Neutral citation [2023] CAT 54

Case No: 1579/4/12/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 September 2023

Before:

HODGE MALEK K.C.
(Chair)
MICHAEL CUTTING
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) CÉRÉLIA GROUP HOLDING SAS
(2) CÉRÉLIA UK LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 10-12 July 2023

JUDGMENT
(NON-CONFIDENTIAL VERSION)

APPEARANCES

Brian Kennelly KC and Alison Berridge (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Applicants.

Robert Palmer KC and Michael Armitage (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. **Introduction** 7

B. **Background** 8

(1) **The parties to the Merger** 8

(2) **The Merger inquiry** 9

C. **The Decision** 11

D. **The application** 15

E. **The Daly Statement** 17

F. **Legal framework** 18

(1) **The Act** 18

(2) **The Human Rights Act 1998** 21

(3) **The standard and intensity of review** 22

(4) **Rationality** 24

(5) **Procedural fairness** 28

G. **CMA guidance** 31

(1) **Disclosure** 31

(2) **Merger assessment** 32

(a) Whether there is an SLC *33*

(b) The counterfactual *34*

(c) Horizontal unilateral effects *35*

(d) Vertical and conglomerate effects *36*

(e) Countervailing factors *36*

(f) The market in which an SLC arises *37*

(3) **Merger remedies** 38

(a) The appropriate remedy *39*

(b) The divestiture remedy *40*

H. **Ground 1A: the CMA's SLC Finding is unsupported by evidence** 42

(1) **The CMA failed to establish a coherent framework for its SLC analysis** 42

(a) Retailer rebalancing *43*

(b) The separate activities of the parties *54*

(2) **The CMA relied uncritically on the statements of retailers** 59

(a) Cérélia's arguments *59*

(b) CMA's arguments *60*

(c) Our assessment *61*

(3) The CMA failed to properly assess the relative importance of alternative competitive threats 64

(a) Cérélia's arguments 64

(b) CMA's arguments 65

(c) Our assessment 66

(4) The scope of the CMA's SLC Finding is irrationally broad 67

(a) Cérélia's arguments 67

(b) CMA's arguments 68

(c) Our assessment 68

(5) Overall conclusion on Ground 1A 68

I. Ground 1B: the CMA's investigation was irrational 69

(1) The CMA failed to adapt its investigation to developments in the market 69

(a) Cérélia's arguments 69

(b) CMA's arguments 70

(c) Our assessment 72

(2) The CMA failed to interrogate inconsistencies within and between retailer evidence 73

(a) Cérélia's arguments 73

(b) CMA's arguments 73

(c) Our assessment 74

(3) The CMA misrepresented relevant evidence 74

(a) Cérélia's arguments 74

(b) CMA's arguments 76

(c) Our assessment 77

(4) The Further Consultation conducted by the CMA is evidence of the irrationality of its approach 77

(a) Cérélia's arguments 77

(b) CMA's arguments 79

(c) Our assessment 80

(5) Overall conclusion on Ground 1B 80

J. Ground 2: remedy 81

(1) Introduction 81

(2) Remedy was disproportionate and irrational 82

(a) Cérélia's arguments 82

(b) CMA's arguments 83

(c) Our assessment 84

(3) The CMA failed properly to assess the effectiveness of alternative remedy proposals ... 84

(a) Cérélia's arguments ... 84

(b) CMA's arguments ... 85

(c) Our assessment ... 86

K. Ground 3: the CMA conducted a procedurally unfair investigation ... 87

(1) The CMA failed to give advance notice of its thinking in sufficient detail ... 88

(a) Cérélia's arguments ... 88

(b) CMA's arguments ... 88

(c) Our assessment ... 89

(2) The CMA conducted a procedurally unfair late consultation ... 90

(a) Cérélia's arguments ... 90

(b) CMA's arguments ... 90

(c) Our assessment ... 91

(3) The CMA unreasonably refused Cérélia's disclosure requests ... 91

(a) Cérélia's arguments ... 91

(b) CMA's arguments ... 92

(c) Our assessment ... 93

(4) Overall conclusion on Ground 3 ... 95

L. Ground 4: the extension to the inquiry period for "special reasons" was unjustified ... 96

(1) Is a challenge to the decision to extend the reference (the "Extension Decision") in this case time barred? ... 96

(a) CMA's arguments ... 96

(b) Cérélia's arguments ... 98

(c) Our assessment ... 100

(2) Standard of review ... 100

(a) Cérélia's arguments ... 100

(b) CMA's arguments ... 101

(c) Our assessment ... 101

(3) Meaning of special reasons ... 102

(a) Cérélia's arguments ... 102

(b) CMA's arguments ... 103

(c) Our assessment ... 104

(4) Did the CMA have special reasons in this case? ... 105

(a) Cérélia's arguments ... 105

(b) *CMA's arguments* ... *106*
(c) *Our assessment* ... *107*
(5) What is the legal consequence if the CMA does not have special reasons? ... 109
(a) *Cérélia's arguments* ... *110*
(b) *CMA's arguments* ... *111*
(c) *Our assessment* ... *114*
M. Conclusions and disposition ... 115

A. INTRODUCTION

1. On 17 February 2023, Cérélia Group Holding SAS ("Cérélia Group") and Cérélia UK Limited ("CUK", and together, "Cérélia") made an application pursuant to s.120 of the Enterprise Act 2002 (the "Act") to review the final report of the Competition and Markets Authority ("CMA") dated 20 January 2023 and entitled '*Completed acquisition by Cérélia Group Holding SAS of certain assets relating to the UK and Ireland dough business (Jus-Rol) of General Mills, Inc.*' (the "Decision").

2. The CMA filed its Defence on 20 March 2023, which was accompanied by a signed witness statement dated 17 March 2023 and exhibit from Margot Daly, who is the Chair of the CMA Inquiry Group (the "Daly Statement"). The CMA also provided Cérélia with disclosure of its retailer questionnaires and some of the responses, as well as some correspondence with retailers. A case management conference ("CMC") was held on 24 March 2023, where the Tribunal gave directions in relation to disclosure and evidence. The Tribunal also gave Cérélia permission to file an amended Notice of Application ("ANoA") in light of the disclosure which it received from the CMA, and for the CMA to file an amended Defence ("AD"). Cérélia made an application on 6 April 2023 for further disclosure, which the Tribunal refused in its Ruling of 13 April 2023 ([2023] CAT 28) (the "Disclosure Ruling").

3. On 5 May 2023, Cérélia filed its ANoA and the CMA filed its AD on 23 May 2023.

4. Cérélia's application was heard on 10-12 July 2023 (the "Hearing") and, at the Tribunal's request, the parties subsequently filed tables containing cross-references to paragraphs in the ANoA, AD, Decision and their respective skeleton arguments, as well as written submissions on the appropriate remedy that the Tribunal should grant Cérélia in the event that Cérélia succeeds on Ground 4 of its ANoA. This is the Tribunal's unanimous decision on the application.

B. BACKGROUND

(1) The parties to the Merger

5. On 31 January 2022, Cérélia Group acquired Jus-Rol (together, the “Parties”) from General Mills, Inc. (“GMI”) pursuant to a number of agreements related to the goodwill, trademarks, inventory, business records, deposits and receivables, and contracts for the Jus-Rol brand (the “Merger”).

6. Cérélia Group is a joint stock company headquartered in France. Cérélia Group produces pie dough, pizza dough, pastry dough, crepes, pancakes, waffles, cookie dough and ready to eat cookies for its own brands and for third parties. Cérélia Group has nine manufacturing sites in Europe and three in North America.

7. CUK is based in the UK and operates under the name ‘BakeAway’. CUK has one manufacturing plant in the UK, and supplies Dough-To-Bake (“DTB”) products and contract manufacturing services to third parties. DTB products include ingredient pastry dough (ie shortcrust, puff and filo pastry dough), pizza dough and other ready-to-bake (“RTB”) dough products (including croissant dough, pain au chocolat dough and cookie dough). DTB products are sold to end consumers by grocery retailers to be baked for final consumption. They are generally stocked in the chilled shelves of grocery retailers, but can also be purchased frozen.

8. CUK’s customers include both consumer brand owners and private label (“PL”) brand owners. Consumer brand owners sell products under their own brand name to retailers, while PL brand owners are retailers who sell products (also known as “own brand” or “own label” products) exclusively with their own packaging and branding. PL products are typically sold at lower price points than corresponding consumer brand products.

9. CUK also supplies contract manufacturing services to its customers; this includes manufacturing DTB goods, packaging those goods, and organising logistics services connected with the supply of DTB goods to customers.

10. Jus-Rol is a consumer DTB brand. The Jus-Rol business comprises certain assets of the UK and Ireland dough business of GMI. GMI is a US-head-quartered global manufacturer and marketer of consumer brands and pet foods.

11. The Jus-Rol UK product range is available either chilled or frozen in sheets, block and RTB forms. Specific products within the range include ingredient pastry dough, pizza dough, sharing bread dough and certain breakfast DTB products supplied in cans such as croissant dough, pain-au-chocolat dough and cinnamon swirl dough.

12. Since 2016, GMI has largely outsourced the manufacture of Jus-Rol products to third party contract manufacturers. Prior to the Merger, Jus-Rol products in the UK were predominantly manufactured by Cérélia.

(2) The Merger inquiry

13. Cérélia informed the Mergers Intelligence Committee ("MIC") about the prospective Merger on 26 November 2021.[1] The Merger was not conditional on any regulatory clearances and completed on 31 January 2022.

14. The MIC informed Cérélia of its intention to investigate the Merger on 1 February 2022. Following the issue and in response to a number of notices under s.109 of the Act ("s.109 Notices") and a Merger Notice submitted by Cérélia on 29 March 2022, the CMA commenced a Phase 1 investigation into the Merger on 31 March 2022.

15. Following the issue and response to a number of further s.109 Notices and Cérélia's response to the CMA's Phase 1 Issues Letter, the CMA issued a Phase 1 decision on 30 May 2022 that, on the information currently available to it, it was or may have been the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the UK.

---

[1] Schedule 1 to ANoA

16. On 15 June 2022, in exercise of its duty under s.22(1) of the Act, the CMA referred the Merger for further investigation and report by a group of CMA panel members (the "Inquiry Group").

17. Further s.109 Notices were issued by the CMA in the Phase 2 investigation, which Cérélia responded to. The CMA's Phase 2 investigation also included carrying out site visits at Cérélia and GMI, sharing and exchanging Issues Statements and working papers with the Parties and holding main party hearings with Cérélia and GMI.

18. On 27 September 2022, the Inquiry Group decided to extend the reference period by eight weeks under s.39(3) of the Act so as to expire on 24 January 2023 (instead of 29 November 2022). The CMA published its notice of extension, which was signed by Margot Daly, the Inquiry Group Chair, on 5 October 2022. The notice stated that:

> "2. The Inquiry Group has decided that the reference period should be extended by eight weeks under section 39(3) of the Act as it considers that there are special reasons (set out below) why the final report cannot be prepared and published within the reference period. The revised reference period will expire on 24 January 2023.
>
> 3. In taking this decision, the Inquiry Group had regard to the complexity of the inquiry, the need to consider the issues raised by the Parties and by third parties, including the broad scope of the submissions made by the Parties in response to the Annotated Issues Statement and Working Papers and the need to reach a fully reasoned final decision in the statutory timeframe. The Inquiry Group considers that completion of its investigation and the publication of its final report will not be possible within the original reference period."

19. The CMA issued its "Provisional Findings" ("PFs") on 4 November 2022, together with a Notice of Possible Remedies. On this date, a full unredacted version of the PFs was provided to Cérélia's external advisers in a confidentiality ring. After the publication of the PFs, the CMA continued to collect evidence relevant to the Merger inquiry (the "Further Consultation").

20. The CMA issued a Remedies Working Paper to the Parties on 16 December 2022 and a Consultation Paper on 19 December 2022. Also on 19 December 2022 the CMA sent the Parties a short consultation paper summarising the additional evidence gathered during the Further Consultation (the "Consultation

Paper") and invited them to make any representations on the additional evidence by 3 January 2023.

21. Following responses from Cérélia and GMI, the CMA published its Decision on 23 January 2023.

C. THE DECISION

22. In the Decision, the CMA found that the Merger had:

    (1) Given rise to a "relevant merger situation" for the purpose of s.35(1)(a) of the Act; and[2]

    (2) Resulted in a substantial lessening of competition ("SLC") in the UK market for the wholesale supply of DTB products to grocery retailers (the "SLC Finding").[3]

23. To remedy this adverse outcome, the CMA determined that Cérélia should be required to divest the entire Jus-Rol UK business to a suitable purchaser.[4] Subject to approval by the purchaser and CMA, Cérélia would have the option to carve out brand and intellectual property rights in relation to the Jus-Rol business in the Republic of Ireland, as well as foodservice and food manufacturing customers.

24. The CMA recognised that Cérélia provided an input to GMI's Jus-Rol product, and considered how the vertical links between the Parties may impact the extent to which the Parties' incentives change as a result of the Merger. However, the CMA found that the Parties compete because ultimately they both supplied DTB products to retailers, and there was cross-channel competition for retailers' shelf space (Decision §§6.6, 6.27).

---

[2] Decision/§3.30. A "relevant merger situation" is defined in s.23 of the Act.
[3] Decision/§9.413.
[4] Decision/§12.157.

25. In relation to the DTB sector and the relevant competitive framework, the CMA made the following key findings:

(1) Grocery retailers' purchasing decisions are informed by what their customers (end-consumers) want to buy. As a result, the CMA formed a view that competition at the wholesale level was linked to the competitive dynamics at the retail level. However, retailers' decisions about which DTB products to stock (and the volume in which to purchase them) were also informed by broader commercial and strategic considerations (Decision §§7.7-7.10).

(2) Negotiation of pricing and terms of PL DTB products typically took place through bilateral negotiations rather than formal tenders; these negotiations would culminate in supply agreements that typically had no fixed term (Decision §7.20). Negotiations between grocery retailers and branded DTB product suppliers occurred approximately on an annual basis (Decision §7.29). Price, quality and service level are the most important factors on which suppliers of DTB products compete (Decision §7.55).

(3) Retailers told the CMA they have a finite amount of shelf space for DTB products, so had to decide how much would be allocated to PL and branded channels across the DTB category. The CMA found that there was an "ongoing process by which retailers select their optimal volume mix of PL and branded DTB products (based on the offerings of suppliers) to best serve their end-consumers and their commercial interests". As a result, the CMA concluded there was competition between DTB suppliers both within and across PL and branded channels; suppliers were disincentivised from raising their prices or providing inferior products because of the risk that a retailer would switch to another supplier for that channel or allocate more shelf space to the other channel (Decision §§7.30-7.35).

(4) Switching between suppliers within the branded channel was extremely rare. Switching between PL suppliers does occur, though this happens

infrequently – rather than switching to a new supplier, retailers may choose to switch volumes between existing suppliers (Decision §§7.80-7.81, 7.90).

26. The CMA considered the product market definition should include both chilled and frozen DTB products supplied to grocery retailers through the PL and branded DTB channels. There was strong demand-side and supply-side substitutability for these products at the wholesale level; retailers tended to source all their PL and branded products, whether chilled or frozen, from a single supplier and evidence from suppliers' internal documents indicated that typically no distinction is made between chilled and frozen products during the normal course of business (Decision §§8.42-8.44, 8.58). The geographic scope of the market was assessed as the UK; grocery retailers tended to have national procurement strategies for DTB products for the UK market only (Decision §8.68).

27. The CMA made the following findings relevant to its competitive assessment:

(1) At the time the Decision was issued, the Parties had a very high combined share in the wholesale supply of DTB products to grocery retailers in the UK; their estimate for 2023 was that by value, Jus-Rol had a forecast share of supply of 40-50%, and Cérélia of 20-30%. Jus-Rol and Cérélia each accounted for a significantly larger proportion of sales than any other competitor, their high shares had been sustained over time, and there were only two other competitors with material shares of supply in the market (Decision §§9.9-9.10, 9.14).

(2) While the Parties performed different activities as regards their respective supply channels, both were ultimately supplying DTB products to retailers, though they each provided different added services alongside the DTB products (Decision §§9.22, 9.27).

(3) The physical characteristics and intended use of the Parties' products were very similar and retailers and end-consumers viewed them to be substitutes. Close competition at the retail level was viewed by the CMA

as an indication of closeness of competition between the Parties at the wholesale level (Decision §§9.41, 9.133).

(4) Retailers referred to their ability to flex volume between PL and branded products as a lever in negotiations (Decision §9.54). The CMA found that "the largest retailer customers of the Parties overall articulated a broadly consistent and coherent view that there is an implicit but important constraint between the Parties which will be lost as a result of the Merger". The CMA therefore found that the Merger would reduce the ability of retailers to protect themselves against potential price rises (Decision §§9.67, 9.152).

(5) The CMA found evidence of a link between end-consumer choices and retailer demand, in that retailers adjust their mix between the PL and consumer branded products to reflect anticipated end-consumer demand, including their anticipation of how retail demand will change in response to a deterioration in the offering. The Parties therefore had an incentive to keep their supply offers competitively priced, as there was a threat that they may lose volumes and sales to the other channel if they deteriorate their offer (referred to as the "rebalancing constraint") (Decision §9.102).

(6) The aggregate competitive constraint on the Parties from alternative suppliers was limited; the merged entity would be the largest supplier of DTB products to UK retailers, with a 60-70% share of supply, and would face limited competition even from the stronger of the competitor firms (Bells and Henglein) (Decision §9.312).

(7) There were no countervailing factors that would offset the effect of the SLC that the CMA found would be caused by the Merger (Decision §10.213).

28. The CMA considered Cérélia and third parties' remedy proposals, third parties' views on Cérélia's remedy proposals, as well as Cérélia and third parties' views on divestiture and relevant customer benefits. The CMA concluded that a

divestiture of the Jus-Rol business would be as comprehensive a solution as was reasonable and practicable to the SLC and resulting adverse effects. As part of the divestiture process, Cérélia would (subject to purchaser and CMA approval of the proposed terms) have the right to carve out brand and IP rights in relation to the Republic of Ireland and foodservice and food manufacturing customers (Decision §§12.157-12.158).

29. In the Decision, the CMA also addressed its approach to information gathering, explaining that in line with standard practice, it had continued to collect and analyse evidence after publication of the PFs. The evidence collected from the Further Consultation comprised oral hearings with three UK grocery retailers which procure DTB products, oral hearings with a supplier of PL DTB products to UK grocery retailers, a questionnaire to another supplier of PL DTB products to UK grocery retailers and internal documents provided by the Parties. The CMA also took account of submissions by the Parties in their responses to the PFs (Decision §6.58).

30. The Decision notes that the CMA did not consider that the additional evidence had changed its provisional SLC finding in the PFs nor that the additional evidence materially changed the reasoning that supported the PFs. However, in the interest of transparency and to ensure that the CMA had the benefit of the Parties' submissions on the additional evidence, the CMA sent the Consultation Paper to the Parties (Decision §§6.59).

