COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1579/4/12/23

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Rules"), the Registrar gives notice of the receipt on 17 February 2023 of an application for review ("the Application") under section 120 of the Enterprise Act 2002 (the "Act") by Cérélia Group Holding SAS ("Cérélia Group") and Cérélia UK Limited ("CUK") (together, "Cérélia" / the "Applicants") of the decisions of the Competition and Markets Authority (the "Respondent") which are contained in its Final Report dated 20 January 2023 in relation to the completed acquisition by Cérélia Group of certain assets relating to the UK and Ireland dough business (Jus-Rol) of General Mills, Inc ("GMI") (the "Final Report") and its decision to require full divestiture (the "Remedy Decision"). The Applicants are represented by Willkie Farr & Gallagher (UK) LLP of Citypoint, 1 Ropemaker Street, London EC2Y 9AW (Reference: Boris Bronfentrinker and Elaine Whiteford).

Cérélia Group produces pie dough, pizza dough, pastry dough, crepes, pancakes, waffles, cookie dough and ready to eat cookies for its own brands as well as for its customers' brands. Cérélia Group has nine manufacturing sites in Europe and three in North America.

CUK is a supplier of dough-to-bake ("DTB") contract manufacturing services to third parties in the UK. DTB goods include ingredient pastry dough (i.e. shortcrust, puff and filo pastry dough), pizza dough and other ready-to-bake dough products (including croissant dough, pain au chocolat dough, cinnamon swirl dough and cookie dough).

DTB products are manufactured by combining ingredients such as flour with a liquid (e.g. water) and/or fat (butter, margarine, olive oil etc.) and sometimes with flavouring toppings, which are sold to end consumers raw to be baked for final consumption. They are often sold in supermarkets in the chilled shelves and to a lesser extent in frozen form.

Cérélia's UK business, which trades under the BakeAway name, is focussed on the manufacturing of DTB products, for retailer private label ("PL") brands and consumer brands, including Jus-Rol itself (owned at the time by GMI). Jus-Rol is a consumer DTB brand, which has largely outsourced manufacturing to third party contract manufacturers including Cérélia. Jus-Rol focused on product and brand development and marketing activities.

According to the Application, following discussions, on 24 November 2021, Cérélia and GMI entered into a series of agreements for CUK to acquire assets relating to the Jus-Rol business, in particular:

a. An asset purchase agreement dated 24 November 2021 pursuant to which CUK agreed to purchase the goodwill, trademarks, inventory, business records, deposits and receivables, and contracts exclusively related to the Jus-Rol brand (the "Jus-Rol Business");

b. A patent and know-how licence dated 24 November 2021;

c. A transitional service agreement dated 24 November 2021.

(together, the "Transaction").

No employees, IT systems or other support services formed part of the Transaction which completed on 31 January 2022.

The Respondent decided that the Transaction, if implemented, would give rise to a substantial lessening of competition ("SLC") in the wholesale supply of DTB products to grocery retailers in the UK, and required Cérélia to divest the Jus-Rol business in the UK and Republic of Ireland (the "ROI").

The Applicants submit that the Respondent recognised that Cérélia and Jus-Rol do not compete directly, for example when retailers organise tenders for the procurement of PL manufacturing services. The Respondent considered, however, that they compete indirectly. According to the Final Report, Cérélia is purportedly constrained from increasing prices or decreasing quality, range or service of its PL manufacturing services, because of the implicit threat that retailers will rebalance their demand towards consumer branded products (and vice versa). This is referred to as the "implicit rebalancing threat". According to the Application, there was however, no adequate evidence to support that finding.

The Applicants further submit that, notwithstanding the lack of direct competition and the lack of the "implicit rebalancing threat", the Respondent determined that this indirect constraint it considered to exist created a SLC and was sufficiently important to require protection in the form of a remedy.

Cérélia proposed a number of ways in which the alleged SLC could be prevented, including divestiture of a production line, which would enhance the ability of retailers to switch DTB PL brand volumes to an alternative third party contract manufacturer and a distribution remedy. These were rejected by the Respondent, on the basis that the only effective remedy was a complete divestiture of the entire Jus-Rol business for UK and the ROI.

In summary, the Applicants challenge these decisions on the following grounds:

1. The SLC finding is irrational because:

    a. First, the Final Report fails to carry out the basic economic analysis required to assess the purported competitive constraint afforded by the (alleged) implicit rebalancing threat and without which it is impossible to form a proper view, supported by adequate evidence as to the statutory SLC Question;

    b. Second, it relies heavily on a small number of uncorroborated self-serving statements by retailers, without subjecting these to any proper critical analysis, with the result that even if it had carried out the necessary basic economic analysis, the Respondent had no sufficient evidential basis for the claim that the implicit rebalancing threat constrains Cérélia or Jus-Rol;

    c. Third, it fails properly to assess the relative importance of the alternative competitive threats operating on Cérélia and Jus-Rol, such as the ability for retailers to switch contract manufacturer for their PL branded products, and in particular to take account of evidence gathered belatedly in the investigation period in relation to the question of available capacity; and

    d. Fourth, it overstates the scope of the SLC, solely in unjustified reliance on uncorroborated self-serving statements by a small number of retailers.

2. The Remedy Decision is irrational and disproportionate. For the reasons set out above, the Remedy Decision is irrational as there is no basis for the SLC. If, however, the Tribunal were to consider the SLC to be justified, the Divestiture Remedy is in any event irrational because it is manifestly disproportionate. The alleged SLC is said to necessitate the divestiture of the entire Jus-Rol brand for the UK and ROI. Yet, when properly analysed, the SLC can only operate, if at all, in relation to a minority of DTB products. The Divestiture Remedy is disproportionate for the following reasons:

    a. it includes products that are not subject to the implicit rebalancing threat;

    b. it extends beyond the geographic market in which the Respondent's SLC was said to arise; and

    c. it includes channels, foodservice and food manufacturing, where there was no finding of any SLC by the Respondent.

3. The Respondent conducted a procedurally unfair investigation because the Respondent:

a. failed to give advance notice of its thinking in sufficient detail so as to enable Cérélia to know the case it needed to answer;

b. required late-stage consultation which was itself procedurally unfair; and

c. unreasonably refused disclosure requests.

As a consequence of each and all of the above, the Respondent's investigation was procedurally unfair and deprived Cérélia of the ability properly to defend itself in resisting what is a draconian and financially significant remedy.

The Applicants seek the following relief from the Tribunal:

1. An order pursuant to section 120(5)(a) of the Act quashing the Decision in its entirety or, alternatively, to the extent necessary to remedy the errors set out above.

2. An order that the Respondent pays the Applicants' costs of this Application.

3. Such further or other relief as the Tribunal deems fit.

Any person who considers that he has a sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

Please note that: (i) a direction of the President is currently in place as to the electronic filing of documents (see paragraph 2 of the Practice Direction relating to Covid-19 published on 20 March 2020); and (ii) any request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)
Registrar

Published 20 February 2023