigation confirmed that upstream contract manufacturers of granola do not compete with downstream brand owners in the retail market”.²⁷

- 2.20 According to the CMA in 2020, upstream co-packers do not compete with downstream brand owners because:

“All the retailers (brand owners) that responded to the CMA’s investigation confirmed that upstream contract manufacturers have little influence over the products. In particular, upstream contract manufacturers do not make any decisions in regard to retail pricing, branding or marketing, and they manufacture the products under the brand owner’s instructions. A few

¹⁹ PFs, para 9.69.

²⁰ PFs, para 9.72.

²¹ le outside of the context of the Parties’ vertical co-pack arrangements, and later the present transaction. See GMI’s response to the WPs, at 5.1.

²² The majority of them do not purchase co-packing services from C r lia and Jus-Rol products at the same time.

²³ PFs, para. 9.296-7; namely (in alphabetical order): [Confidential]. In addition, for the reasons explained in this Section 3, the CMA cannot rely on [Confidential] in support of the “rebalancing” concern as [Confidential] raises a different, distinct concern which is also not well founded.

²⁴ The PFs assert that [Confidential] told the CMA that there was a degree of competition tension between the Parties (see para. 9.76) but then fails to disclose any statements in support. In any event, it is clear from the PFs that [Confidential] considers that the Parties “do not compete” and as a result did not raise any concerns.

²⁵ PFs, para. 9.57.

²⁶ PFs, para. 7.72(a).

²⁷ ME/6872/19, *Anticipated acquisition by PepsiCo Inc. of Pioneer Food Group Limited*; para.37.

retailers acknowledged that the development of recipes was a collaborative process. However, the brand owners make the ultimate decisions around the final product.”²⁸

2.21 The CMA therefore concluded that there are two distinct levels of the supply chain, between which there is no competition:

“On the basis of the above, the CMA understands from third parties that downstream retail brand owners compete between each other in the retail market and do not compete with upstream contract manufacturers.”²⁹

2.22 There is no discernible reason for retailers to have a different view of the grocery supply chain for granola and cereal, compared with DTB products. Like DTB products, granola and cereal are simple, commoditised products, and there is no evidence that retailers have different procurement processes for these product categories.

2.23 The CMA’s decision to depart from its analytical approach in *PepsiCo/Pioneer* appears to have been influenced by the uncorroborated assertions of the 2 Retailers. These do not reflect the market reality, and appear to be inconsistent with evidence they provided to the CMA in the *PepsiCo/Pioneer* case in 2020.

III [Confidential] concern does not support the SLC

2.24 The submissions of [Confidential] merit particular attention as the CMA seeks to rely on some of these in support of its SLC. However, when carefully and objectively considered, it is clear that the CMA has misunderstood and misrepresented [Confidential] submissions.

2.25 The CMA asserts in the PFs that [Confidential] told the CMA that (in the CMA’s words) there is “a degree of competitive tension between the Parties that they can use as a lever in negotiations”.³⁰ [Confidential] was in fact raising a benchmarking concern unrelated to the ‘Implicit’ Rebalancing Threat raised by [Confidential] and [Confidential] (and which is not itself merger-specific).

2.26 The PFs acknowledge that [Confidential] confirmed that it does not reference one Party in negotiations with the other, and that its stocking decisions are largely driven by what consumers want to buy:

(a) “[D]iscussions were centred around the best possible offer each supplier could produce”³¹ and that it has a “separate bilateral relationship in place with each of C r lia and Jus-Rol and would not discuss its Jus-Rol supply requirements/requests with C r lia and vice versa”.³² and

(b) [Confidential] further confirmed that there is an important “price differential” between Jus-Rol and C r lia-produced SKUs and, with branded products typically expected to command a premium, this was key in its separate negotiations with the Parties.

2.27 Turning to [Confidential] concern, the PFs note that it told the CMA that “having at least two distinct suppliers provides the retailer with an objective, independent benchmark”,³³ in negotiations with the Parties. Specifically, it would “use separate supplier negotiations to assess

²⁸ *PepsiCo/Pioneer*, para.40.

²⁹ *PepsiCo/Pioneer*, para. 41.

³⁰ PFs, para. 9.76.

³¹ *Ibid.*

³² *Ibid.*; see further para.7.6 and 7.41, which refer to customer and category led purchasing decisions and customer-centric planning.

³³ PFs, para.9.76(b).

the cost price position of each [of two separate suppliers], and the differential between them, to help assess value for money and competitiveness.”³⁴

- 2.28 [Confidential] has a high degree of cost price transparency as regards the production costs of DTB products in any event. DTB products are simple, commoditised products, with a short list of common ingredients. [Confidential] also has in-house commodity price tracking teams allowing it to benchmark Cérélia’s input costs. The number of suppliers appears irrelevant against that background.
- 2.29 Second, Cérélia already produces both Jus-Rol and [Confidential] DTB PL SKUs pre-merger. [Confidential] knew this. This means that pre-merger [Confidential] did not in fact have two separate and independent objective cost benchmarks to compare. Consequently, [Confidential] comments, as reported by the CMA, are at odds with its existing practices.
- 2.30 Should [Confidential] wish to establish two independent counter-parties across the consumer brand and PL co-pack channels, it can invite tender proposals from the market, eg to test the case for switching all or some DTB PL volumes to a rival co-packer at any time,³⁵ as [X] recently did. It is therefore clear that when its submissions are properly understood, [Confidential] did not raise concerns which fall within the CMA’s SLC and indeed did not in fact raise any merger-specific concerns.

C. The SLC is contradicted by actual business practice and trading data

- 2.31 When the CMA seeks to rely on evidence of retailers adjusting the mix of consumer brand and PL SKUs as evidence of the ‘Implicit’ Rebalancing Threat, it commits a manifest error of assessment and ignores actual business practice and trading data on its file.

I Upstream volume requirements reflect consumer demand

- 2.32 It is clear from the CMA’s own analysis that retailers adjust their mix of Jus-Rol and PL DTB SKUs to reflect actual and anticipated consumer demand. This has nothing to do with any alleged ‘Implicit’ Rebalancing Threat:
- (a) Jus-Rol and DTB PL SKUs compete at the retail level; as such, consumer switching at the retail level drives upstream volume requirements by retailers. The PFs refer to this dynamic as “derived demand” and acknowledge that this dynamic “*significantly*” influences³⁶ the volumes of Jus-Rol products and PL products they purchase.
- (b) The PFs also acknowledge that retailer purchasing decisions, including delisting decisions, are guided by SKU-level sales performance.³⁷ [Confidential] told the CMA that when they de-list a DTB product due to “*poor performance*”, in “*most instances*” [Confidential] replaces such products “*with branded like-for-like or PL products*”.³⁸ The choice of what to list is a function of the retail demand. It is not credible that [Confidential] would delist one of its own PL SKUs which performs well with shoppers and replace it with a Jus-Rol SKU that is much more expensive – for [Confidential]³⁹ and its shoppers – just to put additional pressure on Cérélia’s co-pack terms. Indeed, as PL channel-specific competition delivers competitive co-pack terms this would also be entirely unnecessary.

³⁴ PFs, para. 9.76(b).

³⁵ The strength of rival PL co-packers is addressed in detail in Section 4.B.

³⁶ PFs, para. 7.89.

³⁷ PFs, para. 9.85(b).

³⁸ PFs, para. 9.86.

³⁹ The PFs confirm that Jus-Rol SKUs are typically [Confidential]% more expensive for retailers than the production costs of an equivalent PL SKU. This reflects the Jus-Rol brand premium retailers are willing to pay and hope to be able to recover at the retail level.

- 2.33 For these reasons, the CMA has committed a manifest error of assessment in relying on the fact that retailers adjust the mix between Jus-Rol and PL products over time as evidence in support of the alleged “Implicit” Rebalancing Threat. It is not. All of the evidence shows that this retailer behaviour is driven by consumer choices.
- 2.34 The need to engage in accurate forecasting – and related GSCOP obligations – also limits the ability of retailers to make significant short-term changes to the volumes of DTB products they purchase from Jus-Rol and Cérélia, particularly over the peak trading period of November – December each year.⁴⁰

II Short-term volume adjustments do not affect upstream prices

- 2.35 The SLC assumes that there are “ongoing” price discussions between the Parties and retailers (i.e. after the initial tender for a retailer’s PL manufacturing contract), in particular as regards [Confidential] and [Confidential], where the ‘Implicit’ Rebalancing Threat purportedly plays a significant role in extracting better terms. The CMA adduces no evidence to corroborate this. There are in fact no such “frequent” or “ongoing” price negotiations with either Party.
- 2.36 In its analysis, the CMA appears to unduly conflate retailers’ upstream procurement activity with their downstream selling activity, ie their retail sales strategy.
- 2.37 It is correct that retailers unilaterally adjust retail prices for consumers on an ongoing basis (sometimes daily or weekly) to reflect their retail strategy and retail sales and margin targets. In contrast, retailers typically review their upstream terms much less frequently (eg annually)⁴¹, and upstream suppliers have no visibility or influence over retailers’ retail pricing and volume decisions (which are a function of derived retail demand).
- 2.38 It is therefore simply not the case that retailers push for price concessions on an “ongoing” basis in their communications with Cérélia. While they engage in “ongoing” conversations with Cérélia about purchasing decisions, these are working-level communications about the quantities that Cérélia needs to manufacture to meet the retailer’s retail demand forecasts.
- 2.39 To the extent there are any “ongoing purchasing decisions”, [redacted]. On the contrary, the unit prices that Cérélia charged its retailer customers [redacted].
- 2.40 This is illustrated in Figures 1, 2, 3, and 4 below, which show the evolution of Cérélia’s sales volumes and unit prices for the puff pastry ready-roll products it manufactures for each of its [redacted] retailer customers. (As Annex 1 shows, the equivalent charts for the other PL pastry products that Cérélia manufactures display a very similar picture.)