D. THE APPLICATION

31. By its ANoA, Cérélia seeks an order pursuant to s.120(5)(a) of the Act quashing the Decision in its entirety, or, in the alternative, to the extent necessary to remedy the errors relied upon by Cérélia as grounds of review.

32. Cérélia's ANoA advances the following grounds of review:

    (1) *Ground 1: irrationality.* Cérélia mounts both substantive and procedural attacks on the rationality of the Decision, which are considered in more detail below. In summary:

(i) *Ground 1A: The SLC Finding is unsupported by evidence.* The CMA failed to properly investigate its theory of harm, which was to apply a horizontal unilateral effects theory to a merger of two vertically related parties. The CMA found that Cérélia and Jus-Rol exercise a competitive constraint on each other, based on the potential for retailers to trade PL brand and consumer brand suppliers off against each other by rebalancing the volumes of each product sold. Had the CMA gathered the evidence it needed to support this theory of harm, and properly considered the evidence it had, it would have concluded the "rebalancing mechanism" was implausible. The CMA irrationally discounted the competitive constraints posed by other suppliers, and made an irrationally broad finding that the Merger would cause an SLC in relation to all DTB products.

(ii) *Ground 1B: The CMA's investigation into the Merger was irrational.* The CMA approached its investigation in an incoherent manner, disregarding developments in the market and new evidence it received. When the CMA did seek new evidence, it did so in a manner designed to remedy problems with its case, rather than genuinely seeking new evidence to improve its understanding. The CMA failed to interrogate inconsistencies within and between evidence provided by retailers, overlooked relevant evidence, and misrepresented the evidence it did have.

(2) *Ground 2: the remedy has no rational basis and is disproportionate.* The remedy decision requires a divestment extending well beyond the scope of the SLC Finding, both in terms of product and geographic scope. The CMA rejected a less intrusive, equally effective remedy.

(3) *Ground 3: the CMA conducted a procedurally unfair investigation.* The CMA failed to properly consult the Parties, with the result that Cérélia did not have a fair or adequate opportunity to answer the case against it. In particular, the CMA did not disclose its theory of harm before its PFs

were released on 4 November 2022. The CMA then conducted a procedurally unfair late-stage consultation following release of the PFs, by which time the CMA's misapprehension of the evidence was baked into its theory of harm. The CMA also withheld information from Cérélia (such as the information requests made to third parties), limiting Cérélia's ability to respond.

(4) *Ground 4: the CMA eight-week extension of the enquiry period for "special reasons" was unjustified.* The reasons given by the CMA in justifying the extension were "the complexity of the inquiry, the need to consider the issues raised by the Parties and by third parties, including the broad scope of the submissions made by the Parties in response to the Annotated Issues Statement and Working Papers and the need to reach a fully reasoned final decision in the statutory timeframe".[5] These were not "special" reasons, so the CMA's decision to extend the enquiry period was *ultra vires*. The Decision was released after the expiry of the relevant statutory deadline, so is void, and the Merger should be treated as having been cleared by the CMA.

E. THE DALY STATEMENT

33. As mentioned at [2] above, the CMA filed the Daly Statement on 20 March 2023 with its Defence. The background leading to the Daly Statement and Cérélia's disclosure requests for internal CMA documents explaining or justifying the decision to extend the statutory timetable for "special reasons" under s.39(3) of the Act are set out in the Disclosure Ruling so we shall not repeat them here.

34. At the Hearing, the Tribunal asked Cérélia for its position regarding the status and admissibility of the Daly Statement. Leading counsel for Cérélia confirmed that Cérélia does not challenge the admissibility of the statement, and it is for the Tribunal to decide what weight to give to the reasons set out in the statement.

[5] Notice of Extension of the Inquiry Period published by the CMA on 5 October 2022. (See [18] above.)

35. In summary, the Daly Statement provides further detail as to the CMA's decision-making process and the basis on which the CMA considered that an extension of the inquiry timetable was required. Ms Daly explained, *inter alia*, that the extension of time was prompted by the voluminous submissions and accompanying documents (including new economic analyses and models) provided by the Parties on 12 and 13 September 2022 in response to the CMA's Annotated Issues Statement and Working Papers.

F. LEGAL FRAMEWORK

(1) The Act

36. Part 3 of the Act sets out the functions of the CMA in relation to mergers. Within Part 3, s.22 imposes an obligation on the CMA, in certain circumstances, to refer a completed acquisition to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013:

> **"22. Duty or make references in relation to completed mergers**
>
> (1) The CMA shall, subject to subsections (2) and (3), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
>
> > (a) a relevant merger situation has been created; and
> >
> > (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) The CMA may decide not to make a reference under this section if it believes that—
>
> > (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference; or
> >
> > (b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.
>
> […]"

37. Sections 23 and 24 of the Act define a relevant merger situation and the time limits for determining when two or more enterprises cease to be distinct. Cérélia

does not challenge the CMA's finding that the completed acquisition of Jus-Rol is a relevant merger situation.

38. Where the CMA has referred a completed acquisition, s.35 of the Act places the CMA under a duty to decide the following:

> "**35. Questions to be decided in relation to completed mergers**
>
> (1) Subject to subsections (6) and (7) and section 127(3), the CMA shall, on a reference under section 22, decide the following questions—
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) For the purposes of this Part there is an anti-competitive outcome if—
>
> (a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or
>
> (b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (3) The CMA shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—
>
> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
>
> […]"

39. Section 38 of the Act places the CMA under a duty to publish a report on the reference:

"**38. Investigations and reports on references under section 22 …**

(1) The CMA shall prepare and publish a report on a reference under section 22 […] within the period permitted by section 39.

(2) The report shall, in particular, contain—

(a) the decisions of the CMA on the questions which it is required to answer by virtue of section 35 […];

(b) its reasons for its decisions; and

(c) such information as the CMA considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.

(3) The CMA shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section."

40. Section 39(1) of the Act states that a report under s.38 must be published within 24 weeks of the reference. Section 39(3) allows the CMA to extend that time period by no more than eight weeks "if it considers that there are special reasons why the report cannot be prepared and published within that period". Section 103(1) of the Act requires the CMA to have regard to the need to make decisions on references as soon as reasonably practicable.

41. Where the CMA's proposed decision on the questions mentioned in s.35(1) or s.35(3) of the Act is likely to be adverse to the interests of a relevant party, s.104 places duties upon the CMA to consult and to give reasons for its proposed decision to that party:

"**104. Certain duties of [the CMA] to consult**

(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.

(2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.

(3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.

(4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to—

(a) any restrictions imposed by any timetable for making the decision; and

(b) any need to keep what is proposed, or the reasons for it, confidential.

(5) The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision.

[…]"

42. The ability to and manner in which a person can challenge the CMA's decisions in relation to a relevant merger situation are set out at s.120 of the Act:

"**120. Review of decisions under Part 3**

(1) Any person aggrieved by a decision of the CMA … under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.

[…]

(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

(5) The Competition Appeal Tribunal may—

(a) dismiss the application or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.

[…]"

(2) The Human Rights Act 1998

43. Particular Articles from the European Convention on Human Rights (the "ECHR") are incorporated into UK law through the Human Rights Act 1998 (the "HRA 1998"). Section 1 of the HRA 1998 defines "Convention Rights" as:

"**1. The Convention Rights**

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the [ECHR],

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the [ECHR].

[…]”

44. Article 1 of the First Protocol to the ECHR is set out in Schedule 1 to the HRA 1998 and relates to the protection of property:

> “**Article 1**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

45. Section 6 of the HRA 1998 states that:

> “**6. Acts of public authorities**
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> […]
>
> (3) In this section, ‘public authority’ includes—
>
> (a) a court or tribunal
>
> […]”

(3) The standard and intensity of review

46. In an application for review of a decision under s.120 of the Act, the Tribunal must apply “the same principles as would be applied by a court on an application for judicial review” (s.120(4)).

47. In judicial review proceedings, the Tribunal’s concern is “not with the correctness or otherwise of the [CMA’s] findings, but with the lawfulness of the decision-making process which it adopted”: *Barclays Bank v Competition Commission* [2009] CAT 27 at [22].

48. The Court of Appeal held in *Office of Fair Trading and others v IBA Health Limited* [2004] EWCA Civ 142 ("*IBA*") that, notwithstanding its specialist composition, the Tribunal is to apply the ordinary principles of judicial review in determining applications pursuant to s.120(4) of the Act (see *IBA* at [53] and [88]). As regards the intensity of review, Carnwath LJ observed that:

> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are *R v Secretary of State, ex p Nottinghamshire CC* [1986] AC 240, and *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1AC at 596-597 per Lord Bridge). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:
>
> > 'Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (De Smith para 13-060, citing *Brind v Secretary of State* [1991] AC 696).'
>
> 92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment (see *Brind* [1991] 1AC at 767, per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene:
>
> > 'Such questions are to be answered not by reference to Wednesbury unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'' (*R v Takeover Panel ex parte Guinness plc* [1990] 1QB 146, 184, per Lloyd LJ).
>
> 93. The present case, as the Tribunal observed (para 223), is not concerned with questions of policy or discretion, which are the normal subject-matter of the Wednesbury test. Under the present regime (unlike the [Fair Trading Act 1973]) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion (see *Tameside* case, [1977] AC at 1047 per Lord Wilberforce)."

49. Carnwath LJ went on (at [96]) to cite the concluding remarks of Lord Radcliffe in *Edwards v Bairstow* [1955] 3 All ER 48 at 59, [1956] AC 14 at 38-39 that:

> "The court is not a second opinion, where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with, or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by the commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

50. In a review under s.120 it is not permissible "to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission" (*British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25 ("*BSkyB*") at [63], endorsed by the Court of Appeal *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("*BSkyB (CA)*")).

51. An applicant for judicial review faces a "high hurdle" in persuading the Tribunal to disturb the factual basis for a decision; the Tribunal noted in *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 ("*Stagecoach*") at [45] that:

> "The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review'".

(4) Rationality

52. *Stagecoach* concerned a judicial review application under s.120 of the Act. One of the grounds of challenge was that the Competition Commission acted irrationally by arriving at a counterfactual that was not supported by sufficient or any evidence. The Tribunal applied the approach set out by the Court of Appeal in *IBA* and endorsed in *BSkyB (CA)* (see *Stagecoach* at [41]) and observed that:

> "42. […] it is not the Tribunal's task to reassess the relative weight of different factors arising from the evidence before the Commission. The task is to assess whether the Commission had an adequate evidential foundation for arriving at

> the factual conclusions that it did, in the sense that, on the basis of the evidence before it, it could reasonably have come to those conclusions.
>
> […]
>
> 45. […] Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review' […]
>
> 46. The Commission also reminded us that it is important to consider the evidence relied on in the Decision 'taken as a whole' and that the Decision should not be analysed as if it were a statute. The Tribunal must consider the materiality of any 'fact' found by the Commission which the Tribunal determines has no evidential foundation – not every failure in fact-finding and analysis by a decision making body requires or permits its finding or decision to be quashed.
>
> […]
>
> 48. […] The question we must ask ourselves, paraphrasing the description of the Wednesbury test expressed by the Vice Chancellor (as he then was) in *Office of Fair Trading v IBA Health Ltd* [2004[EWCA Civ 142, is whether the Decision is so unreasonable as to be a decision which no Commission properly instructed and taking account of all, but only, relevant considerations could arrive at."

53. The Tribunal considered the standard of rationality in *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*") when determining a judicial review application under s.179 of the Act. The Tribunal applied *IBA* and *BSkyB (CA)* and held at [20(4)] and [20(6)] that:

> "(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45].
>
> …
>
> (6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ

at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]…"

54. The Act stipulates that applications brought under s.120 or s.179 are to be determined by applying judicial review principles. The principles set out in *BAA* therefore apply equally in the context of a review under s.120 of the Act. This was recognised by the Tribunal in *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 ("*ICE*") at [30]. In *BSkyB (CAT)* at [54], the Tribunal approved a summary of the "no evidence" principle in Wade and Forsyth on Administrative Law (9th edition) at page 272 and 273:

> "… It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
>
> 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on the evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires." (footnotes omitted)

55. The steps taken by the CMA in investigations are also to be judged by application of a rationality standard; the CMA "must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it" (*BAA* at [20(3)]). In carrying out investigations, the CMA is required to make a number of evaluative assessments, as to which "it has a wide margin of appreciation" (*BAA* at [20(3)]). In *BAA*, the Tribunal cited the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35], that:

> 'The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made.'

56. Furthermore, *Akzo Nobel N.V. v Competition Commission* [2013] CAT 13 (*"Akzo Nobel"*) is authority for the proposition that the question of precisely where the line is drawn in determining whether an inquiry has gone far enough is an issue for the relevant authority to evaluate and the Tribunal will need to be shown a strong case to show that the relevant authority manifestly drew the line in the wrong place (see *Akzo Nobel* at [160]).

57. The CMA also has a wide margin of discretion in selecting an appropriate remedy: see *Meta Platforms, Inc. v Competition and Markets Authority* [2022] CAT 26 ("*Meta*") at [173]. In *Somerfield Plc v Competition Commission* [2006] CAT 4 ("*Somerfield*"), where (as here) a divestiture remedy had been ordered in a completed merger case, the Tribunal observed at [88] that the regulator had:

> "a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC".

58. Similarly, in *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30 ("*Eurotunnel*") the Tribunal emphasised at [382] that:

> "[i]n making its decisions about remedies, the [CMA is] necessarily required to make evaluative assessments using its own expertise".

59. The CMA's wide margin of appreciation as to remedy is reflected in the applicable standard of review. The Tribunal will not disturb the CMA's assessment as to the appropriate remedy unless it is "manifestly without reasonable foundation": *Eurotunnel* at [382]. As the Tribunal specifically observed in *BAA* at [20(5)] in relation to a divestiture remedy:

> "Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation standard" which applies."

60. The manifestly without reasonable foundation or "MWRF" standard is "essentially equivalent to ... the ordinary domestic standard of rationality": *BAA* at [20(5)]. That this is the correct approach was recently affirmed in *Meta* at [174(1)] where the Tribunal noted that there was "room for debate" about the merits of the remedy adopted in that case, but emphasised that this was:

"a matter for the CMA, and unless the remediation outcome is irrational, it cannot and should not be successfully challenged".

(5) Procedural fairness

61. The applicable standards of procedural fairness depend on the context of the decision in question. An essential feature of the relevant context is the statutory framework within which the decision is taken: *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560 ("*Doody*"). For present purposes, the key statutory provisions contained in Part 9 of the Act are:

(1) Section 103(1) of the Act, which provides that when making and determining merger references the CMA "shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable". This "duty of expedition" provides important statutory context for any consideration of what level of consultation and disclosure is required during a merger investigation.

(2) Section 104 of the Act, which applies before the CMA adopts a final decision and concerns the extent to which consultation is required during the CMA's investigation. Thus, where the CMA is proposing to make a decision on a merger and that decision is likely to have an adverse effect on a party to the merger, it must, "so far as practicable" (a) consult that person about its proposal before making the decision; and (b) in consulting the person, give reasons for the proposed decision: s.104(2)-(3). In considering what is practicable, the CMA must, in particular, have regard to (a) any restriction imposed by the timetable for making the decision; and (b) any need to keep what is proposed, or the reasons for it, confidential: s.104(4).

(3) Section 237 of the Act, which imposes a general restriction on the disclosure of information received by the CMA in connection with a merger inquiry ("specified information"). Where such information relates to any business of an undertaking, it must not be disclosed while the undertaking continues in existence, unless disclosure is permitted

under Part 9 of the Act (or the information is already in the public domain).

(4) Section 241 of the Act, which permits the CMA to disclose specified information for the purposes of facilitating the exercise of its statutory functions. Such functions include the duty to consult under s.104. The CMA must, however, have regard to a number of considerations before disclosing any information: s.244. These include (a) the need to exclude from disclosure commercial information which might significantly harm the legitimate business interests of the undertaking to which it relates; and (b) the extent to which the disclosure of such information is necessary for the purpose for which disclosure is permitted.

62. The statutory framework thus contains a "clear and workable code" which requires the CMA to strike an appropriate balance between the need to disclose its reasoning to the merging parties and the need to protect the confidential information of third parties: *BMI Healthcare Limited v Competition Commission* [2013] CAT 24 ("*BMI*") at [39(4)]. Moreover, in requiring the CMA to consider what disclosure is "necessary" for its proceedings to be conducted fairly and effectively, the statutory rules accommodate the common law principles of fairness: *Ryanair Holdings Plc v CMA* [2015] EWCA Civ 83 at [39].

63. The Tribunal has considered the CMA's duty to consult in a number of cases. The following principles can be derived from the case law:

(1) Whilst it is for the Tribunal to decide what is and is not fair, "[t]he consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances". Accordingly, the CMA's approach to matters of consultation and disclosure in any given case is entitled to "great weight": *BMI Healthcare* at [39(6)].

(2) As the Tribunal explained in *Eurotunnel* at [168]:

> "It is the administrative decision-maker, and not the reviewing court, that stands in the front line when assessing what is procedurally fair and (to descend to the specific) the Tribunal should be slow to second-guess decisions of the Commission in terms of what needs to be shown to an affected party, how confidential certain material is, and how best to protect the confidentiality in that material."

(3) Fairness requires that the "gist" of the proposed decision be disclosed by the CMA. This is so that a person who will be adversely affected by the decision has an opportunity to make representations before the decision is taken: *Doody* p.560. What constitutes a sufficient "gist" is, however, "acutely context-sensitive" and, in the first instance, it is for the CMA to decide how much to reveal when discharging its duty to consult: *BMI* at [39(7)]. In *Meta*, the Tribunal recently confirmed that these principles continue to hold good and emphasised that "the decision-maker will have a wide margin of appreciation in deciding what the gist of a decision is": *Meta* at [148(4)].

(4) The duty to consult does not require the CMA to disclose "each and every piece of specified information" or "all inculpatory and exculpatory material including transcripts or summaries of evidence provided to it by third parties": *BMI* at [39(4)]; *Eurotunnel* at [221].

(5) The relevant question is "not whether [the applicant] would have had something material to say in relation to information it did not see" but "whether, on the basis of the information that [it] did see, [the applicant] was in a position properly to formulate its response to issues likely to adversely affect it": *Eurotunnel* at [236] and [244]. To put it another way: was an "adequate gist" provided in relation to the issues on which the CMA proposed to take a decision adverse to the applicant's interests? (*Eurotunnel* at [226] and [245]).

(6) The "primary vehicle" for the communication of the CMA's proposed decision and reasons is its provisional findings: *Meta* at [157(3)].

(7) Whilst an applicant may disagree with the CMA's conclusions on an issue, this does not give rise to any procedural unfairness provided it was

presented with "a fair opportunity to voice such disagreement": *Eurotunnel* at [247].

(8) In *Tobii AB (publ) v Competition and Markets Authority* [2020] CAT 1 (*"Tobii"*), the Tribunal reviewed and applied a number of the relevant principles in relation to consultation and the disclosure of information: see [57]-[66]. At [146], the Tribunal emphasised the important point that:

> "[i]t is for the CMA to conduct its own investigation within a relatively short time frame and to gather, analyse and pull together the evidence. It is not desirable or appropriate for the CMA to provide the underlying evidence to the affected party, so as to enable the affected party itself to carry out its own analysis and review of the underlying evidence. To require disclosure to such a level would have a detrimental effect on the process. It may lead to persons becoming less willing to co-operate, as well as delays in a field where decisions on mergers should be made as quickly as reasonably practicable"

(and where, it should be added, the CMA is subject to an express statutory duty of expedition under s. 103 of the Act).

G. CMA GUIDANCE

(1) Disclosure

64. The provisions in Part 9 of the Act governing the CMA's handling of information that comes to it in connection with the exercise of its functions is supplemented by guidance: '*Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973*' (CC7 (Revised), April 2013) (the "Disclosure Guidance"), which has been adopted by the CMA, and '*Transparency and disclosure: Statement of the CMA's policy and approach*' (CMA6, January 2014).

65. Among other things the Disclosure Guidance:

(1) Identifies a number of factors to which the CMA will have regard, in addition to the statutory considerations, when deciding whether particular information should be disclosed and the manner of its disclosure;[6]

(2) Sets out the CMA's general approach to the disclosure of the main types of information that it receives, including information provided by third parties;[7]

(3) Explains that the disclosure of its Provisional Findings and its Notice of Possible Remedies "is the main means by which the [CMA] ensures due process and fulfils its duty to consult on certain decisions under s.104 of the Act";[8] and

(4) Explains the CMA's usual approach to satisfying its disclosure obligations while protecting information contained in disclosed documents. This includes the provision of ranges rather than exact figures on market shares, and the provision of summaries of responses and data provided by customers.[9]

(2) Merger assessment

66. The CMA published its revised '*Merger Assessment Guidelines*' (CMA129) on 18 March 2021 ("MAG"), which set out the substantive approach of the CMA to its analysis when investigating mergers. MAG §§1.11-1.12 explain that the guidelines are applicable to Phase 1 and Phase 2 investigations and the CMA will have regard to the MAG when conducting such investigations. However, merger assessment is inevitably case specific and must take account of the particular transaction and the markets being analysed. Therefore, the methodologies employed in merger analysis should not be applied in a rigid and mechanistic way. Although the MAG provide a framework for merger analysis,

---

[6] Disclosure Guidance §5.2.
[7] Disclosure Guidance §6.
[8] Disclosure Guidance §7.1.
[9] Disclosure Guidance §§9.14-9.15.

the CMA will apply it flexibly, departing from them where it considers it appropriate to do so.

67. In particular, the MAG set out the CMA's approach when assessing:

(1) Whether a relevant merger situation has resulted or may be expected to result in an SLC within any market or markets in the UK for goods or services (MAG Chapter 2);

(2) The counterfactual (MAG Chapter 3);

(3) Horizontal unilateral effects (MAG Chapter 4);

(4) Vertical and conglomerate effects (MAG Chapter 7);

(5) Countervailing factors (MAG Chapter 8); and

(6) The market in which an SLC arises (MAG Chapter 9).

(a) Whether there is an SLC

68. The MAG explain that, in merger assessments, the CMA will develop a general understanding of the competitive process, including of the competitive parameters that are more important to the process of competition in the relevant industry. The CMA will generally take a forward-looking approach to the assessment of any theories of harm, considering the effects of the merger both now, and in the future. Theories of harm are commonly classified according to whether a merger is horizontal or non-horizontal, i.e. a horizontal merger between firms that are active at the same level of the supply chain and compete to supply products that are substitutable for each other, or a non-horizontal merger between firms that offer products that are not substitutable but operate, for example, at different levels of the supply chain. However, the theories of harm discussed in the MAG are not exhaustive and the CMA may consider any

theory of harm involving a potential SLC that could arise as a result of a merger.[10]

69. The CMA does not have a prescriptive list of evidence that it will take into account in its assessments, although it must take reasonable steps to acquaint itself with the relevant information to enable it to answer each of the statutory questions. The MAG note that once the CMA has persuasive evidence of a particular proposition to answer a statutory question, there may be little additional value of gathering further evidence on the same proposition and evidence submitted on those points may need to be more persuasive to counter it. The CMA also has a wide margin of appreciation in its use of evidence. In assessing the evidence, the CMA is not required to make precise predictions about the future nor will the CMA normally quantify the expected loss of competition or detriment to customers.[11]

70. Further, the CMA does not normally consider specific pieces of evidence in isolation, although it is common for the CMA to weight pieces of evidence differently. There is no set hierarchy between quantitative evidence and qualitative evidence. The CMA may take into account any evidence of an explicit intention on the part of merger firms to take a particular course of action that would be consistent with an SLC and there is no requirement for the CMA to find direct evidence of explicit intentions.[12]

(b) The counterfactual

71. The CMA's counterfactual assessment will often focus on significant changes affecting competition between the merger firms and the CMA is likely to only focus on significant changes where there are reasons to believe that those changes would make a material difference to its competitive assessment. Further, significant changes affecting competition from third parties which would occur with or without the merger (and therefore form a part of the

---

[10] MAG §§2.3, 2.14-2.16.
[11] MAG §§2.19-2.22.
[12] MAG §§2.23, 2.25-2.26.

counterfactual) are unlikely to be assessed in any depth as part of the CMA's counterfactual assessment.[13]

(c) Horizontal unilateral effects

72. The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger. One way in which the CMA may assess whether there are sufficient remaining alternatives is through a consideration of measures of concentration, which can be measured in different ways (e.g. share of supply by volume, by value, of capacity or other measures) and the relevance of different measures to a given assessment will depend on the specific circumstances of a case. The MAG note that many aspects of the CMA's approach in the context of horizontal mergers will also be relevant to non-horizontal mergers.[14]

73. The MAG also explain that, in respect of horizontal mergers, unilateral effects may arise in differentiated product markets because a price increase becomes less costly when the products of two firms are brought under common ownership or control. Absent the merger, firms face a trade-off when considering whether to raise prices or reduce quality, range or service. After the merger, it would no longer be as costly for the merged entity to raise prices or reduce quality because it would recoup the profit on recaptured sales from those customers who would switch to the products of the other merger firm. Thus, in differentiated markets, horizontal unilateral effects are more likely where merger firms are close competitors or where their products are close substitutes.[15]

74. In this regard, closeness of competition is a relative concept and that concept is not limited to products or services that have similar characteristics. Furthermore, the constraints exerted by the merger firms on each other may be

---

[13] MAG §§3.8-3.10.
[14] MAG §§4.3-4.5.
[15] MAG §§4.6-4.8.

asymmetric, such that one merger firm may be a close competitive constraint on the other, without the reverse being the case.[16]

75. The types of evidence the CMA may rely on to assess closeness of competition are diverse and will vary from case to case. The CMA will normally not gather evidence from every possible source and will decide which sources to prioritise.[17]

(d) Vertical and conglomerate effects

76. The CMA typically distinguishes between two types of non-horizontal mergers: vertical merger between firms active at different levels in the same industry and conglomerate mergers between firms that are not active within the same supply chain but which are nevertheless related in some way. The MAG recognise that non-horizontal mergers do not involve a direct loss of competition between the merger firms and explain that, in certain circumstances, these mergers may also give rise to concerns other than those of foreclosure effects and the merged entity gaining access to commercially sensitive information of its rivals through its role as their supplier or customer.[18]

(e) Countervailing factors

77. The MAG identify two main ways in which there may be countervailing factors that prevent or mitigate any SLC arising from a merger: through merger efficiencies or through the entry and/or expansion of third parties in reaction to the effects of a merger.[19]

78. In respect of merger efficiencies, these comprise rivalry-enhancing efficiencies and/or relevant customer benefits. The MAG explain that rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects and, while relevant customer benefits do not prevent an SLC, they may outweigh an SLC and any adverse effects of the SLC. However, the CMA does not take

---

[16] MAG §§4.9-4.11.
[17] MAG §4.13.
[18] MAG §§7.1, 7.4.
[19] MAG §8.1.

relevant customer benefits into account in its competitive assessment; relevant customer benefits may be taken into account when the CMA considers remedy options.[20]

79. In respect of entry and expansion, the CMA may take into account in its competitive assessment the entry and/or expansion plans of rivals who will enter or expand irrespective of whether the merger proceeds. However, any analysis of a possible SLC includes consideration of the direct responses to the merger by rivals, potential rivals and customers.[21]

80. The MAG set out the framework that the CMA will use to assess and determine whether entry or expansion would prevent an SLC. The entry or expansion must be (a) timely, (b) likely and (c) sufficient to prevent an SLC. These conditions are cumulative and must be satisfied simultaneously.[22]

81. The MAG also recognise that potential or actual competitors may encounter barriers to entry or expansion, and the guidelines provide a non-exhaustive list of barriers to entry and expansion. Barriers to entry and expansion may be particularly high if some of these factors are present in combination. When considering the likelihood of successful entry by third parties, the CMA may consider the strategic behaviour of the merged entity or other incumbents which itself might create or strengthen a barrier to entry or limit the ability of a new entrant to gain a foothold in the market.[23]

(f) The market in which an SLC arises

82. The MAG explain the role of market definition in the CMA's assessment: the CMA is required to identify the market or markets within which an SLC exists, and an SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms

---

[20] MAG §§8.3-8.5. The framework that the CMA will use to assess whether merger efficiencies mean that the merger does not result in an SLC is set out at MAG §§8.8-8.20.
[21] MAG §8.28.
[22] MAG §§8.31-8.32. These three conditions are elaborated upon at MAG §§8.33-8.39.
[23] MAG §§8.40-8.43.

part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.[24]

83. Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger. The MAG note that, while market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment to assess the potentially significant constraints on the merger firms' behaviour captures the competitive dynamics more fully than formal market definition. Nonetheless, market definition can be helpful in developing certain types of evidence that may be relevant for the competitive assessment.[25]

84. The MAG make clear that, while market definition can sometimes be a useful tool, it is not an end in itself. The outcome of any market definition exercise does not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.[26]

85. The MAG explain how product and geographic markets are defined,[27] but notes that there may be no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition, and the CMA may take a simple approach to defining the market.[28]

(3) Merger remedies

86. Where the CMA finds an SLC, it must also decide whether and, if so, what action should be taken for the purpose of remedying, mitigating or preventing

[24] MAG §9.1.
[25] MAG §§9.2-9.3.
[26] MAG §9.4.
[27] MAG §§9.6-9.16.
[28] MAG §9.5.

the SLC or any adverse effects resulting from it, in particular having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent the SLC concerned and any resulting adverse effects: ss.35(3)-(4) of the Act.

87. In answering the statutory questions on remedies, the CMA will follow the approach set out in the '*Merger Remedies*' guidance (CMA87), published on 13 December 2018 ("MRG"). That approach reflects the principles established in the Tribunal's case law and the CMA's research into the outcomes of remedies.[29]

(a) The appropriate remedy

88. The CMA will seek remedies that are: effective in addressing the SLC and its resulting adverse effects, and then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that its remedy is not disproportionate to the aim of remedying the SLC and its adverse effects. It may, for example, consider whether there are any relevant consumer benefits ("RCBs") arising from the merger.[30]

89. The CMA's assessment of the effectiveness of a remedy will involve several distinct dimensions, such as the impact of the remedy on the SLC and resulting adverse effects, the appropriate duration and timing of the remedy, the practicality of the remedy and the acceptable risk profile of the remedy.[31]

90. When assessing the costs of the identified remedy, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies. In particular for completed mergers,

---

[29] MRG §1.4.

[30] MRG §3.4. See also *Tesco Plc v Competition Commission* [2009] CAT 6 at [137], which includes that the remedy must be no more onerous than is required to achieve that (necessary) aim, and s.41(5) of the Act.

[31] MRG §3.5.

the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.[32]

91. In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects. In such exceptional circumstances, the CMA will not pursue the remedy in question. In unusual situations, it is possible that all feasible remedies will only be partially effective in remedying an SLC. In such cases, the CMA will select the most effective remedy or package of remedies that is available.[33]

92. At Phase 2, the CMA will normally take RCBs into account by considering the extent to which alternative remedies may preserve such benefits. If remedies extinguish RCBs, then the benefits foregone may be considered to be a relevant cost of the remedy.[34]

93. The choice of remedies will reflect the particular circumstances of each investigation, although the CMA prefers structural remedies over behavioural remedies. This is because the CMA considers that structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry, whereas behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and structural remedies rarely require monitoring and enforcement once implemented.[35]

(b) The divestiture remedy

94. The MRG discuss at Chapter 5 that the issues in devising a divestment package include the importance of defining the scope of a package to address the SLC, with the following categories of risks in mind:

[32] MRG §§3.8-3.9.
[33] MRG §§3.11-3.12.
[34] MRG §§3.10, 3.15-3.16.
[35] MRG §§3.45-3.46.

(1) Composition risks: risks that the scope of the divestiture package may be too narrow, may not be attractive to a suitable purchaser, or not allow the purchaser to operate as an effective competitor in the market.

(2) Purchaser risks: risks that a suitable purchaser may not be available, or that a weak or otherwise inappropriate purchaser will buy the divestiture package.

(3) Asset risks: risks that the competitive capability of the divestiture package will deteriorate before the divestiture is completed, for example, because of the loss of customers.[36]

95. The MRG explain that, in identifying a divestiture package, the CMA's starting point will be divestiture of all or part of the acquired business. The CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.[37]

96. The MRG refer to *Somerfield*[38] (cited above). We note that the Tribunal held at [99] that:

> "it is not unreasonable for the [CMA] to consider, as a starting point, that 'restoring the status quo ante' would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question."

97. The scope of the divestiture package will reflect the particular circumstances of the case: it may comprise the sale of all relevant assets in one package or the sale of assets grouped together in a limited number of packages.[39]

98. In appropriate cases, the CMA will consider other structural or quasi-structural remedies.[40]

---

[36] MRG §5.3.
[37] MRG §§5.6-5.7.
[38] MRG footnote 103.
[39] MRG §5.8.
[40] MRW §5.11.

99. In general, the CMA will prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets.[41] There is a preference to avoid 'mix and match' divestitures.[42]

H. GROUND 1A: THE CMA'S SLC FINDING IS UNSUPPORTED BY EVIDENCE

100. Under its Ground 1A, Cérélia claimed that the CMA's SLC conclusions were irrational. Cérélia's argument rested on four main points:

(a) The absence of a coherent CMA framework, and failure to gather relevant evidence and carry out the basic economic analysis that would support the CMA's conclusions;

(b) The CMA's uncritical reliance on retailer statements;

(c) The CMA's failure to deal with other competitive threats; and

(d) The CMA's irrationally broad SLC Finding.

101. We consider each of these in turn.

(1) The CMA failed to establish a coherent framework for its SLC analysis

102. Cérélia's claim that the CMA lacked a coherent framework rests on two aspects:

(1) First, Cérélia contends that the CMA's assumption that rebalancing by retailers is easy is not supported by an adequate evidential basis and indeed was undermined for example by evidence on how consumers would react to the non-availability of a particular DTB product. In a 2008 inquiry into groceries retailing, the Competition Commission had concluded that grocery retailers were not able to achieve lasting

---

[41] MRW §5.12.
[42] MRW §§5.16.

diversion from branded to PL goods.[43] Cérélia states that the CMA's file contained sufficient evidence (purportedly ignored by the CMA) to demonstrate that few customers would respond to a retailer's decision to withdraw a product from sale by diverting between PL branded and consumer branded, and that, for example, customers were more likely to switch within a consumer brand than from branded to PL products.[44] Cérélia suggests that the CMA failed to seek data that would show whether rebalancing was too costly for retailers to present a credible threat to suppliers, particularly given evidence obtained by the CMA that, Cérélia asserts, shows purchasing decisions by retailers are informed by customer demand.[45]

(2) Secondly, Cérélia contends that, when drawing conclusions on SLC, the CMA had failed to take into account the critical fact that Cérélia and Jus-Rol undertook separate activities in the supply chain, and that Cérélia was in most cases the manufacturer of DTB products sold by Jus-Rol. The CMA failed to investigate properly how this affects the impact of any purported rebalancing on the Parties.

(a) Retailer rebalancing

(i) <u>Cérélia's arguments</u>

103. Cérélia states that notwithstanding that the "rebalancing" mechanism is the core underpinning of the SLC Finding, the Decision undertakes almost no analysis of retailers' ability or incentive to carry out this threat, or the competitive impact that any rebalancing would have on Cérélia and Jus-Rol.[46] The Decision does not articulate any mechanism by which the rebalancing threat would be carried out,[47] and the CMA relied on concerns raised by retailers which were not

[43] Competition Commission, Grocery Market Investigation Final Report dated 30 April 2008. Final Report, Appendix 9.10, paragraph 33.
[44] ANoA §§71-72.
[45] ANoA §§73-76.
[46] ANoA §62.
[47] ANoA §66.

supported by concrete evidence. This demonstrates that the CMA's theory of harm was theoretical rather than real.[48]

104. As a result, the CMA failed to consider how the Merger altered market dynamics by changing the incentives of the parties involved. Instead, the CMA assumed that there was sufficient financial incentive for retailers to rebalance demand between PL branded and consumer branded DTB products, and that this could easily be achieved, such that this threat would operate as a competitive constraint on the Parties.[49]

105. Although Cérélia accepts that there exists some degree of competition between its PL products and Jus-Rol's products at retail level, it does not accept that this assists the CMA because Cérélia argues that the CMA needs to establish the existence of competition between the Parties in the relevant market as defined, namely the wholesale level supply of DTB products. Cérélia's position on this was summarised by its leading counsel at the Hearing (Day 1) as follows:

> "To succeed in this appeal, the CMA needs to show that retailers will switch from private label to Jus-Rol and vice versa, in order to get better terms from Cérélia and Jus-Rol, not because of consumer preference. They need to do it in order to get better terms from Cérélia and Jus-Rol and that Cérélia and Jus-Rol appreciate that threat."

106. However, Cérélia's leading counsel submitted that, while retailers would switch between PL and Jus-Rol, the evidence does not show this is a result of retailers exerting bargaining leverage (Day 1):

> "… there's evidence that retailers will stock more private label and less Jus-Rol, for example, if that is what their consumers prefer but it does not follow … that the retailers will stock more private label and less Jus-Rol to secure better wholesale terms."