Figure 1 – comparison of Cérélia sales price per unit to Cérélia total monthly sales volumes for [redacted] ready-roll puff pastry products, 2016-2022

[redacted]

⁴⁰ [redacted]
⁴¹ PFs, para. 7.67; 7.70.

Figure 2 – comparison of Cérélia sales price per unit to Cérélia total monthly sales volumes for [REDACTED] ready-roll puff pastry products, 2016-2022⁴²

[REDACTED]

Figure 3 – comparison of Cérélia sales price per unit to Cérélia total monthly sales volumes for [REDACTED] ready-roll puff pastry products, 2016-2022

[REDACTED]

Figure 4 – comparison of Cérélia sales price per unit to Cérélia total monthly sales volumes for [REDACTED] ready-roll puff pastry products, 2016-2022⁴³

[REDACTED]

Source for Figures 1-4: Frontier Economics analysis – for further details of methodology, raw data sources and commentary, please refer to Annex 1.

- 2.41 The charts confirm the following key facts:
- (a) [REDACTED] the *volumes* of private label products that retailers procure from Cérélia can vary significantly from month-to-month, Cérélia's *prices* [REDACTED]
 - (b) [REDACTED]. [REDACTED].
- 2.42 These graphs are compelling evidence that retailers are not engaged in any “ongoing” price negotiations where the alleged ‘Implicit’ Rebalancing Threat could be relied on to extract better terms. In contrast, Cérélia’s terms are set (or reset) in the context of PL channel-specific competition. That PL channel-specific competition delivers competitive terms for retailers (including [REDACTED] and [REDACTED]) and is wholly unaffected by the transaction – there are simply no merger-specific effects in relation to such competition.
- 2.43 In light of the lack of evidence to corroborate the assertions of the 2 Retailers, it is particularly concerning that the CMA disregarded other sources of evidence, such as the pricing and volume data provided to the CMA by Cérélia at the start of the Phase 2 process.⁴⁴ [REDACTED].
- D. ***The SLC fails to reflect the Parties’ pre-merger vertical relationship***
- 2.44 The SLC is only relevant if the merged entity attempts to raise the price of either Jus-Rol, its co-packing offer, or both. However, the CMA’s provisional SLC finding ignores the fact that Cérélia has no incentive to pursue any of these strategies, in part because of its existing co-packing agreement with GMI.
- 2.45 Cérélia currently manufactures approximately [REDACTED]% of Jus-Rol products by volume [REDACTED]. [REDACTED]. Consequently, Cérélia [REDACTED] even if it were ever made, a rebalancing threat from a retailer to shift volumes between these channels [REDACTED].

⁴² Cérélia confirms that the reduction in average price per unit in July 2019 was due to a system error.

⁴³ Cérélia confirms that [REDACTED].

⁴⁴ Cérélia’s response to the CMA’s first Phase 1 s.109 Notice of 30 June 2022, in particular Annex S109.1.47.001 – Historic selling prices, S109.1.47.002 – Summary of tenders/ negotiations, and S109.1.47.001 – Historic volumes.

- 2.46 This has two important implications:
- (a) First, since Jus-Rol does not exercise a competitive constraint on Cérélia pre-transaction, and a non-existent constraint cannot be ‘lost’, the transaction cannot result in a loss of competitive constraint, and therefore cannot lessen competition; and
 - (b) Second, the merged entity would not be incentivised to raise the price of either Jus-Rol, its co-packing offer, or both. It would simply never be in its interest to take the action required in order for the CMA’s SLC to occur.
- 2.47 The relevance of this pre-existing link between the Parties – and the CMA’s unsound reasoning for downplaying this in the PFs - is discussed in more detail in Section 4.C.

Conclusion

- 2.48 For the reasons set out above, the CMA fails to identify any adequate evidential basis in support of the SLC provisionally identified in the PFs. There is accordingly no proper basis for the CMA to conclude that the transaction gives rise to the identified (or indeed any) SLC.

3. The SLC is narrow and non-substantial

- 3.1 Without prejudice to Cérélia’s submission that the PFs fail to identify a sufficient basis for the CMA’s SLC, it observes that SLC would be exceptionally narrow. Considering that it is also of limited magnitude (for reasons explored in Section 3.B), the CMA’s SLC cannot be considered “substantial”. Cérélia’s comments in this regard also affect what remedies the CMA may require, should the CMA conclude that the “substantial” threshold is (just) met.
- 3.2 The PFs wrongly imply that the CMA’s SLC potentially affects the vast majority of DTB products sold by UK retailers: “*Over 80% of DTB products supplied in the UK are sold by grocery retailers that provide both PL and branded DTB products.*”⁴⁵
- 3.3 Although factually correct on its face, this statement does not reflect the number of SKUs affected by the CMA’s provisional SLC, and therefore materially overstates the possible effects of the CMA’s SLC.
- 3.4 The CMA’s SLC only applies to (i) a minority of grocery retailers, and (ii) a sub-set of DTB product segments sold by those retailers. Even on the CMA’s own case, therefore, the majority of the DTB segment is unaffected by the SLC. Consequently, it is incumbent on the CMA to reassess its provisional finding that any merger-specific lessening of competition is substantial.

A. The SLC could only apply to a small sub-set of retailers and SKUs

- 3.5 The CMA’s SLC can by its nature only affect a limited sub-set of the DTB category. Any ‘Implicit’ Rebalancing Threat can only arise (even on the CMA’s own case) when a retailer sources Cérélia co-packed PL SKUs and GMI/Jus-Rol SKUs in the same retail DTB product sub-segments (the **SLC SKUs**).⁴⁶
- 3.6 In addition, for the CMA’s SLC to have any effect, the retailer must be unable to switch at least a competitively significant amount of its DTB PL volumes to a rival co-packer over a reasonable period of time.⁴⁷

⁴⁵ PFs, Summary, para.35

⁴⁶ This is a reflection of the fact that in practice a retailer could not credibly threaten to ‘rebalance’ a PL pizza product with a Jus-Rol ready-roll puff pastry product. While there is a high degree of supply side substitutability between such products, the essence of the SLC is the rebalancing of volumes between products the end-consumer will consider close alternatives.

⁴⁷ The market test confirms that while switching is not instantaneous, it can occur over a reasonable period of time (6-12 months depending on a retailer’s processes and requirements). Also, in Cérélia’s experience switching can be accelerated or slowed down by retailers. They control the timetable eg how quickly they taste and feedback on

- 3.7 Of the [Confidential] customers which responded to the CMA’s market test questions at various stages of the CMA’s review, only [Confidential] fulfilled the SLC Criteria in at least one DTB product sub-segment. These were [Confidential]. Of these, only two ([Confidential]) raised the ‘Implicit’ Rebalancing Threat (implying that the other two either did not consider this a material competitive constraint that would be lost, or that they were not aware of it at all).
- 3.8 Figure 6 below shows the relevant retailers and the relevant SLC SKUs (marked in red). There are no SLC SKUs at all in relation to frozen DTB SKUs (which fall into the same DTB product market⁴⁸).

Figure 5: Chilled product portfolio - SLC SKU categories

[X]

Source: Cérélia analysis

Notes to Figure 1

- X indicates SKUs supplied by Jus-Rol or retailer PL SKUs produced by Cérélia. The supply arrangements are informed by Kantar data for the 52 weeks preceding 4 September 2022, Nielsen data for the 52 weeks preceding 5 November 2022 and Nielsen data grocery moving annual total data up to 27 August 2022, adjusted for Cérélia’s recent wins and losses.
- Red cells indicate the SLC SKUs, ie SKUs supplied by Jus-Rol and PL SKUs produced by Cérélia for the same retailer.
- Green cells indicate the supply of SKUs which cannot, even on the CMA’s own case, be affected by the ‘Implicit’ Rebalancing Threat.

- 3.9 The above analysis allows the CMA to quantify the maximum possible share of the DTB market which could conceivably be affected by any ‘Implicit’ Rebalancing Threat.
- 3.10 The SLC SKUs represent only approximately [20-30]% by value (c.£ [X]m) and [30-40]% by volume (c.[X]kt) of the total chilled and frozen DTB retail segment.

B. Retail demand limits the operation of the SLC

- 3.11 As well as being narrow in scope, the CMA’s SLC is also of limited magnitude. The operation of the SLC is limited by wider competitive dynamics in which retailers negotiate volumes, quality and price with each of GMI/Jus-Rol and Cérélia.

I Rebalancing is limited by ‘derived demand’

- 3.12 The ‘Implicit’ Rebalancing Threat also assumes that retailers have a free hand when deciding whether to rebalance volumes between GMI/Jus-Rol and Cérélia produced PL SKUs. This is not the case.
- 3.13 Volume “flexing” between Jus-Rol and PL is driven by consumer choice; retailers buy what their shoppers want to buy. Retailers may have some levers over consumer demand, including retail pricing, product positioning etc; however, rebalancing volumes independently of consumers is poor stock management.
- 3.14 The PFs acknowledge this, noting that “*the demand for DTB products across the channels at the retail level significantly influences the amount that the Parties are asked to supply to retailers at the wholesale level (ie it is a ‘derived demand’)*”.⁴⁹ This means, as one of the 2 Retailers

product samples or onboard a supplier - they can move fast or slow as they prefer and as their own commercial objectives require. A co-packer will then need to align with the retailer’s timeline.

⁴⁸ PFs, para. 8.41.

⁴⁹ PFs, para. 7.89.

itself acknowledges, the “ability to switch from PL to branded is limited because PL serves as the entry price point for the category”.⁵⁰

- 3.15 Any attempt by retailers to ignore consumer demand on their purchasing decisions would be irrational – it would make them uncompetitive vis-à-vis other retailers.
- 3.16 The CMA has committed a manifest error of assessment in ignoring this “significant” constraint on the ability of retailers in relation to any alleged “ongoing purchasing decisions”.

II Rebalancing is limited by material upstream and downstream price differentials

- 3.17 As already noted at paragraph 2.3 - 2.12, the CMA has offered no analysis and no reasons for how the ‘Implicit’ Rebalancing Threat’ can operate to defeat the material upstream price differential of [Confidential] % between Jus-Rol and PL SKUs.⁵¹

“Wholesale prices of Jus-Rol are generally at a higher price point than Cérélia’s wholesale prices to PL customers. Typically, there is a brand premium with the wholesale prices of Jus-Rol products being approximately [Confidential] higher than the wholesale prices for similar PL products manufactured by Cérélia.”⁵²

- 3.18 The CMA’s case is that retailers make use of the ‘Implicit’ Rebalancing Threat to defeat (or deter) the risk of a “small but significant price rise”⁵³ by Cérélia after Cérélia has been appointed (or re-appointed) after a tender / market test as a co-packer. The PFs do not contain any indication of what level such a price rise could be. Retailers also offer no examples.
- 3.19 Nevertheless, given the magnitude of the price differential between Jus-Rol and PL SKUs, it would be irrational for a retailer to seek to defeat a “small but significant price rise” for a PL SKU by reallocating volumes to a Jus-Rol SKU which is more expensive to the retailer and to the consumer. This would ignore the derived demand dynamics at retail level (see paragraph 2.31 above).

C. **The alleged SLC “threat” was not in fact needed**

I Pricing is set following channel-specific competition

- 3.20 The PFs contain no evidence that there are in fact any “ongoing purchasing decisions” in which trading terms are re-assessed (eg there are no ongoing price negotiations where an ‘Implicit’ Rebalancing Threat could lead to a better terms for retailers). Instead, the “ongoing purchasing decisions” which retailers make are solely in relation to what volumes to order. As shown in Section 2.C, [redacted].

II Pricing discussions focus on input and production costs

- 3.21 The fact that DTB products are highly commoditized facilitates the ability of retailers to extract competitive terms from each of the Parties pre-merger.
- 3.22 The PFs acknowledge the “relatively simple nature of the [DTB] product and production process”⁵⁴, noting that:

⁵⁰ PFs, para. 7.78.

⁵¹ These refer to ‘wholesale’ prices, ie prices at which GMI sold Jus-Rol products to retailers, and at which Cérélia provided co-packing services for retailer PL products. For an analysis of Cérélia’s manufacturing margins for Jus-Rol and retailer PL products, see Section 4.C below.

⁵² PFs, para. 9.36.

⁵³ PFs, para. 9.291.

⁵⁴ PFs, Summary, para. 56; see also PFs at para. 10.144 and para. 10.185.

“DTB products are manufactured by combining ingredients such as flour with a liquid (eg water) and/or fat (butter, olive oil etc) and sometimes with flavouring toppings, and are then sold to customers as a raw product to be baked for final consumption.”⁵⁵

- 3.23 As such, retailer DTB buyers have a detailed understanding of the basic production prices and costs for producing DTB products. This is relevant to negotiations in both channels, ie in relation to both DTB co-pack negotiations, and in relation to negotiations with eg GMI/Jus-Rol and Bells for consumer brand DTB SKUs.
- 3.24 Further, in their negotiations with each of GMI/Jus-Rol and Cérélia, retailers are greatly assisted by the fact that commodity prices (eg flour and fats) are transparent. Both of the 2 Retailers who raised the ‘Implicit’ Rebalancing Threat with the CMA also told the CMA that commodity cost price transparency *“is often one of the primary points of focus when discussing prices with suppliers”*.⁵⁶
- 3.25 Moreover, any retailer who chooses to test the market for DTB co-pack services typically requires near ‘open book’ cost transparency from each PL co-pack bidder. These market test exercises – which the PFs acknowledge – are undertaken frequently by retailers, and allow retailers to test and refresh their understanding of underlying DTB production costs – even if they ultimately choose not to switch.

III Retailers have leverage by threatening to switch to other co-packers

- 3.26 The starting point or baseline for the CMA’s SLC analysis is the *status quo*, ie primary channel-specific competition, delivers competitive outcomes for UK retailers. However, the CMA fails to draw logical conclusions from that baseline.
- 3.27 No retailers have raised any concerns regarding their (pre-merger) ability to obtain competitive terms from either GMI/Jus-Rol or Cérélia as a result of their “preferred supplier” appointments. Consistent with this position, the PFs raise no concerns in this regard.
- 3.28 Given that these “primary” competition events, eg tenders, deliver competitive outcomes, the CMA’s SLC would only constrain the Parties if they attempted to degrade their offers between “primary channel-specific competition” events when their commercial terms are set. Again, the PFs contain no evidence that the Parties have ever attempted to degrade their offers between these points in time. Indeed, the pricing and volume analysis for Cérélia’s terms for retailers in Section 2.C corroborates that this has not happened.
- 3.29 The prevailing competitive outcomes are therefore delivered by channel-specific competition. The PFs note the following in this regard:
- (a) *“PL suppliers compete directly with other PL suppliers in tenders while branded suppliers compete directly with other branded suppliers.”⁵⁷*
- (b) *“[...] grocery retailers engage in a series of purchasing decisions. First they decide whether they wish to sell PL products, branded products or both. For those retailers that have decided to provide end-consumers with both PL and branded DTB products, they then seek suppliers separately within their chosen channel(s), including selecting a PL supplier.”⁵⁸*

⁵⁵ PFs, para. 5.3.

⁵⁶ PFs, para. 9.273.

⁵⁷ PFs, para. 6.31(c).

⁵⁸ *Ibid.*

- (c) “[...] *the nature of the competitive process means the Parties may be expected to focus on how best to serve their retailer customers relative to any alternative suppliers within their respective channels (PL and branded).*”⁵⁹
- (d) “*This lack of “direct” competition largely reflects the existence of channel-specific competition, in which a grocery retailer selects its preferred supplier within each of the distinct channels.*”⁶⁰

3.30 However, the CMA then commits a fundamental error of assessment in disregarding the absence of direct competition between the Parties these findings and the effective competition within the “PL channel” and the “Brand channel” pre-merger. The PFs instead (wrongly) treat these findings as mere ‘background’ or context for the CMA’s SLC.

3.31 This is a clear example of how the CMA’s misguided horizontal approach has corrupted its subsequent assessment. Rather than accept that there is no horizontal competition between the Parties, the CMA embarks on a misguided quest to find some form of competitive constraint between the Parties where there is in fact no such constraint.

3.32 Turning to the “primary” constraints on the Parties, the PFs acknowledge that Cérélia negotiates its PL co-pack terms with retailers (in particular regarding price and quality) at regular⁶¹ intervals. At these junctures, retailers typically test the market by inviting other PL DTB co-packers to pitch for the business, and then refer to better third party PL co-pack terms when seeking to extract better terms from Cérélia. Indeed, the CMA accepts that “*alternative PL suppliers provide the primary constraint on Cérélia*”.⁶²

3.33 As regards Jus-Rol, GMI’s submissions are clear and consistent, and supported by its retailer communication evidence: GMI needs to justify Jus-Rol’s position on shelf by reference to what the brand can add to the category and its contribution to the category buyer’s P&L. To the extent a retailer delists an underperforming Jus-Rol SKU, it may replace that SKU with either an equivalent Jus-Rol or PL SKU. Importantly, whatever the outcome with respect to Jus-Rol, as Cérélia produced both Jus-Rol and the PL SKUs of the 2 Retailers, [X].

IV Switching is a credible and effective “buying tactic”

3.34 Where retailers consider that better co-pack terms are available from a third party co-packer, they can and do switch. The CMA accepts that “*the evidence also indicates that switching costs (both monetary and non-monetary) are not particularly high and that the switching process is familiar to grocery retailers*”.⁶³ Consequently, the evidence shows that the costs of switching do not form a material barrier.

3.35 In addition, retailers’ refusal to offer either GMI/Jus-Rol or Cérélia any long term contracts, means that a threat to switch is not rendered ineffective by contractual restrictions. Retailers need only observe the GSCOP mandated ‘reasonable’ notice period of three months.

3.36 Given the above considerations, there is no evidential basis for any finding that the ‘Implicit’ Rebalancing Threat would, on the balance of probabilities, have a substantial effect on competition for the purposes of the SLC standard.

4. The transaction should be cleared unconditionally

⁵⁹ PFs, para. 6.31(d)(iii).

⁶⁰ PFs, Summary, para. 34.

⁶¹ The PFs confirm that annual market testing of PL terms are common across many retailers; para. 7.67.

⁶² PFs, para. 9.136.

⁶³ PFs, para. 10.105.