107. In support of Cérélia's contention that the CMA did not establish a coherent framework to consider the ease with which retailers could rebalance between PL and branded products, leading counsel for Cérélia referred the Tribunal to MAG Chapter 4 on 'Horizontal unilateral effects'. In particular, to MAG §§4.6 to 4.8, which set out the basic requirements for analysis in relation to

[48] ANoA §66.
[49] ANoA §82.

differentiated products, which Cérélia says this Merger is concerned with. Cérélia contends that, following this analytical framework, the CMA needed to do a cost-benefit analysis to see if the merged entity can raise prices more than in the counterfactual. Since in this case the merged entity's conduct depends on what its customers, who are the retailers, would do, the CMA needed to ask whether retailers are able to threaten in a credible way to replace PL with Jus-Rol and vice versa to secure better terms from Cérélia and Jus-Rol and whether the merged entity would earn more or less profit if the retailer switches in whole or in part from PL to Jus-Rol and vice versa. However, the CMA failed to ask these basic questions.

108. Instead, Cérélia argued, the Decision irrationally assumed at §7.90 that it is likely to be relatively easy and costless for retailers to switch volumes between existing suppliers of branded and PL products despite the CMA having the following evidence that contradicts this:

(1) Retailers' purchasing decisions are informed by what their customers want to buy and those customers want choice: Decision §§7.8, 7.11. The CMA was told by a large retailer in a June 2022 discussion that its decision is informed by the importance of a particular product to its customers and the impact on profitability of carrying that product. Where a product is important to customers, the retailer is unlikely to consider delisting it or reducing the volume of product stocked. A transcript of a September 2022 meeting between the CMA and that retailer records that it told the CMA there is a limit to what it can do to switch between PL and branded products or switch volumes because it is constrained by customers wanting certain entry price points for products. The paramount importance placed by retailers on consumer preferences is reinforced in a transcript of a November 2022 meeting between the CMA and another large retailer where it told the CMA that its decision on what product to buy at wholesale level is driven by the customer.

(2) While PL products are sold at lower price points and branded products such as Jus-Rol are typically sold for a higher price, some customers are

willing to pay this 'brand premium': Decision §9.120. A February 2022 email between Jus-Rol and a retailer also reflects that customers will not buy another DTB product if Jus-Rol is not available.

(3) Under the Groceries Supply Code of Practice ("GSCOP") §16, retailers who wish to de-list a supplier must provide notice and reasons for the de-listing decision. De-listing is defined at GSCOP §1 to include a significant reduction in volume. If, pre-Merger, retailers did use the threat to switch or rebalance between PL and branded products as a negotiating lever against the Parties, there should be documentary evidence of this. However, there is none. Instead, for example, the April 2022 Phase 1 questionnaire responses provided by a large retailer to the CMA cite product performance (i.e. not unsatisfactory commercial terms) as its reason for de-listing Jus-Rol products. The retailer also states that the wholesale prices of PL products are not a factor in determining the wholesale prices of branded products (and vice versa) and that the retail prices it sets for PL and branded products are not linked. In its July 2022 Phase 2 questionnaire response the same retailer also told the CMA that the increase in allocated shelf space which it gave to branded DTB products was due to a change in consumer buying habits. Further, when asked by the CMA what options were available to it if it was not happy with aspects of its PL and branded suppliers' offerings, the retailer's response did not mention any express or implicit threat to switch. The transcript of a September 2022 meeting between the CMA and the same large retailer records that the retailer has not to its knowledge threatened to switch from PL to branded or vice versa in commercial negotiations with the Parties.

(4) Retailers were unable to substantiate their concerns regarding the Merger. For example, a large retailer whose evidence is summarised at Decision §9.54(c) told the CMA during a discussion in March 2022 that the transaction leverage it has held from the competitive tension between PL and branded suppliers may be lost and set out in its April 2022 Phase 1 questionnaire response the impact on competition that it thinks the Merger would have. However, when the CMA contacted the retailer in

April and August 2022 seeking clarification and relevant documentary evidence to substantiate those concerns, no documentary substantiation or quantification in monetary terms was provided to the CMA by the retailer. Further, another large retailer's concerns regarding the Merger's impact on competition were based on a belief that there was a lack of alternative PL suppliers and which the CMA knew was erroneous but failed to correct.

109. Cérélia contended that this evidence on retailers' attitudes and customer preferences, which the CMA has, shows that it is far from easy and costless for a retailer to switch between branded and PL products. Instead, the evidence is inconsistent with the CMA's theory that pre-Merger the Parties were constrained by retailers' implicit threat of switching and demonstrates that that alleged threat is not credible.

110. Cérélia also points out that the CMA had no probative evidence beyond the unsubstantiated concerns by retailers and the CMA did not carry out an analysis on diversion or how de-listing or volume reductions would impact retailer sales.

111. Leading counsel for Cérélia contended that, in reality, retailers would be reluctant to link wholesale and retail level actions due to concerns about consumer reactions. He said (Day 1):

> "If a shopper walks into Tesco, looking for a private label product, there's relatively little that Tesco can do to persuade them to buy Jus-Rol instead or vice versa. If Tesco does use the levers that it has, like price or taking some products off the shelves, it risks upsetting its customers and losing sales to other retailers. That's, fundamentally, not what retailers do and the evidence makes this crystal clear."

112. To support this contention, he took us to the confidential results of a market research study that GMI had commissioned to understand substitution patterns between DTB products at the retail level. This exercise investigated consumer reactions to a situation in which a consumer who wished to purchase a particular DTB product (of the brand they bought on their last shopping trip) found that the product was not available on the retailer's shelves. He argued that we should focus not on the closest alternative, but instead to look at the importance of all the other options identified by consumers who had participated in this research.

His contention was that, from the retailer's perspective, the prevalence of these other alternatives, taken in aggregate, illustrated the scale of the commercial damage that the retailer would suffer if it did indeed take the step of delisting the brand in question. He argued that if that commercial damage was sufficiently evident, it would preclude the retailer from making a credible threat to delist any one brand, and that without this threat it was not possible for the wholesale bargaining process, on which the CMA's case rested, to operate.

(ii) CMA's arguments

113. In its AD, the CMA responds that Cérélia has adopted an overly narrow description of the competitive assessment carried out in the Decision[50] and the series of economic analyses that Cérélia contends the CMA ought to have carried out is primarily premised on an incorrect argument that the CMA should have conducted its assessment of the closeness of competition between the Parties on a vertical basis only.[51]

114. The implicit threat that retailers might rebalance their demand for PL and branded products was only one competitive assessment identified in the Decision, which considered that competition between the Parties occurred more broadly and as part of an ongoing process:[52] Decision §§7.36, 9.54(b), 9.73-9.89, 9.91. The CMA is also not required to carry out a granular exercise of assessing the impact of a merger on each parameter of competition before it can find an SLC and has a wide margin of appreciation as to the inquiries it carries out in order to answer the statutory question of whether a merger has resulted (or may be expected to result) in an SLC.[53] It is apparent from case law that Cérélia faces a high hurdle of showing either (i) there was "simply no evidence at all" to support the SLC Finding or (ii) on the basis of the evidence the CMA could not reasonably have come to the conclusions that it did (*Stagecoach* at [45]).[54]

---

[50] AD §48.
[51] AD §49.
[52] AD §§48-48A.
[53] AD §§48B, 49, 49B.
[54] AD §45.

115. Leading counsel for the CMA submitted at the Hearing that Cérélia's arguments, which focus on the credibility or absence of a real rebalancing threat from retailers, is a gross simplification of the CMA's theory of harm in the Decision and entirely artificial in construction. The Decision is clear that the mechanism referred to as 'rebalancing' or 'flexing' between PL and branded products is an ongoing process by which retailers select their optimal volume mix of PL and branded products based on the offerings of suppliers to best serve their end-customers and their commercial interests: Decision §7.34. Footnote 228 in the Decision further explains that the terms 'volume mix' and 'shelf space' are considered as interchangeable in this context on the basis that more shelf space is typically allocated to better selling products. In this regard, leading counsel for the CMA pointed out that (Day 2):

> "Just pausing there, there's no reference there to any threatening. It's simply saying: retailers look at the offerings before them and decide what the optimal volume mix at any one time for them is, so as to best serve their end consumers and their commercial interests."

116. Further, in relation to "commercial interests", leading counsel for the CMA submitted that this needs to be read in context. He referred to Decision §§7.8-7.13, which are under the heading "Grocery retailers' purchasing decisions", to show that the Decision acknowledges that retailers' decisions whether to stock PL products, branded products or both are driven by a number of commercial factors. As a result:

> "7.9 … the CMA is of the view that competition at the wholesale level is linked to the competitive dynamics at the retail level. That is, the demand for DTB products at the retail level significantly influences the amount that the grocery retailers purchase at the wholesale level (i.e. it is a 'derived demand')."

117. Leading counsel for the CMA also turned us to Decision §7.35:

> "DTB suppliers will consider the impact of their offering across [price, quality, range and service] on expected volumes which in turn drive profits. The supplier is therefore incentivised to provide the retailer with a good deal because if it does not (e.g. if it raises its price (too much) or fails to develop new products etc), the retailer may (i) switch to another supplier for that channel or (ii) subsequently allocate more shelf space to the other channel. For example, during a tender or renegotiation of a PL supplier's offering to a retailer, the supplier is constrained not only by any risk that it will be replaced by an alternative PL supplier but also by the prospect that, if it remains the selected PL supplier, it may lose sales to the branded channel. As a result, there

> is competition between DTB suppliers not only within the PL and branded channels but also across the channels."

He emphasised that the wording in the Decision refers to a "risk", not threat.

118. Therefore, contrary to Cérélia's characterisation, the CMA's core finding is not based on the ability of retailers to threaten, independently of anything which is happening at retail level in terms of derived demand, or independently of anything which is more or less attractive about the price, quality, range or service dimensions of the wholesalers' offering.

119. Instead, the CMA's case rests on two related propositions in relation to this wholesale-retail level distinction. First, that there are strong links between competition at the retail and wholesale levels, since the retailer's demand for DTB products (whether from PL or branded suppliers) is a derived demand that depends in turn on how consumers behave at retail level. Secondly, that Cérélia's characterisation of the competitive mechanism addresses the wrong question when assessing the SLC concern, since an SLC theory of harm is dependent on how the Parties' customers will react to a unilateral change in price, rather than whether the Parties' customers will simply exert bargaining leverage as a self-standing activity.

120. This latter aspect was addressed by leading counsel for the CMA, who emphasised the need to consider how retailers would respond to an attempt by a supplier to increase the wholesale price as follows (Day 3):

> "Once retailers are acknowledged to be acting within that context, seeking to serve their customers and their commercial self interest as best they can, not within the context of threats levied in some kind of vacuum independently of that dynamic, this point falls away."

And:

> "[Cérélia's argument is] all built on this notion that the CMA believes that the retailers are in the habit or routinely take recourse to making empty threats which are destructive of their own commercial interests. Again, that's not our position. We don't say they make empty threats, we say they make real life decisions on how much to stock, based on what's being offered to them and that's what gives rise to the flex."

121. Leading counsel for the CMA cited the evidence gathered by the CMA, which included the same retailer questionnaires, meeting notes and transcripts that leading counsel for Cérélia referred the Tribunal to and which were summarised in the Decision. He showed how, read in context, the evidence and the Decision described the ongoing conversations that arise between retailers and suppliers on the performance of their products. He emphasised that these conversations took place within the context of the limited shelf space that is available to DTB products. It was this, and the fact that retailers had to weigh up the relative merits of PL and branded products within this limited shelf space, which provided the linkage between retail and wholesale level competition. (For example, Decision §§7.10, 7.36, 9.99-9.103; and §§9.54(b), 9.150, 9.152.)

122. Therefore, when the wholesale price of a product increases, the retailer faces a choice between passing on that upstream price increase in a higher retail price, or absorbing the wholesale price increase in the form of a lower retail margin (or a combination of the two). In either event, the CMA argued that it was reasonable for it to infer that the product in question would come under pressure to justify the space allocated to it by the retailer. If the retailer had increased the retail price, that product would (other things equal) be expected to suffer reduced sales volumes thereby delivering less profit for the retailer. But if the retailer sought to protect the sales volumes of this product by absorbing the wholesale price rise into a smaller retail margin, this lower retail margin would again cause a reduction in the product's ability to deliver profit to the retailer.

123. On this basis, it was perfectly rational – even inevitable – to expect that a retailer would seek to give less prominence to a product whose commercial performance had declined. It was not necessary for the CMA to determine the extent to which wholesale prices were actually passed on into retail price changes, since the adverse consequences of higher wholesale prices on the retailer would arise under any reasonable scenario.

124. Leading counsel for the CMA referred to the CMA's skeleton argument §12, which reiterated that the key legal question arising on Ground 1A is whether there was "evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion that it did" (*Tobii* at

[56]). Although leading counsel for Cérélia submitted it is a high hurdle, it was agreed that that was the relevant test. The CMA further submitted that *Stagecoach* explains at [42]-[45] what is meant by probative evidence. In particular, the Tribunal's observation in *Stagecoach* at [45] that the fact that the evidence might have supported alternative conclusions is not determinative of unreasonableness in respect of the conclusion actually reached. Leading counsel for the CMA urged the Tribunal to be wary of Cérélia's challenge, which the CMA contends is in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review. Here, Cérélia has taken the Tribunal piecemeal through each piece of evidence to say that that individual piece of evidence could not rationally support a finding, on the basis of that piece of evidence alone. However, the CMA submits that the Tribunal has to look at the evidence as a whole, how all the evidence relates to all the other evidence and what it adds up to in total.

(iii) Our assessment

125. In our view, the CMA's analysis is entirely reasonable. The clearly stated concerns from major retailers that the Merger would constrain their ability to exert bargaining leverage across the PL and branded channels seems entirely consistent with the way in which the Parties compete against one another to justify the share of scarce retailer shelf space that is allocated to their DTB products. Indeed it is Cérélia's assertions that wholesale and retail competition should be regarded as unconnected unless proof to the contrary could be shown that seems the more contentious approach.

126. Even taking the results of the GMI market research at face value, we consider that it does not support Cérélia's case. The research indicated that the closest substitute for one DTB brand would be another DTB product of the same description. Given the very high share of all branded products accounted for by Jus-Rol, this in turn suggests that branded and PL versions of any particular product are each other's closest substitutes at retail level. That finding is entirely consistent with both the CMA's theory of harm, and the evidence from retailers that they benefit from the ability to play the Parties' product offers off against one another.

127. We also consider that there are a number of serious flaws in Cérélia's argument that we should look at the importance of all the other options identified by customers who participated in the GMI market research because, if the commercial damage was sufficiently evident, it would preclude the retailer from making a credible threat to delist any one brand.

128. First, it is incorrect to aggregate all of the stated consumer switching options other than the switch to the PL equivalent and to equate this aggregate with commercial damage to the retailer. Instead, several of the other options on the study we were shown refer to possibilities (e.g, "bought another size/amount", "bought another type/flavour", "bought something else instead of category", "would have bought it on my next trip"), that seem to involve no loss of business to the retailer concerned. Only a very small proportion (below 10%) of responses indicated a switch to buy the unavailable product at another store. This evidence therefore fails to support Cérélia's main contention that it is particularly harmful for the retailer to delist an individual DTB product.

129. Second, whilst it is understandable that this market research exercise focuses on the question "What would you do if your product isn't available?", because that is a well-used device to force the respondent to identify and rank alternatives, this research question does not address the actual levers available to retailers when considering how to play off one supplier against another. Delisting might be the ultimate threat, but, as the evidence before us showed, it does not often take place within the DTB segment. If retailers take less draconian measures to flex their bargaining power over DTB suppliers, such as reducing or degrading the shelf space allocated to a product, consumers who have strong preferences to buy that particular product would still find it available and would not need to shop elsewhere. This seriously undermines the validity of Cérélia's claim that exercise of bargaining power by retailers lacks credibility.

130. Third, we consider that leading counsel for the CMA was right to stress the need to consider the retailer bargaining mechanism specifically in relation to the context of the SLC concern that is central to this matter, and not "in a vacuum". The SLC concern focuses specifically on the constraints that prevent a merging firm from raising price, and on how those constraints change as a result of the

merger. The appropriate way to test whether retailer customers exert bargaining power in this scenario is to enquire as to how they would respond to a unilateral price increase by one or other supplier. If one focuses on (say) a significant unilateral price rise charged by Cérélia for its PL products, it is entirely reasonable – in fact necessary – to trace through how such a unilateral wholesale price change might affect the retailer's conduct, and what role the availability of alternative wholesale suppliers might play in that scenario. Whether the retailer absorbs or passes on such a wholesale price increase, it is entirely rational for the CMA to predict that this will cause the product in question to perform less well for the retailer, and that this will give rise to pressure to rebalance the retailer's preferences between this and competing products whose performance have not deteriorated.

131. Therefore, we reject Cérélia's contention that rebalancing is so costly to the retailer that the CMA should have ruled it out as a means of negotiating. We do not see any irrationality in the CMA's contrary view that some such rebalancing is likely to be a more or less inevitable consequence of any unilateral increase in price of one of the merging firm's products.

(b) The separate activities of the parties

(i) <u>Cérélia's arguments</u>

132. Throughout the investigation and the current application, Cérélia has maintained that it is wrong for the CMA to have characterised the transaction as horizontal in nature, because of the different economic activities that are performed by the Parties. Cérélia is a manufacturer of DTB products, whereas Jus-Rol is primarily involved in the design and marketing of DTB brands and contracts with others to perform the manufacturing function. This distinction is emphasised by the fact that Cérélia manufactures the great majority […][✂] of the branded products sold by Jus-Rol in the UK. Cérélia's belief that the transaction is essentially vertical rather than horizontal in nature led it to prepare an analysis of the possible vertical foreclosure concerns that might arise from the transaction.

133. Cérélia stated, and provided information to the CMA, that it was indifferent pre-Merger as to whether retailers switch between buying PL or Jus-Rol products: Decision §9.140. The CMA acknowledged in its Decision that if manufacturing margins were similar across the PL and branded channels, then in theory, it would not make economic sense for the merged entity to degrade Jus-Rol post-Merger if the expectation were that customers would divert from Jus-Rol to the PL alternative in response and the CMA was unable to fully rely on current margin data to assess the Parties' incentives to raise prices post-Merger: Decision §§9.388-9.389. Cérélia relied on these statements in the Decision as pointing to a conclusion that pre-merger, Cérélia did not have a preference for making sales through either PL or branded, such that switching by retailers would have limited financial impact and the Merger would not relax the competitive constraints on the Parties.

(ii) CMA's arguments

134. In contrast, the CMA has maintained its view that the Parties compete, on the grounds that both supply DTB products at the wholesale level to UK retailers. It therefore considered that the standard model of unilateral effects was the appropriate basis for assessing whether the Merger led to an SLC, and did not accept that Cérélia's submissions on vertical foreclosure were relevant.