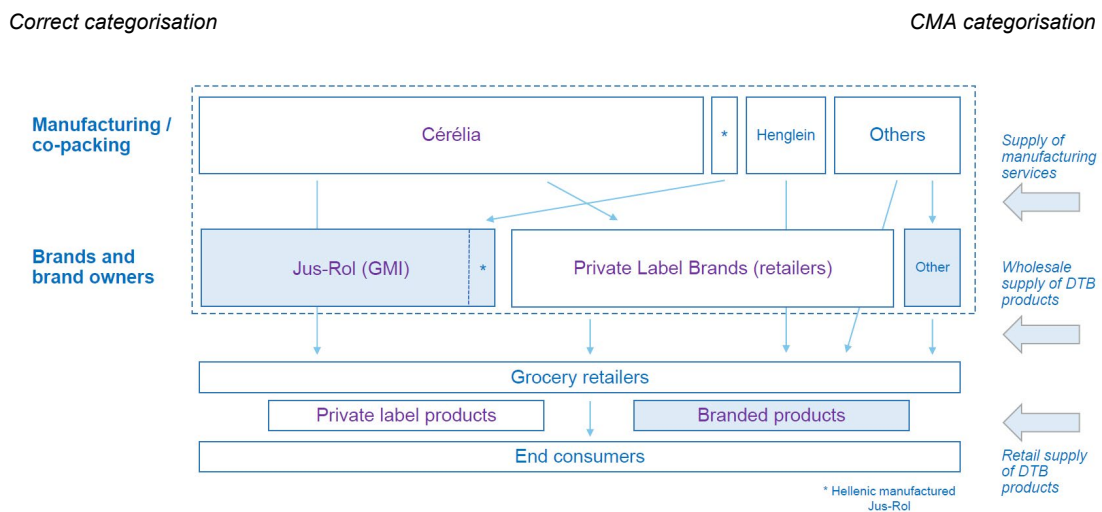
A. **The CMA's errors of assessment flow from the CMA's misguided decision to apply a horizontal framework to a vertical transaction**

4.2 The transaction is vertical in nature. It concerns the acquisition by an upstream supplier (Cérélia) of a downstream customer (Jus-Rol).

4.3 Cérélia provides a manufacturing service. That service is one of many inputs for brand owners, ie GMI/Jus-Rol and retailers, who wish to create their consumer products. Cérélia has no control over the attributes of the products it manufactures – it therefore does not compete with its downstream customers (brand owners). The vertical relationship between contract manufacturers (or co-packers) and brand owners (including retailer brands) was expressly recognised by the CMA in *PepsiCo/ Pioneer* in 2020.

4.4 The structure of the supply chain can be summarised as follows:

Figure 6 Retail DTB supply chain



- (a) The Parties are not competitors because their “products” are not substitutes – Cérélia provides a bespoke upstream manufacturing service,⁶⁴ and Jus-Rol is a brand.
- (b) Upstream manufacturers do not compete with downstream retail brand owners, consistent with the CMA’s findings in *PepsiCo/ Pioneer*.

4.5 Despite the clearly vertical economic links between the Parties described above, the CMA applied a ‘horizontal’ frame of reference in the PFs:

“At phase 2, as with phase 1, we have focused our investigations on one possible way in which the Merger could give rise to an SLC. This ‘theory of harm’ was whether the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in the wholesale supply of DTB products to grocery retailers in the UK. What we mean by this is the possibility that the Merger could remove from the market a business that was competing with Cérélia in the supply of these products.”⁶⁵

4.6 The PFs equate ‘DTB PL SKUs’ with Cérélia, rather than accept that these are retailers’ products. This is incorrect - Cérélia merely provides an input. To the extent any retailers attempt to get consumers to switch from Jus-Rol to PL this cannot be depicted (as the PFs seem to

⁶⁴ The PFs recognise that Cérélia provides a manufacturing and packaging service. The CMA’s Market Definition WP identifies a distinct market for the supply of manufacturing services (see slide 8, ‘step 1 in the supply chain’).
⁶⁵ PFs, para. 19.

suggest) as a move from GMI/Jus-Rol to Cérélia – it is a move from GMI to the relevant PL brand. These PL SKUs are the retailers’ SKUs, not Cérélia’s SKUs.

- 4.7 Importantly, GMI and retailers control the competitive parameters (product characteristics and brand positioning) of their respective brands. Co-packers such as Cérélia have no control over these. The PFs now abandon the assertions in the Working Papers (**WPs**)⁶⁶ that Cérélia “substantially controls” the competitive parameters of the PL SKUs it manufactures for retailers.
- 4.8 The PFs introduce the concept of ‘channel-specific’ competition in the PL channel, but only captures the manufacturing/ co-packing of PL products, not consumer brand products. Cérélia provides manufacturing/co-packing services to both retailer and consumer brand customers, as other co-packers do.

I The Parties are not competitors as their “products” are not substitutes

- 4.9 When considering product market definition (or “frame of reference”), it is “*important to bear in mind precisely what is being bought and sold and why*”⁶⁷. The CMA asserts that the Parties are competitors in relation to the “wholesale supply of DTB products”. In doing so, the CMA ignores the significant differences in what the Parties “supply” to retailers.⁶⁸ The failure to reflect these material differences appropriately in the frame of reference amounts to a fundamental error of assessment.
- 4.10 In brief, GMI sells retailers finished branded products on a ‘take it or leave it’ basis, which retailers can put directly on their shelves. In contrast, retailers do not buy a finished branded product from Cérélia on a ‘take it or leave it basis’. Instead, retailers instruct Cérélia to produce their PL SKUs in accordance with their instructions. Retailers do not control the Jus-Rol products and Cérélia does not control the retailers’ PL products (as it does not control the Jus-Rol products it produces for GMI).
- 4.11 Co-packing services merely allow those retailers to ‘create’ DTB PL products to list as an alternative to Jus-Rol products. In their dealings with Cérélia, retailers specify precisely what they wish Cérélia to produce (format, packaging and recipe) and Cérélia then executes these instructions. This allows retailers to give consumers more choice at the retail level, by pitting their PL products against consumer brand products. Cérélia does not itself have any presence at the retail level (unlike Jus-Rol, which competes with other final DTB products). The CMA’s analysis fails to grasp the significance of this distinction.
- 4.12 That said, the PFs do recognise some difference between the Parties’ offerings:
- “We found that the Parties’ offerings to retailers are differentiated and the constraint between them does not typically manifest itself through direct competitive interactions (in particular through head-to-head competition in tenders).”⁶⁹*
- 4.13 Despite this observation, the CMA fails to reflect its true implication in the frame of reference – which lays the foundation for all subsequent analysis. As a consequence, the remainder of the CMA’s investigation proceeds on an unsound basis. The errors that flow from the CMA’s erroneous frame of reference include its assessment of the merged entity’s incentives, and it provides untenable reasons for dismissing the Parties’ economic arguments as to why the

⁶⁶ Alternative constraints WP, slide 6.

⁶⁷ BGL v CMA [2022] CAT 36, para.114(5).

⁶⁸ On the ‘economists call’ between the CMA team and Cérélia’s external advisors on 26 September 2022 (at an advanced stage of the CMA’s investigation, after the main party hearing), a member of the CMA’s economists team asked Cérélia’s advisors to “*explain why the parties are putting quite so much emphasis on the importance of who does what in the supply chain and on those details*”.

⁶⁹ PFs, para. 9.285. The use of the term “typically” is wrong because the Parties never compete directly, as all of the evidence confirms.

merged entity would have no incentive to degrade either its co-pack offer, Jus-Rol, or both (see Section 4.C).

- 4.14 Having adopted the wrong frame of reference, the CMA then asked itself “*the wrong questions*” in relation to its competitive assessment, and disregarded compelling, pre-existing business evidence.
- 4.15 The CMA also fails to provide any analysis of how its channel-specific assessment in the PFs is affected by the competitive dynamics in the upstream market for manufacturing and packaging services. This gap in reasoning, which is addressed in section 4.B below, is a fundamental error of assessment.

II The CMA fails to give reasons a different frame of reference from *PepsiCo/Pioneer* is required

- 4.16 In treating the transaction as horizontal, the CMA ignored *PepsiCo/Pioneer*,⁷⁰ where the market test confirmed – and the CMA accepted – that there were important differences between the supply of branded consumer grocery goods and co-packing services to retailers. This led the CMA to identify separate product markets for upstream co-packers and downstream brand operation (including third party consumer brands and retailer PL brands).⁷¹
- 4.17 Cérélia requested on numerous occasions that the CMA explain on what basis it considers the two cases can be distinguished and why the vertical frame of reference in *PepsiCo/Pioneer* is not applicable in the present case. The CMA declined to do so; indeed, in over 250 pages, CMA does not once engage with this recent and pertinent decision.
- 4.18 Legal certainty and good administration require a public body to give reasons when it applies a fundamentally different frame of reference to similar fact patterns in two cases in short succession, even where it is, as a matter of law, not bound by its prior decisions⁷².
- 4.19 This is all the more important in a voluntary merger control system, where businesses need to rely on the CMA’s published decisions for legal certainty in self-assessing the need to notify a transaction to the CMA.
- 4.20 The failure to do so in this case amounts, among other things, to a manifest error of assessment on the part of the CMA.

B. ***Cérélia is constrained by other co-packers, which are not affected by the transaction***

- 4.21 The PFs accept that “channel-specific” competition for DTB PL co-pack services delivers competitive terms for retailers pre-merger. There are sufficient “outside options” to whom retailers can switch all or some of their DTB PL co-pack volumes within a reasonable period of time:
- (a) **There are more co-packers in the market than significant customers.** In a market with only 5 large retailers, there are at least 6 active UK and non-UK DTB co-packers; some with significant excess capacity, such as [X] and [Confidential]. Co-packers therefore have to compete fiercely for volumes.
- (b) **There is more capacity for the UK DTB PL market than retailer customer demand.** The entire UK PL market for chilled DTB products can be met with [X] production lines

⁷⁰ ME/6872/19 *Anticipated acquisition by PepsiCo Inc. of Pioneer Food Group Limited*; referred to in Cérélia’s Issues Statement Response, paras. 1.8, 2.3-2.5 and 2.9; AIS Response para. 2.8; slides for economists meeting. The case concerned, among other things, a very similar, highly commoditised grocery segment (granola).

⁷¹ PepsiCo/Pioneer, para. 49.

⁷² The CMA was, however, prepared to address another relevant (older) case – *GMI/Saxby* – in its PFs.

at sufficient capacity, or at most [X] production lines.⁷³ The CMA itself acknowledges that a single production line can meet the entire requirements of a large retailer on competitive terms.

4.22 Cérélia discusses these “outside options” in more detail below.

I PL co-pack switching threats are real and credible

4.23 Retailers can and do switch DTB PL co-packers. Indeed, retailers switch sufficiently often to ensure that the mere threat of switching is an effective constraint on incumbent DTB co-packers. It is relevant in this regard that a switching event in the DTB category disproportionately affects the DTB PL co-packer, not the retailer. For the retailer, DTB is only a very small part of its revenues and therefore a switching event has only a marginal impact on them. For the co-packer, it would likely have a significant impact, as lost volumes may represent a significant part of its total revenues (in particular for a firm like Cérélia [X]).

Switching costs are not material

4.24 As noted at paragraph 3.34, the PFs confirm that “*the evidence also indicates that switching costs (both monetary and non-monetary) are not particularly high and that the switching process is familiar to grocery retailers.*”⁷⁴

4.25 Cérélia agrees with these findings which fairly reflect the prevailing market dynamics.

Retailers test their co-pack terms in the “PL channel” annually

4.26 The CMA accepts that “*grocery retailers often review the terms of their agreements with suppliers annually, meaning there will have been a significant number of occasions on which retailers have decided not to switch.*”⁷⁵

4.27 In each of these instances, retailers test whether the DTB PL co-pack terms of their incumbent co-packer are competitive by reference to the terms available from other co-packers in the “PL channel”. No retailers suggested that these exercises are not effective in securing competitive terms, irrespective of whether they lead to switching.

4.28 Taking these switching events and PL channel market test events together, the only conclusion open to the CMA is that retailers frequently consider switching, and switch sufficiently frequently to ensure that incumbent PL co-packers take switching threats very seriously. Cérélia’s internal documents evidence that all retailer switching threats are taken seriously, and that credible switching threats can refer to both large European Continental co-packers (such as [X]) and domestic co-packers (such as [X] and [X]).

4.29 Indeed, the CMA recognizes in the context of its entry and expansion analysis that: “*Investing millions of pounds into such a market and being reliant on a single contract, that can be exited at fairly short notice, would be a risk*”. Inexplicably however, the CMA then fails to apply this logic to Cérélia’s incentives to offer retailers competitive terms to prevent them from switching away at short notice.

Switching occurs relatively frequently

⁷³ See Cérélia’s response to the CMA’s RFI dated 27 September 2022, in which it explained that [X]. In previous submissions, Cérélia conservatively referred to [X] production lines being sufficient to service the entire chilled and frozen DTB PL market. However, based on these assumptions, [X] production lines would be sufficient to service the entire chilled DTB PL market in the UK. The size of the chilled DTB PL market in the UK is less than [X]kt, according to Kantar data for the 52 weeks preceding 4 September 2022, Nielsen data for the 52 weeks preceding 5 November 2022 and Nielsen data grocery moving annual total data up to 27 August 2022.

⁷⁴ PFs, para. 10.105.

⁷⁵ PFs, para. 7.67.

- 4.30 The PFs assert that “switching in the PL channel is not frequent”.⁷⁶ This misrepresents the evidence.
- 4.31 Any assessment of switching frequency must have regard to the highly consolidated nature of the customer base, in which only 6 retailers account for 90% of the DTB market. The CMA accordingly accepts that: “Across the six largest grocery retailers (accounting for 90% of the DTB market), there have been five instances of switching private label supplier in six years”.⁷⁷ The last significant switching event took place [X].
- 4.32 The CMA’s assessment does not reflect the balance of the evidence. The available switching data shows in absolute terms that switching is a common feature in the market (which explains why switching threats are taken seriously by incumbent co-packers, [X]).
- 4.33 Furthermore, of the six years covered by the CMA’s analysis, two fall into the Covid pandemic period which resulted in both an unexpected rise in demand (which has now tailed off) and supply chain challenges, which made retailers focus more than usual on security of supply issues. Covid also constrained the ability of retailers to carry out site visits and audits, making switching temporarily more challenging. The true amount of switching in a more typical period may therefore be understated as a result. The situation has now normalised (see [X]).

Multi-sourcing is an effective ‘buying tactic’

- 4.34 The CMA acknowledges that “[a] majority (six out of nine) of [retailers] that sell PL products [...] use more than one PL DTB supplier”.⁷⁸
- 4.35 The CMA further recognizes that “multi-sourcing is possible [for a large retailer] and may be a tool for retailers that want to test a supplier or switch incrementally”.⁷⁹
- 4.36 The mere switch of small volumes to another co-packer therefore has a disproportionate effect on the incumbent co-packer, as there is a threat that the balance of its volumes could be lost as a second step in short order.
- 4.37 Overall, this means that retailers utilise a combination of the above ‘buying tactics’ in the “PL channel” to ensure they obtain competitive terms for their DTB co-pack needs. These dynamics are not affected by the transaction.

II CMA’s concerns about DTB PL manufacturing capacity are unfounded

- 4.38 The PFs note that the capacity of certain existing DTB PL co-pack rivals in the UK is constrained.⁸⁰
- 4.39 This concern is unfounded, as there is currently excess manufacturing capacity servicing the UK DTB PL market:
- (a) [X]. This creates compelling incentives for [X] to offer competitive terms to retailers to fill its site and cover its overheads. The PFs recognise this dynamic: “suppliers want to keep capacity filled and their fear of losing large PL contracts may increase retailers’ leverage when threatening to switch PL suppliers”.⁸¹

⁷⁶ PFs, para. 10.105.
⁷⁷ PFs, para.43.
⁷⁸ PFs, para.7.51.
⁷⁹ PFs, para.7.60.
⁸⁰ PFs, para. 9.261(a).
⁸¹ PFs, para. 9.279

- (b) The PFs suggest that **[Confidential]** may not have excess capacity **[Confidential]**.⁸² However, **[Confidential]**.
- (c) **[Confidential]** already has sufficient spare capacity to service the entire needs of a large UK retailer.⁸³
- (d) **[Confidential]**, has just invested in a fourth manufacturing plant, new pastry categories and pizza assortment. **[Confidential]** would therefore be well-positioned to expand in the way Bells and Cranswick have, if a UK retailer were to offer it a PL contract.
- (e) A number of smaller competitors are open to further expansion in the UK, but do not yet have concrete plans due to economic uncertainty (**[Confidential]**). The offer of a contract by a large UK retailer – even if just for a year – could provide the security required to overcome this temporary uncertainty. The PFs recognise that retailer tendering exercises could encourage smaller DTB manufacturers to expand.⁸⁴
- (f) There are a number of manufacturers which the CMA has identified as manufacturers of PL frozen breakfast goods for retailers, including **[Confidential]** and **[Confidential]** which currently manufacture frozen croissants for multiple large UK retailers. These manufacturers have already received UK retailer approval and are familiar with retailer processes and requirements. They can easily repurpose existing production lines to supply chilled dough pastry products.
- (g) “*All [grocery retailers] bar [Confidential]*”⁸⁵ have told the CMA that they would consider foodservice suppliers. Retailers have also indicated their willingness to consider potential suppliers from adjacent sectors.⁸⁶

4.40 Retailers are able and willing to sponsor alternative PL manufacturers through the award of a contract.

- (a) As the CMA is aware, C r lia/BakeAway’s own history in the UK is an effective illustration of sponsored entry (on the basis of a contract award from Sainsbury’s).
- (b) The PFs acknowledge that: “[...] *the Merger does not stop grocery retailers from awarding new business to existing or new suppliers other than the Parties*”.⁸⁷ This is precisely what **[Confidential]** has done, noting that: “[**[Confidential]**] *was its preferred mode of sponsoring to create new capacity in the own label category*”.⁸⁸
- (c) **[Confidential]** would consider foodservice suppliers, subject to technical and commercial requirements, and even **[Confidential]** indicated it was willing to ‘*look at who else was in the market*’.⁸⁹
- (d) With respect to smaller retailers, the PFs recognize that “*their lower volume requirements mean it would likely be easier for them to find alternative suppliers*”.⁹⁰

⁸² PFs, para.9.145.
⁸³ PFs, para.9.185.
⁸⁴ PFs, 10.148.
⁸⁵ PFs, para.10.146.
⁸⁶ PFs, para.10.149.
⁸⁷ PFs, para.9.279(d).
⁸⁸ PFs, para.9.279(d).
⁸⁹ Para.10.147.
⁹⁰ PFs, para.9.281.