135. Leading counsel for the CMA explained that, as Cérélia's reliance on the Parties' vertical relationship was raised throughout the investigation process, the CMA addressed this by gathering evidence, which includes retailer views that there was a competitive tension between PL and branded products (Decision §§7.7-7.13, 7.20-7.29, 7.80-7.92, 8.13-8.24, 9.24-9.30, 9.35-9.38, 9.42-9.45, 9.51-9.64, 9.71-9.89). In its competitive assessment, the CMA took into account that Cérélia supplies PL products whereas Jus-Rol supplies branded products, alongside the particular fact that Cérélia manufactures for Jus-Rol (Decision §§6.5, 6.6, 6.10, 6.11, 6.15-6.18, 6.21-6.27). These formed the basis of the CMA's competitive assessment, whose overall structure is set out at §9.2, and the CMA provided reasons in the Decision why it analysed the Merger on the basis of a horizontal unilateral effects theory of harm but which took particular account at various points of the vertical relationship between the

Parties (e.g. Decision §§9.4-9.6, Table 9.1, §§9.14-9.18, 9.21-99.22, 9.25-9.34, 9.39-9.41, 9.46-9.49, 9.65-9.67, 9.90-9.92, 9.94-9.97, 9.101-9.103, 9.105-9.111, 9.130-9.133, 9.141-9.142, 9.150-9.156., 9.158, 9.160-9.161, 9.166-9.168, 9.310-9.313).

(iii) Our assessment

136. Our starting point is that the CMA is clearly justified in saying that both Parties supply DTB products at the wholesale level - ie to retailers. Where a merger involves two suppliers selling into the same set of customers it is rational for the CMA to employ the unilateral effects framework for its analysis, albeit that in doing so it should take careful account of the factual detail regarding supply arrangements higher up the supply chain. Since the Decision relates to the CMA's unilateral effects theory of harm, we shall concentrate our review on whether that theory provided a coherent framework for the SLC Finding. In doing so, however, it is important to take account of the specific facts associated with the contract manufacturer relationship that Cérélia already had with Jus-Rol prior to the Merger. In particular, how that might affect the incentives facing the post-Merger firm.

137. We have decided above that it was rational for the CMA to conclude that retail level competition between the PL products sold by Cérélia to the major food retailers and the Jus-Rol brand can be expected to feed back to create competition between the Parties' products at the wholesale level. Thus, the next step is to review how the CMA considered that the Merger might relax the competitive constraints operating on each set of products.

138. Under the standard unilateral effects framework, one first seeks to understand what factors constrain the prices charged for the product prior to the transaction, and then assesses the extent to which the transaction might relax those constraints to generate an SLC. In making this assessment, the focus is on what changes as a result of the Merger. The constraints that arise from the threat of losing sales to third party products can be assumed to be unchanged pre- and post-Merger, and so it is the loss of competition between the Parties' products that is critical.

139. The CMA did this in the Decision from §9.379. The CMA conducted a conventional assessment of unilateral effects, focusing on the incentives of either Party to raise price. The essential factor here is that, to the extent that loss of sales to the other Party was a significant factor in constraining either Party from increasing its price pre-Merger (or in the counterfactual), then the fact that any switching (or 'diversion') to the other Party's products would be recaptured by the post-Merger firm would result in this constraint being relaxed.

140. For Jus-Rol's DTB products, the CMA's assessment starting at Decision §9.387 does acknowledge that the particular facts of this case require an adjustment to the standard unilateral effects framework. Where Cérélia is already the contract manufacturer for Jus-Rol in the pre-Merger environment, this could offset or even neutralise the SLC concern because, although the post-Merger firm would benefit from the margins earned on any sales that diverted from Jus-Rol to Cérélia's PL products, it would simultaneously lose out on the margin that Cérélia earned on the manufacture of the Jus-Rol product volumes that were lost to Cérélia's PL products in the event of a Jus-Rol price rise. Pre-Merger, Jus-Rol was indifferent about the harm to Cérélia from any loss of volume that its brand suffered (since that was Cérélia's loss, and not Jus-Rol's), but the post-Merger firm would care both about the loss of the manufacturing margin on the reduced Jus-Rol sale, and the gain in margin on any diversion of demand towards Cérélia's PL product. In the simplest case where Cérélia made 100% of Jus-Rol's products, and where Cérélia's margin on contract sales to Jus-Rol was similar to its margin on PL contracts with retailers, these two influences would cancel out. This point is acknowledged at Decision §9.388:

> "… if manufacturing margins are similar across the PL and branded channels or larger in the branded channel, it would appear, in theory, to not make economic sense for the Merged Entity to degrade the Jus-Rol channel post-Merger if the expectation were that customers would divert from Jus-Rol to the PL alternative in response. Under these conditions, the margin on any sales recaptured in the PL channel would be offset by the loss of the manufacturing margin in the branded channel. …"

141. The CMA did undertake some investigation of Cérélia's relative margins in the PL and contract manufacture channels, but this did not yield any definitive results. More concretely, the CMA observed that Cérélia manufactures the great majority […][✂] of Jus-Rol's products, and so this neutralising effect would

not operate on the remainder. Further, at Decision §§9.390-391 the CMA proposed an argument about dynamic competition between PL and branded products, whereby the fact that the post-Merger firm would gain control of both branded and PL product specifications might mean that under Cérélia's ownership Jus-Rol would no longer need to have the same concern about possible product quality improvements implemented by Cérélia on PL products.

142. The situation is somewhat different as regards the post-Merger constraints on Cérélia's wholesale prices for PL contracts. Here, Cérélia's primary argument was that the CMA had undertaken an irrational approach to assessing the ability of retailers to switch between Cérélia and other PL DTB product manufacturers. We address that point below. But to the extent that competition from Jus-Rol's branded products is a significant part of the constraint on the prices that Cérélia can charge on PL products pre-Merger, the CMA's unilateral effects concern is more straightforward and does not suffer from the neutralising effect described above with respect to constraints on Jus-Rol's product pricing.

143. This is addressed at Decision §9.395 where the CMA argues that the diversion of sales from Cérélia's PL volumes to Jus-Rol's branded product sales would make a significant difference to the competitive incentives operating on the post-Merger firm. Even though the commercial harm to Cérélia from losing volume from its PL products to Jus-Rol is to some extent cushioned by the fact that Cérélia would continue to benefit from the manufacturing margin it earns on Jus-Rol's products, that factor would be in play both pre- and post-Merger. The change from the Merger would arise from the fact that Cérélia would also benefit from the whole of the margin on the Jus-Rol branded product sale if any such diversion occurred.

144. In principle, this mechanism is clear and well established by the CMA. The only legitimate question that remains is whether the CMA was wrong to conclude that the threat from diversion from Cérélia to Jus-Rol products was a significant part of the total constraints acting on the pre-Merger firm. This in turn rests largely on whether the CMA has been irrational in its assessment of the competitive threat on Cérélia from other potential PL suppliers (see further below).

145. Whilst the so-called 'vertical' aspects of the transaction (more precisely the fact that Cérélia is a manufacturer of both PL and Jus-Rol branded products) does impact the SLC assessment, the CMA took this into account in its assessment. We consider it was rational for the CMA to conclude that these vertical aspects do not eliminate the legitimate SLC concerns that it describes in the Decision.

(2) The CMA relied uncritically on the statements of retailers

(a) Cérélia's arguments

146. Cérélia criticises the CMA for overstating the extent of retailer support for its theory of harm, and then "uncritically" adopting these retailer views in reaching its conclusions. In support of this, we were referred by leading counsel for Cérélia to the same retailer questionnaires, meeting notes and transcripts which Cérélia relied upon in respect of its sub-Ground (1) arguments, and Cérélia relies on these to support its contentions under this sub-Ground (2) that the CMA relied uncritically on retailer statements. In particular Cérélia contends that:

(1) There was little, if any, documentary evidence of retailers threatening to rebalance their DTB product sales as a way of exercising the bargaining power that they claimed to value;

(2) The evidence identified a handful of instances where retailers had given notice to a supplier to delist an individual DTB product. It was explained that such delisting events triggered a requirement for the retailer to engage with the supplier pursuant to the GSCOP. However, in each case, it was evident that the retailer's decision had been instigated by the product in question under-performing, not as a tool for commercial bargaining; and

(3) There is a paucity of examples of such formal delisting events.

147. Cérélia also contends that the CMA "materially overstated" the extent to which retailers agreed with the CMA's SLC conclusions, which characterised retailer

support as clear and consistent when it was mixed and equivocal. Having conducted its own document-by-document analysis of the evidence on which the CMA based its conclusions, Cérélia states that the CMA's summary of the retailer evidence is based on errors in its interpretation of the evidence, and that it summarised retailer evidence in a selective and superficial manner.[55] For example, one of the national grocery retailers who expressed concerns about the loss of the implicit rebalancing threat explained that these concerns were "forward looking and speculative", and that this caveat was not included in the Decision. Cérélia further refers to two national grocery retailers who it says mentioned the rebalancing threat only in response to leading questions by the CMA. Cérélia also says that the CMA relied upon retailer statements in support of its proposition that "Cérélia and Jus-Rol compete at wholesale level" when it had not used the word wholesale in the question it posed to retailers. In these circumstances, Cérélia says the CMA failed to properly appraise the evidence supplied to it and its conclusions are therefore unsupported by any adequate evidential base, and are irrational.

148. Cérélia's final set of arguments on the retailer evidence relates to the reliance placed by the CMA on the description of retailer conduct in the Parties' internal documents. Cérélia contends that if the rebalancing threat was part of Cérélia and Jus-Rol's thinking in relation to their DTB offers, it would have been referred to regularly in contemporaneous internal documents, yet the CMA had only identified a "mere handful" of documents it considered supported the SLC.

(b) CMA's arguments

149. The CMA acknowledges in their Decision that the evidence from retailers in respect of the rebalancing mechanism was not typically explicit, but said they would not expect such competitive leveraging to be communicated explicitly to the Parties by grocery retailers. Retailers had described the constraint as "implicit" and the market was small with few alternative suppliers, such that the available supply options to grocery retailers would generally be expected to be well-understood by market participants. (Decision §9.94(c)).

---

[55] ANoA §§99-103.

150. In respect of one retailer response, […][✂], the CMA acknowledges that it had made an error, since the commercial concern it expressed with the Merger related purely to the change in ownership and had no links to the loss of competition between them as such. In relation to the other retailers, the CMA says that Cérélia's line-by-line analysis of their evidence is misconceived; the key question for the Tribunal was whether the CMA could reasonably have reached the conclusions it did by reference to the body of evidence as a whole.[56] The CMA also casts Cérélia's analysis of the evidence as overly narrow, explaining that retailers referred to the implicit rebalancing mechanism in their own words (eg "playing suppliers off against each other") and that it was open to the CMA to interpret the evidence as supportive of its theory of harm.

151. As regards the Parties' internal documents, the CMA points out that these showed both that (i) the Parties monitored each other's prices and regarded each other as competitors (e.g. Decision §9.78(a)) and (ii) retailers consider replacing Jus-Rol products with equivalent PL products (and vice versa) when assessing their product ranges.[57]

(c) Our assessment

152. The Decision deals at some length with retailer views about both the nature of competition between the Parties' products and the likely impact of the Merger on competition. It must be said that this evidence, taken at face value, is plainly unhelpful to Cérélia's case: six out of nine grocery retailers who responded to the CMA's questionnaire, who together account for a large majority of supply of DTB products in the UK, reported there was a degree of competitive tension between the Parties that they can use as a lever in negotiations (Decision §9.54). The majority of retailers who responded to the inquiry (based on value of DTB sales) considered that the Merger would reduce competition (Decision §9.344).

153. Concerns regarding the effect of the Merger were greatest for the large grocery retailers who stock PL and branded DTB products side by side, whereas those

[56] AD §74.
[57] AD §§34.4.4 and 34.4.5.

who concentrated solely or largely on either PL or branded products expressed fewer or no concerns. This possibly ties in with Cérélia's challenge to the breadth of the SLC Finding (which we address below), but it is not surprising that the retailers who currently have significant trading arrangements with both Parties were those to express concerns with the reduction in their bargaining options post-Merger.

154. It is clear to us that this aspect of Cérélia's challenge must fail. Having reviewed both Cérélia's and the CMA's analyses of the retailer evidence, we do not agree that the CMA misunderstood or misrepresented these views in reaching its conclusions in the Decision. As we have concluded above, there is a clear and highly plausible link between a retailer's concern with loss of bargaining power and an SLC effect, and, whilst the CMA reminded us that there was no definitive hierarchy in the categories of evidence that it should take into account, it is legitimate for the CMA to take serious account of the views of customers who would be affected by a Merger. This holds especially true where (as here) those customers are sophisticated entities who can be expected to have carefully considered views on the effects of the Merger. As leading counsel for the CMA stressed during the Hearing, it is misleading to dismiss a customer view as "speculative" solely because it relates to a view about what might happen in the future, when a merger assessment is by its nature generally a forward-looking exercise.

155. That is not to say the CMA should be entirely uncritical of the retailers' responses, and the […][✂] case illustrates the possibility that retailer customer views might be motivated by concerns that do not tie in with the SLC theory of harm. However, Cérélia's attempt to argue that this same criticism applies to the other major retailers who supported the SLC fails. Contrary to Cérélia's submissions, the CMA did find support for the existence of the pre-Merger constraint that the retailers had identified as being lost from the Merger.

156. The same conclusion broadly applies to Cérélia's contention that there was little if any documentary evidence of retailers threatening to rebalance their DTB product sales as a way of exercising the bargaining power that they claimed to value. We reject Cérélia's argument as, in light of the circumstances described

at Decision §9.94, it was not irrational for the CMA to give weight to the retailers' responses in the absence of evidence showing express communication of competitive leveraging.

157. As regards Cérélia's argument that the limited instances of delisting were due to underperformance of a product and not to a rebalancing threat, we consider that this evidence is entirely consistent with the CMA's theory of harm and the notion that the results of gains or losses between products at the retail level would feed back to affect commercial discussions between suppliers and retailers at the wholesale level.

158. Further, Cérélia's reliance on the paucity of examples of such formal delisting events also misses the point. This argument falsely assumes that delisting is the only bargaining tool open to the retailer. It is more realistic to infer that such events would form the tip of a much larger iceberg. The evidence collected by the CMA from retailers describing the bargaining power they derive from playing off their PL and branded DTB suppliers, allied to the clear understanding that these suppliers vie for a more or less fixed allocation of retail shelf space, was sufficient to meet the CMA's obligations. Had the CMA's enquiries evidenced more, or more concrete, examples of retailers actually threatening to shift shelf space allocations, that would of course have provided further support for the CMA's SLC Finding. But the relative absence of such concrete evidence, when viewed in the commercial context described in the Decision, does not support Cérélia's contention that the retailer's statements about bargaining were unreliable or that the CMA's conclusions were irrational.

159. The Parties' internal documents summarised in the Decision refer to retailers' ability to re-allocate shelf space between branded and PL products, and in one instance explicitly refers to a threat to switch from Jus-Rol to PL for a particular category. Again, reading such evidence in the context of the linkages between competition at the wholesale and retail levels supports the CMA's thinking on SLC and does not indicate any degree of irrationality on the part of the CMA's SLC conclusions.

(3) The CMA failed to properly assess the relative importance of alternative competitive threats

(a) Cérélia's arguments

160. Cérélia characterises the CMA's conclusion that "the competitive constraint on the Parties from alternative suppliers is limited, both individually and in aggregate" as irrational: Decision §9.337. In fact, the CMA has evidence that both Parties were constrained by other PL suppliers, in particular Bells and Henglein: Decision §§9.175, 9.190, 9.193, 9.196-197, 9.230-9.231, 9.240.

161. Cérélia's principal contention under this sub-Ground is the failure of the CMA to take proper account of the competitive threat for retailers to displace Cérélia with contracts from alternative private label suppliers, notably established PL suppliers Bells and Henglein. This is an important part of the case, particularly in view of the asymmetry between the two sides of the CMA's SLC mechanism that arises from Cérélia's pre-Merger manufacturing activities for Jus-Rol.

162. Cérélia contends that competing suppliers of DTB products held "massive" spare capacity and that this capacity overhang provided the primary competitive constraint on Cérélia's PL supply contracts with major UK retailers. It also argues that the CMA had been irrational in failing to identify the existence and importance of this constraint when reaching its SLC Finding, and in particular that it did not adjust its assessment when it learnt in July 2022 that a large new PL contract was agreed between a major retailer and Bells which should have triggered a revised CMA assessment of this important alternative competitive threat on the post-Merger firm.

163. Cérélia's arguments on this aspect of the case focus on two PL suppliers: Bells, based in Scotland; and Henglein, based in Germany.

164. As regards Bells, Cérélia argues that not only was the CMA wrong and irrational to conclude that Bells lacked sufficient spare capacity to constrain Cérélia in its first assessment, but also that it was even more inexplicable not to change that assessment after Bells took on a substantial new contract to supply puff pastry

PL products to one of the largest UK grocery retailers. It argues that, even after taking on this substantial new PL contract, Bells had […][✂]. Cérélia notes that Bells' own response to the CMA questions during the enquiry unequivocally endorsed its ability to supply another PL retailer. Cérélia also criticises the CMA for failing to assess the extent to which any given loss of Cérélia's PL volume might inflict commercial harm on its business, thus determining whether any such loss would motivate Cérélia to maintain competitive prices.

165. In relation to Henglein, Cérélia argues that the CMA concluded in its PFs that Henglein represented a material constraint on the Parties, particularly in relation to competition for smaller suppliers. However, the CMA reached a different conclusion in the Decision, stating that Henglein offers only a limited competitive constraint on the Parties and no explanation is given for the CMA's *volte face*.[58]

(b) CMA's arguments

166. In response, the CMA claims that the evidence on Bells' ability to constrain Cérélia's PL prices depended on a variety of factors other than capacity alone. It must also depend on the switching costs facing the retailer, the cost-effectiveness of any spare capacity, the extent to which Bells would wish to […][✂]. It also draws attention to the fact that Bells' decision to supply PL products under the contract it agreed with the large retailer depended on a number of specific contextual factors that would not necessarily be replicated in other cases.

167. CMA's AD points out that Cérélia advances the opposite complaint in relation to Henglein to that in relation to Bells by criticising the CMA for maintaining its view on Bells between the PFs and the Decision, while changing its position on Henglein following the PFs. Further, Cérélia fails to accurately summarise the position in relation to Henglein as the PFs made clear that the constraint exerted by Henglein was likely to be weaker in relation to wholesale supply to large retailers where the competitive effects of the Merger were likely to be

[58] ANoA §§136-139.

greatest. The PFs also provisionally concluded that the constraint from Henglein was likely to be confined to PL supply, with minimal effect on branded supply. These provisional conclusions are entirely consistent with the conclusions in the Decision.[59]

(c) Our assessment

168. Given the diverse mix of factors taken into account by the CMA in considering Bells' effectiveness as a constraint, it is entirely possible that the CMA might have reached a different outcome on this assessment. It is possible that, had it done so, this might have affected its overall SLC assessment regarding a post-Merger increase in PL prices. It was open for the CMA to have done more to explore whether any given loss of Cérélia's PL volume to a rival PL supplier would (if credible) have been sufficient to provide an effective competitive constraint on Cérélia's pricing of PL products, thereby placing less emphasis on simple market share considerations. However, it is evident from the long list of factors at play here that the CMA is entitled to considerable discretion when making this assessment, and we cannot say that it was unreasonable to draw the conclusion that it did and not make further specific enquiries. Cérélia's argument about the existence of Bells' spare capacity is contentious in its own right, and also addresses only part of the picture that was relevant to the CMA's deliberations on this point. There was sufficient information for the CMA to conclude that Bells' spare capacity was only a limited competitive constraint for the reasons set out in the Decision. Bells had left its options open and naturally would want to see how its new contract would develop before taking a decision on whether to explore taking on any new large contract.