- 4.41 The CMA also accepts that capacity expansion is relatively easy: “operating a single production line at sufficient capacity which would enable smaller suppliers to compete on price to win a contract from a major grocery retailer”⁹¹, and such “production capacity could be installed within a year at a cost of £3-4 million”.⁹²
- 4.42 Finally, there are other ways to overcome temporary capacity constraints during peak trading periods without the need for capacity expansion, [§]. This is a highly effective, immediately implementable and low cost capacity flexing tool for co-packers.
- 4.43 Overall, it is ‘within the power’ of retailers to support capacity expansion at any point with only modest commitments on their part. This could be as simple as offering a co-packer a term that would provide security beyond the currently standard three months minimum GSCOP mandated notice period. The CMA has failed to give significant weight to this option.
- 4.44 Indeed, the market developments since *GMI/Saxby* (2006) have effectively demonstrated that the ‘market’ is capable of delivering whatever additional DTB PL capacity UK retailers require. As the CMA is aware, the (then) OFT concluded in *GMI/Saxby* that: “Based on the evidence available to the OFT, we consider that the costs of entry and expansion into the ingredient pastry sector (particularly own label) are relatively low”.⁹³ It therefore concluded that: “the prospect of new entry or expansion by existing suppliers in the sector, particularly into own label, would exert a significant constraint on the parties post-merger.”⁹⁴
- 4.45 The OFT’s assessment was subsequently proved correct. The DTB PL segment has expanded significantly since 2006 and with it, DTB PL co-pack capacity. Market forces delivered what retailers needed in an effective and efficient manner.
- 4.46 The CMA’s skepticism in this regard is therefore unfounded based both on the evidence on the file and on past market developments. The apparent reluctance of retailers to support entry and expansion decisions by offering suppliers reasonable contractual certainty beyond the GSCOP mandated three months minimum notice period is no reason to discount the reality of the entry and expansion argument itself.
- C. *Post-merger, Cérélia will have no incentive to degrade its offer***
- 4.47 The PFs find that Cérélia and Jus-Rol act as competitive constraints on one another today, and therefore conclude that this constraint would be lost through the transaction. This leads to the CMA’s SLC in relation to the SLC SKUs (only), as described above, in respect of which the merged entity is allegedly incentivised to raise the price of either Jus-Rol, its co-packing offer, or both.
- 4.48 The Parties have explained in previous submissions that the pre-existing vertical link between Cérélia and Jus-Rol means that Jus-Rol does not currently constrain Cérélia and *vice versa*. They have also explained that the merged entity would not be incentivised to raise its prices post-transaction.⁹⁵ Specifically:
- (a) Cérélia has explained in previous submissions that – as a matter of economic logic – there is no reason to think that Jus-Rol imposes a competitive constraint on Cérélia

⁹¹ PFs, para.10.81.

⁹² PFs, para.10.71.

⁹³ *GMI/Saxby*, para.49.

⁹⁴ *Ibid.*

⁹⁵ The CMA is invited to review the Merger Notification, the transcript of the Phase 1 Issues Meeting, Cérélia’s written response to the Phase 1 Issues Letter, the response to the Phase 2 Issues Statement, the response to the AIS and working papers, the transcript of the Main Party Hearing and the presentation and follow up email to the “Economists Call”.

today.⁹⁶ [REDACTED]. [REDACTED]. There is no competitive constraint to be lost even in terms of the CMA's SLC.

(b) Cérélia has also explained why the merged entity would have no incentive to raise the price of Jus-Rol post-transaction.⁹⁷ In summary:

- (i) Pre-merger, GMI's aim in setting prices for Jus-Rol products has been to maximise its profits on the "brand margin" it generates. Since GMI outsources the manufacturing services for Jus-Rol products (to Cérélia), it does not gain – or consider in its pricing and investment decisions - any "upstream" profit margins associated with manufacturing these products.
- (ii) Post-merger, the Merged Entity would in comparison earn an "upstream" manufacturing margin (in addition to the equivalent "downstream" brand margin as GMI today) on sales of Jus-Rol products. It follows that the Merged Entity would have *more* to lose than GMI would today every time a retailer switched away from Jus-Rol, as the Merged Entity would lose both the brand margin *and* the manufacturing margin. Any price increase beyond the current profit-maximising level that GMI has set today with respect (only) to its own brand margins would be financially irrational.
- (iii) This conclusion is not affected by the fact that the Merged Entity would be able to recoup some of these revenues if switching customers choose Cérélia-manufactured PL products instead.

First, substantially less than all Jus-Rol switchers would be expected to purchase a PL DTB product instead (given the various differences in the products' customer groups⁹⁸). Of those who *did* switch to a PL product, not all would switch to a PL product that had been manufactured by Cérélia. So any recoupment of losses would affect substantially less than all customers who switched as a result of a price rise.

Second, even where a customer who switched away from a Jus-Rol product *did* purchase a Cérélia-manufactured PL product instead, the lost revenue/profits the Merged Entity recaptured this way could only ever compensate for the "manufacturing margin" element lost from the equivalent Jus-Rol sale – the "brand margin" element would never be recouped. As explained above, [REDACTED].

4.49 As a consequence, any attempt to increase Jus-Rol prices above current levels (and/or degrade the quality of Jus-Rol products) can be expected to be profit reducing for the merged entity, just as it would be profit reducing for GMI today. Indeed, given that not all Jus-Rol switchers would be expected to purchase a Cérélia-manufactured PL product instead, the loss of the additional "upstream" manufacturing margin as described above for each of these lost sales would be an additional cost of losing Jus-Rol business for the Merged Entity over and above the costs that GMI takes into account when setting Jus-Rol prices today.

⁹⁶ For more detail, please see: Issues Statement response, paras 3.5-3.7;5.13-5.15; AIS response, section 3 and 6.4; Annex AIS.11.a Foreclosure incentives analysis and AIS.11.b Foreclosure incentives model; follow up email to the "Economists Call".

⁹⁷ For more detail, please see: Final Merger Notice, paras 67-75, 556-565; Additional Submissions (14 April 2022), sections 2-3; Issues Letter response, section 7; Phase 2 Initial Submissions, paras 4.12-4.13; Issues Statement response, section 5; AIS response, section 5; Annex AIS.11.a Foreclosure incentives analysis and AIS.11.b Foreclosure incentives model; follow up email to the "Economists Call".

⁹⁸ See for example Issues Statement response, paras 1.21-1.22 and AIS Response, para. 5.4

4.50 The CMA does not properly engage with these arguments or with the evidence provided in support.

I Cérélia has no incentives to raise Jus-Rol prices post-merger

4.51 First, with regard to the question of whether Cérélia will have an incentive to increase Jus-Rol prices, the CMA contends that the fact that Cérélia manufactures some PL products means that, if sales migrate from Jus-Rol to these PL products, the merged entity will “recapture” some of the profits in the PL channel. It contends that this recapture is “*a factor that the Merged Entity may consider as part of its price setting process, whereas pre-Merger Jus-Rol attributed no value to any lost sales when setting its profit-maximising prices*”.⁹⁹

4.52 This is incorrect. As explained above, it overlooks the fact that any manufacturing profits Cérélia might recapture at the PL level [§] the manufacturing profits it would lose on Jus-Rol products. There is therefore no additional benefit to Cérélia as compared to GMI from increasing the prices of Jus-Rol. The CMA has not engaged with this fundamental element of the analysis even though Cérélia has highlighted it on several previous occasions.¹⁰⁰

II Cérélia has no incentives to raise PL co-packing prices post-merger

4.53 Second, with regard to the question of whether Cérélia will have an incentive to increase its PL co-packing prices by removing Jus-Rol as a competitive constraint, the PFs conclusions fail to reflect the CMA’s finding that Cérélia currently recaptures a material share of any sales diverted from sales in the PL channel to Jus-Rol.¹⁰¹ Given that the CMA notes that the margin data is inconclusive, it cannot then suggest that Cérélia [§]. An objective analysis of the data shows that [§] meaning that it cannot be the prospect of sales migrating from PL products to Jus-Rol that is acting as a competitive constraint on Cérélia’s PL co-packing services today.

4.54 In contrast to this dismissal of significant economic submissions, and the comment that certain margin data evidence is *not* probative, the PFs then *do* place weight on the statements made by retailers as to the relevance of the pre-Transaction vertical link: “*However, when large retailers (including retailers currently supplied by Cérélia) were specifically asked about this issue, they indicated that they did not consider it to undermine their view that Cérélia was constrained by Jus-Rol.*”¹⁰²

4.55 The CMA’s balancing of the evidence here is irrational.

4.56 From the descriptions of retailer comments in the PFs, it is not clear that the CMA understood the factual position correctly.¹⁰³ Nor is it clear that the CMA reminded retailers about the pre-merger vertical link – resulting in mixed and confused feedback. It is also curious that the PFs do not set out¹⁰⁴ why the retailers considered that the pre-merger vertical link between Cérélia and GMI/Jus-Rol did not affect their previous submissions – these views are not explained. The lack of reasoning and disclosure in the PFs, on an issue so critical to the CMA’s SLC, was one of the reasons why Cérélia requested further disclosure of evidence to understand the relevant retailers’ comments which underpin the CMA’s SLC. As mentioned above, the CMA denied all of these requests. Consequently the retailers’ position in this regard is still not understood by

⁹⁹ PFs, para. 9.312.

¹⁰⁰ The Parties made a submission in to the CMA to unpack these points in response to the Phase 1 Issues Letter, and refer the CMA to this submission again here. In its Phase 1 decision, the CMA acknowledged this submission and did not challenge the logic. Instead, it chose to shift its focus to the question of whether the merged entity could worsen the private label offering to divert sales to Jus-Rol products (which is addressed below). The CMA has not explained why it has now reversed its thinking compared to Phase 1 SLC decision.

¹⁰¹ PFs, para 9.116.

¹⁰² PFs, para.9.112.

¹⁰³ Particularly in its Phase 1 investigation and the early stages of its Phase 2 investigation.

¹⁰⁴ At para 9.112 or indeed elsewhere.

Cérélia, which has hindered Cérélia's ability to identify all of and correct the CMA's misunderstandings.