169. It also bears mention that the CMA is entitled to take into account the commercial motivation of competing suppliers when addressing their submissions on SLC concerns. In contrast to customers, who generally have a direct interest in avoiding an SLC, rival suppliers would stand to gain from any relaxation in competition in the market in which they are also sellers. This is not to suggest that Bells took a strategic approach to its responses to the CMA, but

[59] AD §36.

it does justify the CMA in taking a more rounded view of the evidence it received from competitors to the post-Merger firm.

170. As regards Henglein, the factors behind this assessment are different but again, we do not find that the CMA's conclusion was unreasonable. The Decision showed that Henglein had become a less active supplier to the UK since Brexit. Although Cérélia cited its very large total DTB capacity relative to the size of the UK market, that alone does not address legitimate questions as to how much of Henglein's capacity it would choose to devote to supplying UK customers, or indeed the extent to which those customers would perceive the logistical complications of depending on a supplier whose production was based outside the UK. This is not to say that all the indicators around the threat from Henglein as a PL supplier pointed unequivocally in favour of the CMA's assessment, but the criticisms raised by Cérélia come nowhere close to proving its case to the requisite standard for establishing irrationality.

171. Cérélia also stressed that the actual constraint on Cérélia's PL business from alternative competitors would comprise the sum total of the constraints offered by Bells and Henglein combined. We agree. However, since the CMA's assessment of neither constraint was obviously irrational or wrong, this does not change our conclusion.

(4) The scope of the CMA's SLC Finding is irrationally broad

(a) Cérélia's arguments

172. Cérélia's final argument under Ground 1A is that the CMA was wrong to conclude that the SLC applied across the entire UK wholesale market for DTB products (Decision §65) when not all retailers stock both PL and branded products. Cérélia therefore contends that there was limited scope for retailers to respond directly to a price increase or quality deterioration by switching between PL and branded, such that the scope of the SLC as identified by the CMA was irrationally broad.[60]

---

[60] ANoA section 5.4.

(b) CMA's arguments

173. The CMA responds that the basis of the SLC was broader than that identified by Cérélia; it involved an ongoing process of rivalry that was not limited to the rebalancing constraint.

(c) Our assessment

174. As we have noted above, it is unsurprising that the loss of bargaining power was cited predominantly by retailers who currently buy substantial amounts of PL and branded products in the category. These were the very largest UK grocery retail groups who together account for a large share of total grocery sales. However, to suggest that an SLC might apply to these retailers in isolation from those (mainly discounters) who stock PL only and those (mainly smaller retailer groups) who do not offer PL products in this category, clearly ignores the critical linkages between the wholesale and retail levels of the grocery market. It was not irrational for the CMA to conclude that significantly higher wholesale prices to the main grocery retailers would be expected to feed through into retail prices and that this would in turn be expected to affect all prices in the relevant market as defined. We therefore see no merit in this part of Cérélia's case.

(5) Overall conclusion on Ground 1A

175. Having reviewed all the arguments in relation to Ground 1A, the Tribunal dismisses this Ground which was a root and branch attack on significant aspects of the Decision. The CMA gathered a great deal of information and evidence for its assessment and carefully weighed the evidence that it had gathered. Whilst on some aspects it may have been open to it or a reasonable decision maker to take a different view on certain aspects, it did not make any error of fact or law. In dealing with Ground 1A the Tribunal has reviewed both the various sections of the Decision and the underlying evidence that the parties have referenced for its consideration.

I. GROUND 1B: THE CMA'S INVESTIGATION WAS IRRATIONAL

176. Cérélia argued that as a result of a number of flaws in the CMA's investigation, the outcomes of the investigation were irrational. These flaws included the CMA:

    (a) failing to adapt its investigation to and test its evidence properly in the light of market developments;

    (b) failing to interrogate inconsistences within and between retailer evidence;

    (c) misrepresenting available evidence; and

    (d) overlooking relevant evidence.

177. As a consequence of each and all of the above, Cérélia argued that the CMA's investigation was irrational.

(1) The CMA failed to adapt its investigation to developments in the market

(a) Cérélia's arguments

178. In June 2022, Cérélia informed the CMA that it had not been awarded the contract to supply a major national retailer. In July 2022, that retailer confirmed to the CMA that that the contract had been awarded to Bells. This was a material market development. It was also a material development in terms of the investigation because until this point, despite market participants having brought Bells to the CMA's attention, Cérélia argues that the CMA had paid little to no attention to Bells.

179. Cérélia says that it was not until November 2022, three weeks after the PFs had been published and mere weeks before the end of the statutory timetable that the CMA finally asked about Bells. It appears from the Decision (at §9.186) that that other retailer suggested that Bells [...][✂]. However, Cérélia says, there is no evidence that the CMA asked what that other retailer meant by a full own-

brand offer, what it understood in terms of Bells' capacity or that the CMA tested whether those views took into account that Bells had won a large new PL contract for another major national retailer. In other words, it was unclear whether the second retailer's view was an informed one deserving of some weight, or a wholly uninformed one, deserving of almost none. The CMA did not ask itself any of these questions but simply attached significant weight to this second retailer's submissions, which, given their vagueness and internal inconsistency and their inconsistency with other credible evidence, should have been afforded little weight.

180. Further there was no evidence of the CMA having tested this second retailer's apparent concerns about Bells. This, itself, was further evidence of the shortcomings of the CMA's investigation because, as the CMA ought to have been aware, there was evidence on the file that Bells had an ongoing relationship with that second retailer. Rather than interrogate the vague evidence and test it against the evidence on file, the Decision irrationally treated it as evidence as deserving of considerable weight.

181. Cérélia argues the CMA also failed properly to interrogate other major retailers about this development.

(b) CMA's arguments

182. The CMA says that the approach that it took on this issue was not irrational. To the contrary, the CMA carefully considered the implications of the award of the large new PL contract to Bells, gathered additional evidence in relation to the issue, and reasonably concluded (in the light of that additional evidence) that Bells nevertheless would still represent only a limited constraint on the Parties.

183. The fact that the CMA did not conduct a specific additional round of questioning with retailers, seeking their views on the discrete issue of the award of Bells' large new PL contract, was a matter falling well within its investigative discretion, bearing in mind the extensive evidence and analysis concerning Bells referred to in the Decision at §§9.172-9.198. That evidence/analysis included,

but went well beyond, the expressed views of grocery retailers in relation to Bells.

184. Quite apart from the obvious confidentiality concerns to which a discussion with one retailer about the award of a contract by another may have given rise, the CMA argues that its choices about whether to discuss a particular market development with a particular retailer cannot be impugned on rationality grounds, in circumstances where the materiality of the constraint imposed by Bells was extensively considered and explored in the course of the CMA's investigation.

185. Secondly, as for Cérélia's criticism of the weight that the CMA attached to evidence from one retailer about one manufacturer, the CMA argues that weight is a matter for the CMA. There was nothing irrational about the CMA placing reliance on this indication from a major retailer, alongside the range of other evidence concerning Bells that is referred to in the Decision. Contrary to Cérélia's statement, there was nothing "vague" about what the other retailer questioned by the CMA said: it was consistent with evidence that it had provided earlier in the investigation.

186. For the same reasons, it was also not irrational for the CMA not specifically to "test" that second retailer's indication in relation to Bells. Cérélia relies in this context on evidence that the second retailer had an existing relationship with Bells. In fact, this pre-existing relationship supports the CMA's approach of not asking the second retailer a specific follow-up question about its evidence as to Bells' lack of capacity. In any event, the CMA was entitled to place weight on its views in relation to Bells' capacity.

187. Furthermore, the CMA specifically considered the constraint that would be imposed by Bells on the hypothesis that it was awarded a further contract, at Cérélia's expense, by another large retailer, and took the view that it would still only impose a limited constraint. This was a rational way of testing the question of whether the new evidence in relation to Bells' capacity affected the CMA's provisional conclusion that Bells represented only a "limited" constraint.

188. As for Cérélia's complaint that the CMA was told by Bells in August 2022 that one of the largest national retailers had indicated that it was interested in Bells' shortcrust pastry, but that the CMA did not discuss this with the retailer – again, it was well within the CMA's wide margin of investigative discretion not to follow this specific point up. The CMA had other evidence available from this particular retailer; its response to question 17 of the Phase 2 questionnaire stated that "[…][✂]", and in the context of an assessment of the competitive constraint that Bells would pose on the merged entity and the possibility of entry/expansion, had said (at Decision §10.137) "[…][✂] suggested that it has […][✂]". Those parts of the evidence are also consistent with the direct evidence the CMA obtained from Bells in November 2022. As the CMA ultimately concluded, Bells considered that it was at most able to […][✂]. At that point, Bells would be capacity constrained.

(c) Our assessment

189. Our approach takes account of the principles established in past cases that the Tribunal will not intervene merely because it considers that further inquiries would have been desirable or sensible, but only if no reasonable authority could have been satisfied on the basis of the enquiries made: *BAA* (cited above) at [20(3)]. Furthermore, it is appropriate to consider the depth and quality of the CMA's investigation of the issue in the round.

190. On that basis we accept the arguments of the CMA; it responded to the market development and it tested anew whether in the light of that market development the relevant supplier would exercise a significant constraint in the future. In that context it considered both the type of pastry which that supplier could and could not supply; it considered the extent of its spare capacity and its willingness to extend further into supply to supermarket retailers; and it considered the attitudes of the relevant supplier and the major retailers to that supplier. There was nothing irrational about that process.

(2) The CMA failed to interrogate inconsistencies within and between retailer evidence

(a) Cérélia's arguments

191. Cérélia says that the CMA, throughout its investigation, appeared to take statements from the retailers at face value and failed to interrogate inconsistencies within and between retailer evidence. This failure in investigation was procedurally unfair to Cérélia which was thereby deprived of the opportunity properly to defend itself, producing irrational outcomes on the part of the CMA.

192. The CMA, for example, failed to investigate inconsistencies in a retailer's responses to a Phase 2 questionnaire. One retailer stated in its response to one question that Cérélia and Jus-Rol did not compete because they "do not provide like for like products". This retailer appears to have responded to another question that puff and shortcrust pastry are "interchangeable products from brand to PL with little differentiation from a recipe perspective". There was no evidence that the CMA noticed or investigated this inconsistency between two answers to a single questionnaire.

(b) CMA's arguments

193. The CMA says that it is obviously not the case that the CMA is required exhaustively to investigate every possible inconsistency in the evidence that it receives, or that a failure to do so renders any decision irrational (which is the implication of this part of the ANoA). Again, the relevant question is not whether further inquiries would have been desirable or sensible, but whether no reasonable authority could have been satisfied, on the basis of the enquiries made, as to the conclusion reached. Moreover, the CMA cannot control the nature of the responses that it receives from third parties, but must instead assess (and decide what weight to afford to) the evidence that it does receive. For all the reasons given, there was clearly an adequate evidential basis for the SLC Finding and the small number of inconsistencies that Cérélia purports to identify cannot possibly undermine it.

194. In any event, so far as concerns the alleged inconsistencies in the evidence of the retailer referred to above, the CMA says that it had summarised different statements and noted the inconsistencies and assessed the weight to be given to the evidence. During the Further Consultation that retailer was given the opportunity to articulate its views.

(c) Our assessment

195. We accept the CMA's position on these matters. So far as concerns whether the process it conducted was rational and fair, we conclude that it was. So far as concerns the evidence of the retailer referred to above, we conclude that the CMA set out the evidence received appropriately; conducted an appropriate process in seeking to give that retailer fair chance to comment further and that no basis for challenging the CMA's process or Decision arises here.

(3) The CMA misrepresented relevant evidence

(a) Cérélia's arguments

196. Cérélia argues that the CMA's irrational approach to the evidence also included having misrepresented relevant evidence.

197. Cérélia says that at Phase 1, a retailer mentioned Bells as being one of the main suppliers of PL products. At Decision §9.184, however, the CMA suggests that the same retailer must no longer regard Bells as one of the main PL contract manufacturers because Bells stopped supplying it PL products. Aside from the fact that this statement appears not to be evidence of what the retailer thinks but to be a conclusion drawn by the CMA, it plainly does not follow. A contract manufacturer can be a main contract manufacturer even if it does not manufacture for a particular retailer at a particular point in time. Cérélia says that here the CMA put its words in the retailer's mouth in this part of the Decision, which was inappropriate and contrary to the CMA's duty to set out the evidence fairly. In doing so, it misrepresented the retailer's evidence.

198. Cérélia says that another example of the CMA manipulating retailer evidence rather than presenting it objectively in the Decision concerned the evidence about Bells provided by the large retailer who had awarded Bells the large new PL contract. The CMA states at Decision §9.177(a) that that retailer told the CMA it did not believe […][✄]. However, at Decision §10.137, it is said that the retailer had suggested that it had […][✄]There is, Cérélia says, a material difference in the meaning of these two sentences.

199. Another example could be found in the treatment of the evidence on switching. In considering switching, the CMA's conclusion at Decision §7.81 was that switching "does not happen frequently ... because only one of the large grocery retailers has switched since 2017". However, Cérélia says the CMA imposed arbitrary limitations on the available evidence on switching – that switching was only considered relevant if it was by a "large grocery retailer" since 2017. These arbitrary limitations allowed the CMA to ignore the evidence that two major national retailers had switched in 2017 (and also during the course of the CMA's investigation), and a smaller (but nonetheless significant) retailer had switched twice since 2017. There was consequently no rational basis for the CMA's conclusions on switching because this depended on an arbitrary cut-off date and the exclusion of all but the largest retailers.

200. The CMA's purported misrepresentations were not confined to third party evidence or documents; Cérélia contends that some of the CMA's own statements were subsequently misrepresented by the CMA. By way of example, the CMA suggests that when confirming in the Remedies Working Paper that there was "excess manufacturing capacity" (see Decision §9.162(k)) it was referring to excess manufacturing capacity held by Cérélia alone, and that it was not referring to any spare capacity on the part of Cérélia's competitors. Cérélia contends that is plainly not correct. In discussing whether or not the sale of a production line by Cérélia to an established contract manufacturer known to grocery retailers would address the CMA's SLC, the CMA says "this is unlikely given the excess manufacturing capacity in the market". Given both the context of the statement and the words used, this was plainly not a statement about Cérélia's excess capacity. It was a statement about the market as a whole (confirmed by the conclusions about capacity the CMA reached in the Decision)

and the CMA is simply wrong to try to suggest otherwise. In so doing, it misrepresents its own previous statements.

(b) CMA's arguments

201. The CMA emphatically denies Cérélia's contention that the CMA misrepresented relevant evidence and any contention that the CMA deliberately distorted evidence to suit its theory of harm by manipulating the evidence.

202. In relation to Cérélia's criticism that it had put words in the mouth of one of the retailers, the CMA says that it had simply accurately recorded the retailer's evidence that Bells had been a supplier but had then stopped supplying it. The same is true in relation to the evidence from another retailer; the report merely recorded different statements.

203. So far as concerns the treatment of the evidence about switching, it is clear from the Decision and investigation as a whole that the CMA had carefully considered all the evidence on switching. Further, it says that its approach in considering switching by large retailers was not irrational since large retailers may be expected to be particularly affected by the loss of competition from the Merger; it was entirely reasonable for the CMA to consider whether there had been any recent (using a reasonable period of the last six years) evidence of switching by such retailers, and to attach such weight to that matter as it considered to be appropriate.

204. So far as concerns Cérélia's criticism of the presentation of certain statistical materials in the Decision, the CMA rejects the criticisms and says that it could not be seriously suggested that presentational matters of that kind could be such as to render the investigation irrational.

205. In response to Cérélia's criticism of its treatment in the Remedies Working Paper, the CMA says that, read in context, the reference to capacity was expressly linked to the relative attractiveness to potential purchasers of the "production line divestment remedy" that Cérélia was proposing as an

alternative divestment; that is to say, it was a point about Cérélia's own capacity (as part of the market).

(c) Our assessment

206. It is "not the function of the Tribunal to trawl through the long and detailed reports of the [CMA] with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way": *BAA* (cited above) at [20(8)]. Furthermore, it is not clear to us that even if the errors had been established by Cérélia, this would make good its argument that the Decision as a whole was flawed, given the totality of the evidence and reasoning set out by the CMA in its Decision.

207. Nevertheless, having considered the arguments and materials presented by Cérélia and the CMA, we conclude that relevant evidence was not misrepresented by the CMA and that the CMA's explanations of the various points are to be preferred. That said, we should stress the importance of the CMA accurately recording and summarising evidence in its decisions, particularly where the underlying evidence is not produced to the parties to a merger under investigation prior to the decisions being made.

(4) The Further Consultation conducted by the CMA is evidence of the irrationality of its approach

(a) Cérélia's arguments

208. Decision §6.62 notes that the CMA considered it "appropriate to conduct targeted additional evidence gathering and analysis following publication of the PFs" to ensure that "it had the necessary evidence properly to assess the theory of harm under consideration" (i.e. the "Further Consultation": see [19] above). Cérélia argues that the Further Consultation did not, however, remedy the deficiencies in the CMA's evidential base because: (i) the retailer outreach was selective; (ii) the CMA failed to use the process of gathering additional evidence after the publication of the PFs to investigate all the relevant inconsistencies and

ambiguities in the evidence it had previously received; and (iii) the CMA misrepresented evidence it did receive.

209. Cérélia says that the CMA cherry-picked the retailers and contract manufacturers from which to gather additional evidence. The purposes of the additional evidence were described by the CMA as having been: (i) "mainly to further assess the nature of the competitive interactions between the Parties and the extent of any constraints from existing competitors"; (ii) "mainly to further assess the extent of any constraints from existing competitors"; and (iii) "mainly to further assess the extent of any constraint from existing competitors and the effects of the Merger more generally".

210. Cérélia says that there was no explanation in the Further Consultation or in the Decision of why the CMA deemed it necessary to seek further evidence on these topics from such a narrow range of third parties, particularly in circumstances where the CMA was engaging with the wider group of customers and competitors in relation to the Remedies Working Paper. As such, the Further Consultation was further evidence of the irrational approach on the part of the CMA.

211. The Further Consultation was also procedurally unfair because, having determined that further evidence must be gathered, the CMA did not use the evidence-gathering process to address the many inconsistencies and ambiguities that were present in the evidence. For example:

(1) In the PFs, the CMA had placed particular weight on the evidence of two retailers in identifying the SLC of the "implicit competitive constraint". However, in obtaining further evidence as to "the nature of the competitive interactions between the Parties and the extent of any constraints from existing competitors", the CMA contacted neither and did not explain that failure. That failure to include either in its additional evidence gathering was yet more extraordinary in light of the inconsistencies in the evidence provided by one of those retailers.

(2) Cérélia characterises as a "significant omission" the CMA's failure to approach another national retailer again. Although this retailer is smaller (in relative terms), its relevant competitive dynamics are the same as those for larger retailers and, as a purchaser of both consumer brand and PL brand DTB goods, could be expected to cast greater light on "the nature of the competitive interactions between the Parties and the extent of any constraints from existing competitors" than, for example, retailers which stock PL only. Moreover, the Further Consultation process also could have afforded the CMA the opportunity to understand why this retailer had expressly rejected the SLC: "By contrast, one smaller retailer said that the wholesale price negotiated with PL suppliers has no bearing on the wholesale price negotiated with branded suppliers and that commercial viability was instead prioritised" (PFs §9.81). Given that the CMA's further investigations concerned "the nature of the competitive interactions between the Parties and the extent of any constraints from existing competitors" the failure to ask further questions of this retailer in the Further Consultation was irrational.

(3) Another lacuna in the CMA's investigation that it could have addressed through its Further Consultation was to check whether the fact of Bells having won the large new PL contract changed retailers' and competitors' views of Bells as a potential alternative contract manufacturer. This was another significant material failure by the CMA.

212. Cérélia argues that in the PFs, the CMA had said that Bells would exercise limited competitive pressure on the Parties over the next one to two years due to its having limited capacity. In the Further Consultation, Cérélia said that it became clear that Bells was in fact not capacity constrained and had spare capacity that was very significant in the context of the market (as did Henglein).

(b) CMA's arguments

213. The CMA rejects Cérélia's contention at ANoA §175 that the purpose of the Further Consultation was to "remedy the deficiencies in the CMA's evidential base"). Rather, the Further Consultation formed part of an iterative information-

gathering process culminating in the Decision, and was carried out pursuant to the CMA's wide discretion to acquaint itself with the information it considers relevant to enable it to answer the statutory questions it is required to answer. Indeed, as the Consultation Paper (see [20] above) made clear (at §3), the decision to seek further evidence post-PFs was informed by the Parties' own submissions in their responses to the PFs, and at the response hearings, in relation to the evidentiary basis for the PFs. It did not follow that the evidentiary basis for the PFs was somehow deficient. Indeed, the CMA considered that the evidence gathered in response to the Further Consultation was "generally in line with the third-party evidence set out in the PFs, and therefore provide[d] further support for the CMA's provisional view" (Consultation Paper, §5).

214. In terms of selectivity, the CMA says its approach was grounded in the question of which suppliers it felt further evidence was required from. It had already received enough on the relevant issues from the retailers now identified by Cérélia. It had also had extensive discussions with Bells.

215. The CMA characterises Cérélia's argument in respect of Bells' capacity as repetition of its other points about the additional evidence obtained from Bells. It rejects Cérélia's argument that this evidence "turned the CMA's prior understanding" of Bells' capacity on its head.

(c) Our assessment

216. The CMA's explanation of its approach to and conduct of the Further Consultation discloses no basis for Cérélia's arguments that it was irrational or unfair.

217. The arguments around the CMA's treatment of the alternative competitive constraints have been considered under Ground 1A above. Suffice to say here that we reject this complaint here too.

(5) Overall conclusion on Ground 1B

218. For the reasons above, we therefore dismiss Ground 1B in its entirety.

J. GROUND 2: REMEDY

(1) Introduction

219. In its Decision, the CMA formed the following view on the appropriate scope for the divestiture package:

> "12.104 In considering the scope of the Jus-Rol IP rights, we have sought, consistent with the approach set out in the CMA's guidance, to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.
>
> 12.105 Our view is that a divestiture of the Jus-Rol business should include, as a minimum, rights to the Jus-Rol brand and associated IP for products supplied to all customers in the UK and Republic of Ireland. However, as set out in paragraphs 12.87 and 12.98, Cérélia may retain rights in relation to customers in the Republic of Ireland, and for foodservice and food manufacturing customers in the UK, at the option of the purchaser (and on terms acceptable to the CMA)."

220. The Decision acknowledges that Cérélia had submitted that some products should not form part of the SLC identified by the CMA, and therefore should not be the subject of any remedy. However, the Decision states:

> "12.101 … The SLC that we found (Chapter 11, paragraph 11.2) is in the wholesale supply of DTB products to grocery retailers in the UK, which includes products such as pizza dough and cookie dough where there is currently no overlap between Cérélia and Jus-Rol. Therefore, any remedy which excludes particular DTB products is unlikely to comprehensively address the SLC.
>
> 12.102 We also consider that exclusion of these products could undermine the effectiveness of the remedy. For example, if we were to exclude some SKUs, as Cérélia proposes, this would lead to a situation where some Jus-Rol DTB products would be produced by Cérélia and some by the purchaser of the divestiture business. These products would be next to each other on supermarket shelves, complicating merchandising arrangements by grocery retailers and leading to confusion among shoppers, particularly if there were packaging or recipe changes by one manufacturer. The divestiture business would also be restricted to a very narrow range of products, preventing it from innovating and introducing new products, either in the DTB or other categories. This would potentially lessen innovation in the market and also make the divestiture business significantly less attractive to a purchaser. Finally, we have concerns that the brand split could not be accurately specified, particularly when trying to take into account new products.
>
> 12.103 We therefore consider that there should be no restriction on the scope of the Jus-Rol IP in relation to product sub-categories or SKUs, and that the

> divestiture package should include the Jus-Rol brand and IP rights in relation to any DTB products that the purchaser wishes to supply."

221. The legal test for review of a decision by the CMA as to remedy is set out in Section F above.

(2) Remedy was disproportionate and irrational

(a) Cérélia's arguments

222. Cérélia argues that the remedy had no rational basis and was in any event disproportionate.

223. The arguments whether the SLC Finding as the basis for (any) remedy was irrational have been considered above under Ground 1A and 1B. Therefore, we do not repeat them here.

224. In respect of Cérélia's arguments that the remedy was disproportionate, Cérélia put forward three bases for this claim:

(1) the remedy included products that were not subject to the implicit rebalancing threat;

(2) the remedy extended beyond the geographic market in which the CMA's SLC was said to arise; and

(3) the remedy included channels, foodservice and food manufacturing, where there was no finding of any SLC by the CMA.

225. In particular, Cérélia argues that, since it does not produce Jus-Rol's entire product range, there is not a full overlap in their ranges. In the absence of that overlap, any threat of rebalancing by supermarkets could not apply and no SLC could result.

226. Cérélia argues also that the extension of the scope of the remedy to include the IP licenses in relation to the ROI was disproportionate on the basis that there were examples of brands being held separately in ROI and Northern Ireland and

so no scope for customer confusion arose or was specifically considered and that the volumes of business in ROI would not affect the economic viability of Jus-Rol in the UK. Consequently, it argues the CMA's conclusion that the ROI business should be included to avoid undermining the attractiveness of the remedy to a potential purchaser is neither appropriate nor necessary and is therefore disproportionate.

227. Cérélia argues that the distinctness and smaller scale of the Jus-Rol business in the foodservice and food manufacturing sectors meant that their inclusion in the remedy is unnecessary and therefore disproportionate. It says that the CMA had accepted that there were differences in these sectors and their customers; that there was unlikely to be confusion if there were separate brand owners for the different sectors; and that there were unlikely to be material synergies between the businesses. Indeed, the CMA had said that exclusion of this part of the business might not undermine the effectiveness of the remedy.

(b) CMA's arguments

228. In response, the CMA argues that the competitive tension between the Parties is broader than this (for example in relation to product innovation or where the Parties are options for future supply) and that the SLC is broader than the overlapping products. Further the CMA had specifically concluded (Decision §12.102) that exclusion of non-overlapping products could undermine the effectiveness of the remedy because it would mean that the divestiture business would be restricted to a narrow range of products, preventing it from innovating and introducing new products, either in DTB or other categories.

229. The CMA says it had concluded that the limitation proposed by Cérélia to restrict the IP licence just to the UK risks undermining the attractiveness of the divestiture to a potential purchaser. Moreover, Cérélia fails properly to reflect the nuances of the remedy imposed by the Decision, which recognised the possibility that potential purchasers may consider this risk to be less significant and therefore allowed Cérélia the option, as part of the divestiture process, to seek to agree a carve out of brand and other IP rights in the ROI during

negotiations (i.e. to exclude them from the divestiture), on terms acceptable to the CMA and to the purchaser (Decision §§12.79-12.87).

230. The CMA argues that in its Decision, the CMA had concluded that the exclusion of Jus-Rol's foodservice and food manufacturing sectors might make the divestiture unattractive to a purchaser (Decision §12.95). However, again, the CMA had made clear in its Decision that should the ultimate purchaser of the divestiture package so elect, it might be possible to secure the limitations proposed by Cérélia (Decision §§12.97-12.98).

(c) Our assessment

231. In light of the consideration given by the CMA at Decision §12.101-110 to the scope of the divestment package and the risks to the effectiveness of the remedy or to the attractiveness of the divestment package to potential purchasers of excluding the parts of the Jus-Rol business referred to by Cérélia in relation to its arguments (1) to (3) we conclude the scope of the divestment package was well reasoned, proportionate and not irrational. We also specifically accept the CMA's argument in relation to (1) that it was proportionate and not irrational for the package to extend beyond the narrowly overlapping products. We conclude that these decisions by the CMA were well within the margin of its appreciation and with reasonable foundation.

(3) The CMA failed properly to assess the effectiveness of alternative remedy proposals

(a) Cérélia's arguments

232. Cérélia argues that the CMA had failed properly to consider two alternative remedies that it argued would be effective but less restrictive, namely the "Production Line Remedy" and the "Open-book Pricing Model Remedy".

233. The Production Line Remedy would involve divestiture of one of Cérélia's DTB production lines to an independent third party in the UK, with Cérélia offering to use its best endeavours to obtain the support and consent from a retailer

customer to transfer at least one major retailer contract to the purchaser. Cérélia said that in its assessment of the effectiveness of the Production Line Remedy, the CMA ignored that the Production Line Remedy would add production capacity equivalent to around 25% of the total amount of PL brand demand of UK retailers. As such, the Production Line Remedy would add material additional production line capacity and allow a new entrant to supply PL brand DTB contract manufacturing services at competitive prices.

234. The Open-book Pricing Model Remedy had been suggested by a large supermarket operator. It would allow a comparison of cost movements to public indices and allow customers to assess whether price increases were justified by changes in input costs. Cérélia says that this would be an effective remedy in light also of the spare capacity in manufacturing.

(b) CMA's arguments

235. The CMA maintains that its conclusion that the Production Line Remedy would not effectively remedy the SLC was rational. This conclusion was reached by having regard to two of the risk categories referred to in the MRGs, the CMA had regard to the views of grocery retailers, their reservations about transferring contracts and that none of the industry participants thought that the Production Line Remedy would address the CMA's identified concerns. (Decision §§12.189-12.210, 12.216-12.219, 12.221).

236. The Decision also expressly took into account, as part of the CMA's assessment, Cérélia's response to the Remedies Working Paper, which included Cérélia's submission that the Production Line Remedy would result in more than a 25% enhancement in annual DTB capacity (Decision §12.169).

237. Furthermore, Cérélia's argument that the Production Line Remedy is effective as it addresses the essential elements of the CMA's SLC is about the merits of the remedy. Even if there is room for debate about that, the relevant question is whether the CMA's decision as to remedy is manifestly without reasonable foundation or irrational.

238. The CMA considered the Open-book Pricing Model Remedy a behavioural remedy; it noted that the MRG say, in effect, that structural remedies are generally to be preferred to behavioural remedies, but concluded that it was not a credible proposal because it did not address the lack of alternative supply that it had identified in its SLC assessment; in addition, such a remedy would not address the adverse effects of the SLC in the form of lower quality and less innovation.

(c) Our assessment

239. At Decision §§12.162-12.223 the CMA considered the Production Line Remedy against the principles set out in its MRG. It concluded that:

(1) The remedy would not be capable of restoring competition to the level that would have prevailed absent the Merger, and so would not comprehensively remedy the SLC. Inter alia, the CMA relied on the fact that Cérélia had submitted that the capacity of a production line would be able to satisfy "at least […][✂]" of the market, which is significantly lower than the increment in market share of 30-40% that was brought about by the Merger (Decision §§12.197-12.198).

(2) The CMA also identified a number of practical concerns in relation to the scope of the Production Line Remedy, e.g. the fact that retailers might not agree to transfer contracts to the purchaser of the production line, meaning that the purchaser would be unable to make sales and cover its set-up costs for a significant amount of time (Decision §§12.199-12.219).

(3) The CMA considered that the limitations in the scope of the Production Line Remedy would make it an unattractive proposition for a potential purchaser who was dedicated to serving the UK grocery retail DTB market, and that there was accordingly a "significant risk that a suitable purchaser for this remedy would not be found" (Decision §12.219).

(4) The CMA also had regard at Decision §§12.178-12.187 to:

(a) the views of grocery retailers that while the Production Line Remedy was capable of mitigating the SLC, its effectiveness would be entirely dependent on the capability of the purchaser;

(b) the reservations expressed by retailers about transferring contracts; and

(c) the fact that none of the industry participants thought that the Production Line Remedy would address the CMA's identified concerns.

240. The Decision also considers and explains why the CMA considered that the Open-book Pricing Model Remedy would not provide an effective solution to the SLC, be timely and, therefore, would not provide an effective solution to the SLC (Decision §§12.27).

241. It is clear from our summary of the CMA's thinking set out above and from the Decision itself that the CMA gave due consideration to the alternative remedies and assessed them carefully against the relevant principles (which are set out in the MRG) and in light of its findings on the SLC. Its decisions that the Production Line and Open-book Pricing Model Remedies would not effectively remedy the SLC were not made without reasonable foundation or irrational. We therefore dismiss Ground 2.

K. GROUND 3: THE CMA CONDUCTED A PROCEDURALLY UNFAIR INVESTIGATION

242. Cérélia argues that the CMA's Decision followed a procedurally unfair investigation which deprived Cérélia of the "ability properly to defend itself in resisting what is a draconian and financially significant remedy".[61] Cérélia claimed that the CMA's investigation was "fundamentally unfair" by virtue of three aspects:[62]

[61] ANoA §203.
[62] ANoA §202.

(1) The CMA failed to give "advance notice of its thinking in sufficient detail so as to enable Cérélia to know the case it needed to answer";

(2) The investigation required a late-stage consultation which was itself procedurally unfair; and

(3) The CMA unreasonably refused disclosure requests.

(1) The CMA failed to give advance notice of its thinking in sufficient detail

(a) Cérélia's arguments

243. Cérélia argues that the Decision turned on a theory of harm based on what it called the "implicit rebalancing threat" from retailers, and that this theory of harm was not explained to Cérélia until the PFs. It argues that this was "too late to allow Cérélia to respond to it and materially influence the CMA's thinking on this point" (ANoA §206) and "by which point [the CMA] had effectively reached conclusions that were adverse to the Transaction". Cérélia says that the "late stage articulation of this "implicit rebalancing threat" was particularly unfair in view of the fact that neither Cérélia nor GMI recognises the existence of such a threat from their own experience of retailer negotiations".

244. In arguing that the PFs stage was "too late" for these purposes Cérélia contends that the Tribunal had "recognised the practical impossibility of the CMA's analytical framework changing after the PFs" in *J Sainsbury PLC v Competition and Markets Authority* [2019] CAT 1 ("*J Sainsbury*") at [64]:

> "… Although the Applicants will in due course be able to make submissions in response to the Provisional Findings, we think it is unrealistic to suggest that once the Group has reached provisional conclusions based upon those underlying analyses, the Group would readily require the CMA staff to adopt a different methodology, or even significantly to revise the underlying analysis. That stage of the inquiry will effectively be passed."

(b) CMA's arguments

245. The CMA argues that what Cérélia phrases as the "implicit rebalancing threat" was just one aspect of a broader horizontal competitive dynamic between the

Parties. The CMA's emerging concerns about the horizontal effects of the Merger were articulated over the course of its investigation and well before the PFs. These include the Issues Statement published on 15 July 2022, to which Cérélia's response dated 2 August 2022 shows it well understood the theory of harm, and the Annotated Issues Statement provided to the Parties on 26 August 2022, which referred to the loss of retailers' ability to "play the Parties off against each other".

246. Further, the CMA argues that the PFs are the primary vehicle and main means by which the CMA fulfils its statutory duty to consult and that in this case these contained a detailed articulation of its concerns on which the Parties were able to comment. The CMA argues that *J Sainsbury* is not authority for the proposition that the CMA must set out the full detail of its theory of harm prior to the PFs; that the PFs are provisional and that the CMA had not already reached conclusions adverse to the transaction at that stage.

(c) Our assessment

247. *Meta* and *Tobii* are clear authority for the proposition that the PFs should be the primary vehicle for communication of the CMA's proposed decision and reasons. In *Meta* the Tribunal described the complete wording of the PFs as constituting the gist of the case which the Merging Parties had to answer (at [157(3)]).

248. So far as concerns Cérélia's arguments relating to "the implicit rebalancing threat", in our judgment the CMA complied with its duty to act fairly. We accept that the PFs were no more than "provisional", and that the CMA had not reached its final conclusions at that stage. PFs §9.75 onwards in this case set out the context and nature of the constraint, including their implicit nature (PFs §9.83). The nature of the rebalancing threat can be seen as a refinement of the reference to the loss of the retailers' ability to play the Parties off against each other raised earlier in the process. The submissions made in response to the Phase 1 issues letter indicate that the Parties were sufficiently on notice of the case against them from that stage, but certainly the PFs gave rise to a sufficiently clear exposition of the CMA's theory of harm for them to respond to.

(2) The CMA conducted a procedurally unfair late consultation

(a) Cérélia's arguments

249. Cérélia repeats its submission made in response to the Consultation Paper that the need for the CMA to gather further evidence after publication of the PFs was a consequence of deficiencies in the CMA's earlier investigation.

250. Cérélia argues that the Further Consultation after the PFs was procedurally unfair, because it came after the PFs and because it failed adequately to assess or interrogate evidence that the CMA had already collected.

251. Cérélia also argues that the Further Consultation was selective in which retailers and manufacturers were approached for evidence. The Further Consultation was procedurally unfair in that the CMA did not address what Cérélia said were inconsistencies and ambiguities in the evidence before the CMA and failed to reflect some of the evidence found from the Further Consultation in its conclusions in the Decision.

(b) CMA's arguments

252. The CMA points out that Cérélia's complaints under this sub-Ground of Ground 3 do not make any specific complaints about the Further Consultation that go beyond those set out in relation to Cérélia's Ground 1B.