III Absent the merger, Cérélia would have continued to manufacture Jus-Rol

- 4.57 The CMA contends that Cérélia could be constrained by Jus-Rol if it switched to an alternative co-packer in the absence of the Transaction, seemingly in an attempt to sidestep the relevance of the existing vertical link to the analysis. However, once more, the reasoning in the PFs is unsound.
- 4.58 First, the CMA states that Jus-Rol could one day switch to an alternative co-packer, suggesting that there could be competition between the Parties in the future, even though there is no such competition today. Given that the CMA's counterfactual is the pre-merger conditions of competition, where Jus-Rol is being manufactured by Cérélia, the CMA hypothesis appears to posit a change to the counterfactual and is not a permissible counterfactual.
- 4.59 This counterfactual is in direct contradiction to evidence from GMI that it has no intention to award the Jus-Rol contract to another co-packer: "*GMI added that based on its experience with Cérélia, absent the Merger it would most probably have extended the contract*".¹⁰⁵
- 4.60 More importantly, there is an inconsistency in the CMA's reasoning when it suggests that *GMI could* readily switch co-packers whereas (according to the CMA) *retailers may not* be able to do so. The CMA cannot have it both ways. That said, the evidence shows that (i) switching is possible and (ii) GMI would have continued to use Cérélia as its co-packer.¹⁰⁶
- 4.61 Secondly, the CMA suggests that Jus-Rol could alternatively bring production back in-house in the future in the absence of the transaction. However:
- (a) There is no reason to expect this. GMI has taken a strategic decision to outsource manufacturing of DTB products with a view to freeing up capacity to focus on other priorities; and
 - (b) In any event, the re-entry of GMI as a manufacturer after several years of outsourcing production would amount to a 'market entry' event. The CMA cannot in its analysis *discount* the threat for market entry of co-packers and *rely* on market entry by GMI. In any event, the evidence is clear that (i) while GMI could decide to bring production back in-house (ie it is possible), (ii) GMI has no intention of doing so. GMI continuing to outsource production is therefore the appropriate counter-factual.
- 4.62 For these reasons, the CMA's contention that Jus-Rol imposes any competitive constraint on Cérélia today (let alone a substantial constraint) and/or that it would be likely to begin imposing a constraint on Cérélia in the absence of the transaction is pure conjecture. The CMA is contradicting its own provisional conclusions about barriers to entry and expansion in DTB manufacturing services.

5. Conclusion

- 5.1 For the reasons provided in this submission, the CMA's provisional SLC finding is unsound and, even on the CMA's case, any "lessening of competition" identified by the CMA is not in fact "substantial".
- 5.2 Cérélia invites the CMA to re-examine the evidence and its analysis with an open mind, before reaching any conclusions in the Final Report. The only conclusion that can be reached consistently with the evidence is that the transaction does not result in any SLC.

¹⁰⁵ PFs, para.4.14.

¹⁰⁶ PFs, paras. 38, 9.264 and 9.326.

Cérélia/Jus-Rol Merger Inquiry

Annex 1

Evolution of Cérélia private label manufacturing prices vs retailer purchasing volumes and in-store prices

28 November 2022

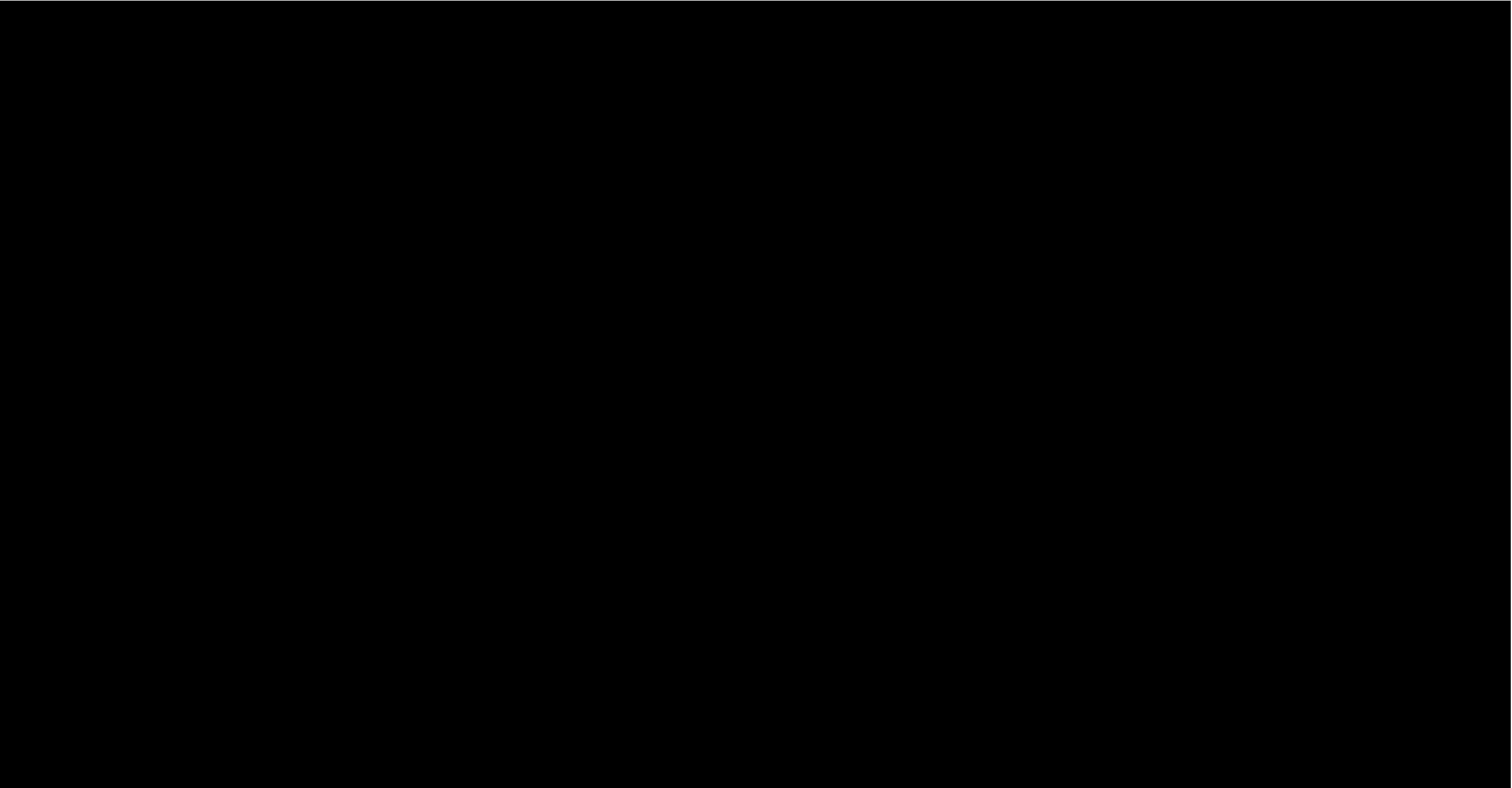
Overview of analysis and key takeaways

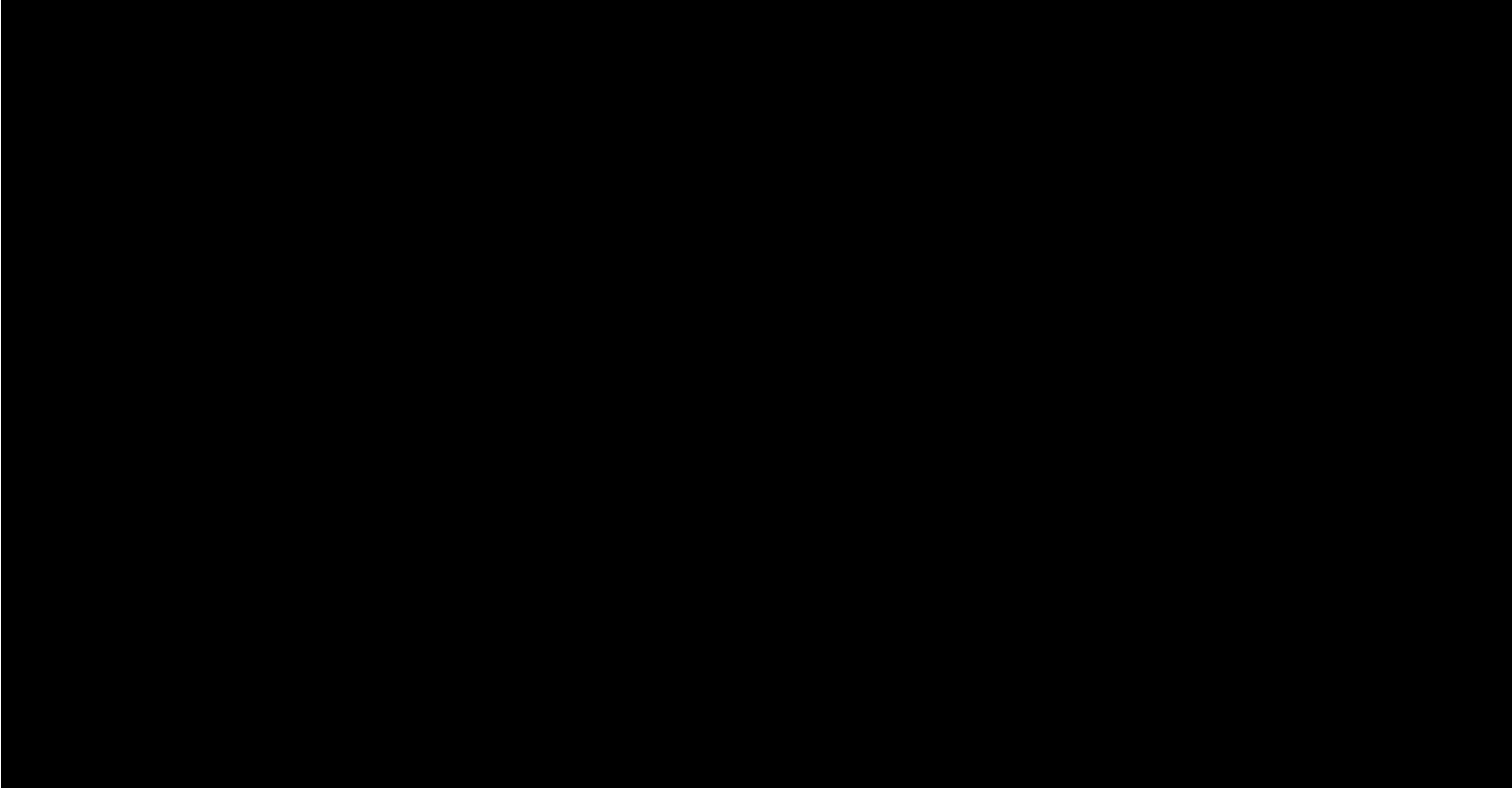
- In its Provisional Findings (PFs), the CMA contends that “retailers flex their purchases across both [the private label and branded] channels to reflect price and quality needs, and in this context in particular, the Parties are material competitors.” (PFs, para 9.88).
- However, the **CMA has not undertaken any analysis to test this “rebalancing threat” hypothesis**, even though **Cérélia has already provided the CMA with the data it would need to assess this**.
- Cérélia has therefore asked Frontier Economics to carry out such an assessment, using the historical data on retailers’ private label dough-to-bake (PL DTB) purchasing volumes that Cérélia had previously submitted to the CMA.
- The resulting charts in the following slides clearly show that [REDACTED] in the way that the CMA’s theory of harm would imply.

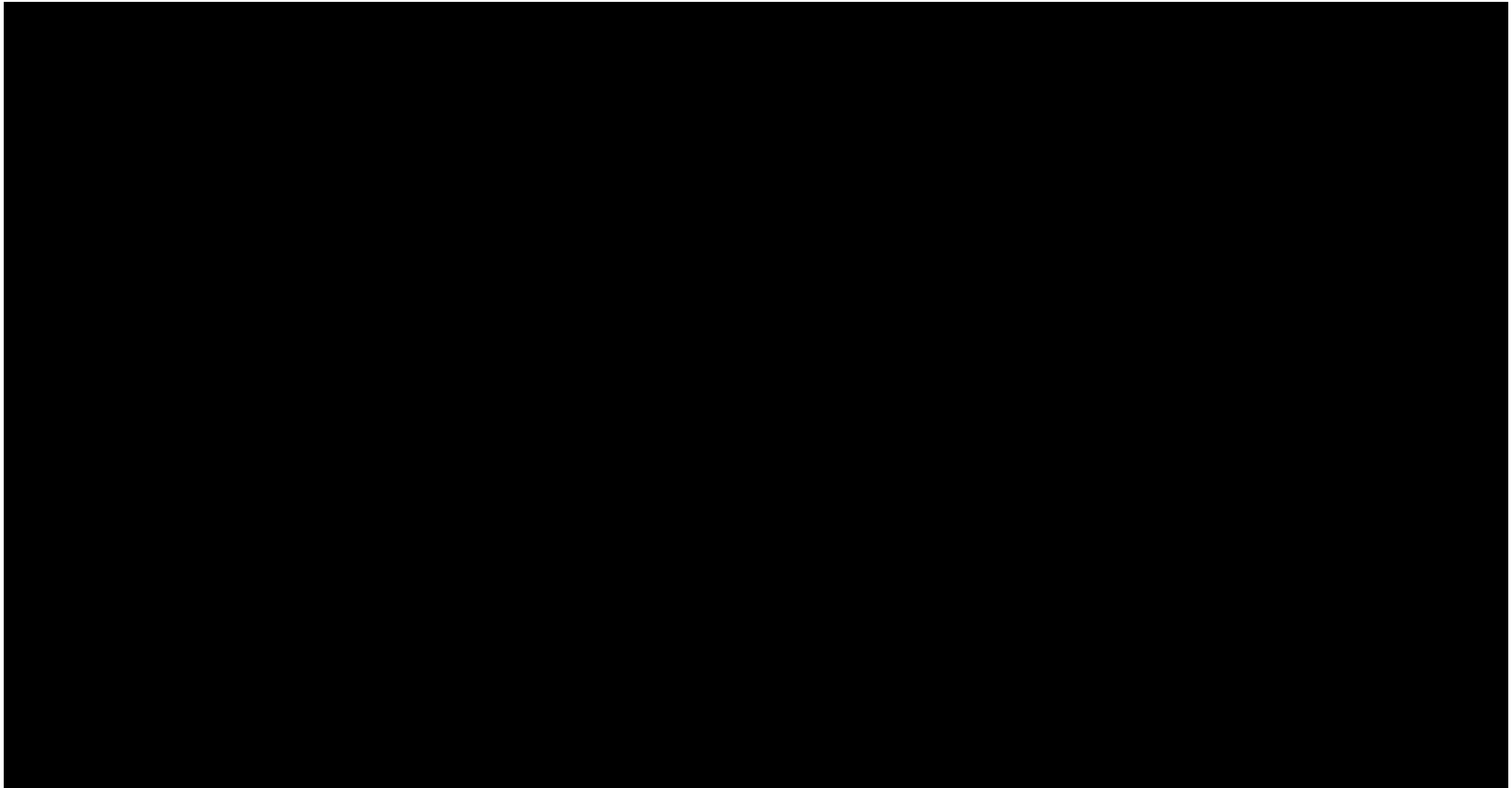
- The charts also show that there have also been a number of [REDACTED]. This indicates that changes in retail prices for these products often reflect decisions taken by retailers independently of any influence by Cérélia as their contract manufacturer.

Overview of the charts presented in this pack

- The charts in the following slides show the results of our analysis for:
 - [REDACTED] **UK retailers that Cérélia supplies** with DTB pastry contract manufacturing services [REDACTED] and [REDACTED]
 - **each of the main DTB pastry product categories** that Cérélia manufactures for each of these retailers (i.e. ready roll and block puff pastry and ready roll and block shortcrust pastry, which collectively accounted for [REDACTED] of Cérélia's net sales to these retailers in FY22).
- Specifically for each retailer and pastry product category combination, we have plotted:
 1. A chart comparing the evolution of **Cérélia's sales price per unit** to the evolution in the **volumes of these products that these retailers have procured** from Cérélia, between 2016 (when Cérélia acquired Bakeaway) and 2022; and
 2. A chart comparing the **average unit price charged by Cérélia** to the retailer to **the in-store retail price** set by the retailer since 2020 (retail price data for earlier years is not available to Cérélia).
- For further detail on data sources and methodology used, please refer to the methodology annex at the back of the pack.







Methodology notes (1)

Comparison of volumes of products procured from Cérélia and Cérélia unit prices

- We have sought to assess whether there is any evidence that Cérélia varied its prices in response to changes in retailers’ “ongoing purchasing decisions” in the way that the “rebalancing threat” theory of harm that the CMA has set out in the PFs would imply.
- For this purpose, we referred to historic data on (i) the volumes of PL DTB products that retailers have purchased from Cérélia and (ii) the unit prices that Cérélia has charged to retailers to manufacture and supply these products.
- The data on both these variables are available and had already been submitted to the CMA on 14 July 2022:
 - **Cérélia unit prices** are extracted from file ‘S109.1.47.001 - Historic selling prices’, which has been previously submitted to the CMA in response to Question 47 of the First S109 Notice;
 - **Cérélia sales volumes** are extracted from file ‘S109.1.47.003 - Historic volumes’, which has been previously submitted to the CMA in response to Question 47 of the First S109 Notice.
- We have **broken out the analysis by individual retailer and PL DTB product category** since:
 - the mix of DTB products that retailers procure from Cérélia vary from retailer to retailer; and
 - the recipes of the products that Cérélia manufacturers can vary from retailer to retailer, depending on each retailer’s preferences and specifications.
- The volume data indicate that there is seasonality in demand for DTB products (with, for example, strong increases in demand around Christmas). We have therefore **extended our analysis back to 2016** to assess whether there is any evidence of Cérélia reacting to changes in retailer purchasing decisions over a longer time period, rather than just in response to these short-run changes.

Methodology notes (2)

Comparison of retailer in-store unit prices and the unit prices Cérélia charges retailers

- We have also sought to plot the relationship between the unit prices Cérélia charges retailers and retailer in-store unit prices, in order to assess how far changes in the latter reflect changes in the former.
- For this purpose, we need historical data on (i) the unit prices that Cérélia has charged to retailers to manufacture and supply their PL DTB products and (ii) the in-store prices that retailers charge consumers for these products.
- We have used the following data sources:
 - **Cérélia unit prices** are again extracted from file 'S109.1.47.001 - Historic selling prices', which was submitted to the CMA in response to Question 47 of the First S109 Notice;
 - data on **in-store retailer prices set by retailers** were extracted by Cérélia using the Nielsen data portal.
- Nielsen data are only available to Cérélia from October 2020 onwards. The resulting charts therefore cover the period 2020-2022.
- The resulting charts present a varied picture across retailers. However, the charts show that there have been a number of recent changes in PL DTB retail prices that had nothing to do with changes in Cérélia's contract manufacturing prices. As noted above, this indicates that changes in retail prices for these products often reflect decisions taken by retailers independently of any influence by Cérélia as their contract manufacturer, and as such are a product of the retailers' own specific pricing strategies rather than simply changes in contract manufacturing costs.



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