253. The CMA argues in relation to the suggestion of procedural unfairness that merger investigations are an iterative process, and it is not uncommon for the CMA to continue to gather evidence relevant to its substantive assessment after publication of the PFs. Indeed, this explanation was provided in the Decision §6.61 when Cérélia made this criticism in its response to the Consultation Paper. The Further Consultation was a means of ensuring that the investigation was fair, and was prompted (in part) by the need for the CMA to satisfy itself that it properly considered the evidence and submissions it had received in response to the PFs. It says that the Parties were given a full opportunity to respond to the Consultation Paper before the CMA made any final decisions.

(c) Our assessment

254. Insofar as Cérélia's complaints under this sub-Ground are more properly to be considered as challenges to the basis on which the CMA found an SLC, we have considered and dismissed those challenges under Ground 1B above.

255. As regards Cérélia's contention that the Further Consultation was procedurally unfair because the CMA did not obtain particular evidence that Cérélia says was necessary, the Tribunal would need to be shown a strong case that the CMA manifestly drew the line in the wrong place: *Akzo Nobel* at [160]. We are not satisfied that Cérélia has shown this to be the case.

256. We accept the CMA's explanation that the Further Consultation was prompted by the material it had received in response to the publication of the PFs and response hearings. We note that the CMA gave the Parties an opportunity to comment on the material gathered in the further process. We also note that the Further Consultation involved matters that were already within the scope of the PFs and did not change the gist of the case. At Decision §6.79 the CMA said that:

> "The CMA took into account the Parties' representations on the additional evidence prior to making its decision on the statutory questions."

257. It is therefore difficult to see how any unfairness to the Parties arose. We find no unfairness arising from the Further Consultation.

(3) The CMA unreasonably refused Cérélia's disclosure requests

(a) Cérélia's arguments

258. Cérélia argues that the CMA's refusal to disclose its questionnaires and retailers' responses [and other evidence] deprived it of the ability to properly defend itself because it could not "properly understand the practical manifestation (or real "gist") of the CMA's SLC".[63] It also submitted at the Hearing that its representations during the investigation and Further

[63] ANoA §211.

Consultation stages would have been different had the CMA's Phase 1 and Phase 2 questionnaires and responses been disclosed to it.

259. Cérélia argues that the CMA's refusals to give disclosure compounded the CMA's errors of assessment because Cérélia did not get the chance at an appropriate point to explain how the CMA's information requests were flawed or to allow it to identify inconsistencies in retailer evidence. For example, the CMA's questionnaires presupposed that the Parties undertook the same activity and failed to address a "fundamental question" which the CMA was required to address, namely whether entry would become quickly attractive if prices were to start rising post-Merger.

260. Cérélia also contends that the CMA had "misrepresented" the evidence it had received and been selective in its use of that evidence. The numerous errors, misappraisals and selective quoting of the evidence demonstrate that a fair procedure in this case required the Phase 1 and Phase 2 questionnaires as well as information and underlying evidence to be disclosed to Cérélia.

(b) CMA's arguments

261. The CMA denies that its questionnaires were flawed in the way suggested or that the criticisms of its use of the retailer evidence were made out. More fundamentally it argues that there is no obligation on the CMA to provide detailed disclosure of underlying documents from its investigation. It says the Tribunal had emphasised in *Tobii* that the provision of such disclosure may well be detrimental to the efficient conduct of the investigation. Moreover, it says that the CMA is required to balance the general prohibition on disclosure of information received from third parties in the course of a merger inquiry with the need to comply with its statutory duty to consult and to its consequent obligation to provide the merger parties with a sufficient "gist" of its proposed decision (cf. s. 244 of the Act). The CMA's decisions as to where to strike that balance (including its decisions as to whether it is appropriate to grant any particular disclosure request during the course of an investigation) are another area in which significant latitude should be afforded to the CMA.

262. Against that background, the CMA says its decision not to grant disclosure to Cérélia of the requested documents during the course of the investigation was not liable to be set aside. It says that Cérélia had been provided with a great deal of information throughout the investigation, more than sufficient to discharge the obligation to provide an adequate gist of its proposed decision. Thus, prior to publication of the PFs, Cérélia had been provided with an Issues Statement, an Annotated Issues Statement, eight separate working papers and a list of relevant internal documents, enabling Cérélia to understand the CMA's emerging thinking in significant detail and to prepare for the main party hearings. A very detailed articulation of the CMA's provisional decision, and a description of the key evidence on which it was based, was then provided in the PFs. Further, in accordance with the approach set out in the Tribunal's judgment in *Meta* at [157]-[159], the full unredacted version of the PFs was provided to Cérélia's external advisers in a confidentiality ring on 4 November 2022.

263. So far as concerns Cérélia's criticism of the CMA's treatment of entry and expansion, the CMA says that it was not obliged to consider this question and that the MAG were expressed in a permissive way on this issue. The CMA argues that having decided to consider entry and expansion, the precise questions it used were "quintessentially" matters for it.

(c) Our assessment

264. The answer to Cérélia's point that its representations to the CMA would have been different had the Phase 1 and Phase 2 questionnaires and responses been disclosed to it can be found in the quotation from *Eurotunnel* (cited above) at [236]: "the relevant question is not whether [the applicant] would have had something material to say in relation to information it did not see" but "whether on the basis of the information that [it] did see, [the applicant] was in a position properly to formulate its response to issues likely to adversely affect it" (see also *Eurotunnel* at [244]). To put it another way: was an "adequate gist" provided in relation to the issues on which the CMA proposed to take a decision adverse to the applicant's interests? (*Eurotunnel* at [226] and [245]).

265. This begs the question whether the summary of the case set out in the PFs was enough for the Parties to understand sufficiently the gist of the case they had to make. In our judgment the relevant paragraphs of the PFs (particularly from PF §9.75) did so. The issue of the CMA's refusal to disclose those questionnaires goes to the evidence that the CMA was relying on rather than the gist of the theory of harm.

266. In the course of these proceedings the main relevant documents have been disclosed to Cérélia (albeit within appropriate confidentiality rings) and Cérélia's arguments on Ground 1 have reflected its access to those underlying materials. We have nevertheless rejected its challenges to the rationality of the SLC Finding.

267. As set out in *Tobii* at [141], the CMA was not obliged during its investigation to disclose every piece of specified information it received (see *BMI* at [39(4)], which is summarised at [58] above). It was entirely reasonable for the CMA to disclose evidence by means of its PFs and in a way which complied with the CMA's obligations under Part 9 of the Act. Therefore, the question for this Tribunal is whether the disclosure which the CMA made in the PFs and Consultation Paper was fair. In short, was the evidence and information disclosed by the CMA to Cérélia in its PFs and Consultation Paper sufficient to enable it to understand the gist of the case it had to answer?

268. The PFs set out the gist of the case on the closeness of competition between the Parties and Cérélia was able to respond to this and make or repeat its argument that the CMA had mischaracterised the similarities between the Parties; the PFs set out the implications of the differences in the position of PL and branded products and the extent of range overlap in the Parties' activities.

269. In summarising customers' perceptions of the Parties, the PFs stated at §9.61:

> "We found that the majority of customers perceive the Parties to be competitors. We note the mixed response from suppliers, but consider that this is, to some extent, likely to reflect the channel-specific nature of the tendering process and each supplier's position and focus on its own rivals within that channel."

270. The CMA noted at PF §9.61 that this was a mixed response. The CMA noted how the Parties considered each other in their internal documents. In the section on "constraint in commercial negotiations" the CMA noted the Parties' evidence that retailers never threaten to shift volumes between PL and branded but pointed to evidence from some retailers of the way they understood the tension to be available for use as a lever in negotiations, which is summarised at PF §9.76-9.88 and §9.101-106.

271. This allowed Cérélia to understand the case it had to answer and a reasonable exposition of the gist of the major supermarkets' positions, either in their responses to the questionnaires or as supplemented by meetings or calls as supporting evidence for the case set out in the PFs.

272. Similarly, the PFs and Consultation Paper set out the CMA's position on alternative competitive constraints in considerable detail. The positions of Bells and Henglein were discussed at length and the evidence on the extent to which they were or were not likely to be effective constraints now and in the short-term future was set out for Cérélia to respond to.

273. The PFs deal with entry and expansion at Chapter 10. They considered evidence relating to likely entry and retailers' attitudes to potential entry. They considered the impact of market size and growth and gross margins on the likelihood of entry and expansion at §§10.107 to 10.118; see, for example, PFs §§10.107-10.110, 10.114 and 10.118 in particular.

274. Again, therefore, the PFs contained the gist of the case on entry and expansion and no unfairness to Cérélia arises from the drafting of the questionnaires or from the CMA's refusal to disclose them or the answers relating to entry and expansion during the investigation.

(4) Overall conclusion on Ground 3

275. We therefore reject Ground 3.

L. GROUND 4: THE EXTENSION TO THE INQUIRY PERIOD FOR "SPECIAL REASONS" WAS UNJUSTIFIED

276. Under Ground 4, Cérélia argues that the CMA's extension of the inquiry period was not justified by "special reasons" within the meaning of s.39(3) of the Act, and that as a result the extension was *ultra vires*. The consequence of this is that the Decision was published after the expiry of the applicable statutory deadline and is therefore void, and the Merger should be treated as having been cleared.

277. Having considered the ANoA, AD, skeleton arguments and the oral submissions made by leading counsel for Cérélia and the CMA at the Hearing, as well as the written submissions filed by Cérélia and the CMA after the Hearing, we consider that Ground 4 raises the following issues:

   (1) Can a challenge to the existence of special reasons be raised now or is that challenge time barred?

   (2) If so, what is the standard of review?

   (3) What does "special reasons" mean in s.39 of the Act?

   (4) Did CMA have special reasons in this case?

   (5) If the CMA did not have special reasons in this case, what are the legal consequences of that?

(1) Is a challenge to the decision to extend the reference (the "Extension Decision") in this case time barred?

(a) CMA's arguments

278. In oral submissions at the Hearing (Day 3) and in post-Hearing submissions the CMA argued that Cérélia could have challenged the Extension Decision at the time it was made. That is because s.120(1) of the Act permits any person aggrieved by "a decision mentioned in subsection 1(A)" to apply to the Tribunal for a review of that decision. The decisions mentioned in subsection 1A(a)

include a decision of the CMA "under this Part in connection with a reference or possible reference in relation to a relevant merger situation". A decision under s.39(3) of the Act to extend the statutory timetable for the investigation of a merger reference is a decision "in connection with" that reference.

279. The CMA says that if such challenge had succeeded at the time, the result would have been that the Decision would have had to be produced within the original (unextended) time limit (or a later extension made for other "special reasons" such as the need to conduct the Further Consultation). But Cérélia did not apply for a review of the Extension Decision at the time it was made, and instead waited to see the outcome of the CMA's investigation. The CMA says Cérélia should not be permitted to call into question the validity of the Decision on the grounds that the (unchallenged) Extension Decision was invalid. To hold otherwise would frustrate the operation of the statutory scheme. Among other things, it would circumvent the time limit in rule 25(1) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules"), under which an application under s.120(1) of the Act for the review of a decision in connection with a reference or possible reference in relation to a relevant merger situation must be made by filing a notice of application within four weeks of the date of notification / publication of the decision concerned. The "decision" for these purposes is the Extension Decision which was made on 5 October 2022. By the date of its application for a review of the Decision (issued on 20 January 2023), Cérélia was well beyond the time limit in rule 25(1) of the Tribunal Rules for an application for review of the Extension Decision.

280. The CMA says it has not only a power but a *duty* to decide whether there is an SLC in a relevant merger situation and to take remedial action, as well as a power to extend the time within which that decision should be taken.

281. It follows, the CMA argues, that there is no basis at this late stage for Cérélia to invite the Tribunal to treat the Decision as having been unlawfully made, solely by virtue of the alleged failings in the Extension Decision.

282. The cases which Cérélia relies on are different in that the issues went to the procedural fairness of the process and therefore the SLC decision (eg for failure

to disclose) whereas in this case the collateral challenge is to a "discrete, reviewable decision in its own right", namely the decision to extend the investigation timetable.

(b) Cérélia's arguments

283. Cérélia argues that the CMA was out of time in raising these points because they were not raised in its Defence or AD but only in post Hearing submissions. However, if the Tribunal were to entertain these points, Cérélia says the following arguments are relevant:

(1) First, it is well recognised that a final decision can be challenged on the basis of unlawfulness at an intermediate stage in the decision-making process.

(2) That question was addressed by the Court of Appeal in *R (Eisai Limited) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438. The case concerned NICE's refusal to make available to consultees a fully executable version of an economic model relating to the cost effectiveness of a particular drug, rather than a read-only version. That refusal was said to be procedurally unfair. NICE argued that the challenge was out of time because it should have been brought at the time that the model was sent out, rather than at the end of the consultation. The Court of Appeal rejected NICE's argument, confirming at [70] that the final determination could be challenged on the basis of the earlier unfairness:

> "… The Final Appraisal Determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable version would have been academic. Further, and very importantly, Eisai had a right of appeal to the Appeal Panel against that determination, and the grounds on which such an appeal lay included procedural unfairness."

(3) In the context of merger reviews, there are numerous examples in which the Tribunal has heard and adjudicated on challenges in exactly

analogous situations to the present, and which have not been addressed by the CMA. See for example *Ryanair Holdings Plc v Competition Commission* [2014] CAT 3, *Tobii* (cited above) and *Meta* (cited above) – despite a clear acknowledgement that parties may also challenge the intermediate step (see *Sports Direct International Plc v Competition Commission* [2009] CAT 32). All of these cases included challenges to a final report based on an earlier (alleged) failure to disclose sufficient information. Based on the CMA's submissions, all of these challenges would have been out of time and not even been considered by the Tribunal. However, that is not how they were dealt with and it does not appear from the judgments that the CMA argued in each of those cases that the substance of the challenges could not be considered.

(4) The premise for the CMA's submission that Cérélia is time barred from challenging the Extension Decision is therefore false. Such challenges are not illegitimate. To challenge a decision based on irregularity in its making is a well-recognised application of judicial review principles.

284. Cérélia further argues that there is no foundation for the CMA's assertion that for the Tribunal to even consider that Cérélia's Ground 4 "would frustrate the operation of the statutory scheme". Cérélia says that it is entirely legitimate for a merger party to challenge a final report on the basis that it is out of time, and this comes within the (limited) right of review provided for in s.120 of the Act. If the CMA were correct in its submission, all challenges to intermediate decisions would have to be made during the investigation, at a time when the outcome of the investigation was unknown, resulting in a proliferation of potentially academic challenges, disrupting the (as the CMA argues) highly constrained investigation period.

285. Cérélia says that the risk that future decisions could be challenged in this way is limited. This challenge has not arisen from any real confusion as to the statutory test, but from the fact that the "special reasons" put forward by the CMA do not withstand scrutiny. There is nothing in the documents disclosed by the CMA to suggest that any steps were taken to assess whether the issues in the case were in fact especially complex, or the submissions particularly extensive

or if there was anything "special" at all, as compared to the many mergers considered by the CMA. Nor could there be any suggestion that the CMA was unaware of Cérélia's position on the Extension Decision during the merger inquiry and the possibility of this being a ground of challenge as Cérélia made its objections clear at the time of the extension. It was clear, Cérélia says, that the situation is one of the CMA's making and one that it could readily avoid in future.

(c) Our assessment

286. Allowing the challenge to be considered now would not frustrate the scheme of merger control. To insist that all challenges to an extension decision have to be made immediately would encourage such appeals and as a matter of practical probability give rise to further delays and unnecessary applications. Resources would need to be taken away from dealing with the merger investigation to deal with interlocutory appeals. Further the hearing of such applications is likely to be overtaken by events once a final decision has been made.

287. Furthermore, where the CMA concludes, after an extension in the timetable, that a relevant merger situation may not be expected to result in an SLC or where it finds an SLC but imposes a remedy acceptable to the merger parties, a challenge to that extension is less likely. So, insisting that any challenge to an extension must be brought immediately may encourage litigation that might otherwise prove unnecessary.

288. These seem to us good reasons to conclude that Cérélia's challenge under Ground 4 can be considered now.

(2) Standard of review

(a) Cérélia's arguments

289. Cérélia argues that it is for the Tribunal alone to determine the meaning of "special reasons", which is a matter of law. Once this term has been defined, the CMA's application of it is to be reviewed on the basis of an irrationality

standard. At this second stage the subjective nature of the test informs the review, but does not obviate the need for the CMA's application to be reasonable and its consideration to be objectively justified by relevant facts.

(b) CMA's arguments

290. The CMA argues that the statutory language, which speaks of whether the CMA "considers that there are special reasons" (emphasis added) for an extension of the prescribed timetable, makes clear that a decision whether to extend is a matter for the CMA (i.e. it is a subjective rather than an objective test). It submits that, just as a wide margin of appreciation is afforded to the CMA in relation to the inquiries it considers appropriate to undertake as part of a merger investigation, so should significant latitude be afforded to the CMA in deciding whether there are special reasons that justify an extension of time. It follows that it is not for the Tribunal to decide for itself whether the reasons put forward by the CMA for extending time are sufficiently "special". Instead, consistently with the fact that applications under s.120 of the Act must be decided in accordance with ordinary judicial review principles, the Tribunal should not interfere unless the decision to extend time is based on a misdirection as to the correct legal test or the decision is irrational.

291. The CMA further argues that whether a reason is "special" is an inherently protean concept, and in practice will be a matter of evaluation in an acutely fact sensitive context (all the more so when that wording in s.39(3) of the Act is prefaced by "if [the CMA] considers"). The phrase "special reasons" does not lend itself well to further definition or gloss.

(c) Our assessment

292. It seemed eventually to be common ground that it was for the Tribunal to determine as a matter of law the meaning of "special reasons" in s.39 of the Act, although the CMA has a margin of appreciation to determine what amounts to a special reason. The position is clear that it is a question of law what is the meaning of special reasons and that is something that the Tribunal can rule upon. If the CMA makes an error of law, then the Tribunal can intervene. However

whether a situation is sufficiently special to fall within the provision is a matter of fact for the CMA, where the Tribunal can only intervene on the usual judicial review grounds.

(3) Meaning of special reasons

(a) Cérélia's arguments

293. Cérélia referred us to a number of sources suggesting that the original intention of Parliament (or at least relevant Ministers) was that extensions would be sought only in "exceptional" circumstances and also to a July 2021 consultation paper stating that the CMA has used its power to extend the statutory timeframes for Phase 2 merger investigations in approximately half of cases. Further, Cérélia pointed to the CMA's statutory duty of expedition, the consequence of a failure by the CMA to comply with time limits in Phase 1 (see s.33(3)(za) of the Act) and the possibility of sanction in the event parties fail to deal with the CMA's information requests on time. These, Cérélia says, all point to an interpretation that extensions to the Phase 2 statutory timeframe should be exceptional.

294. Cérélia also referred us to oral submissions made on behalf of the CMA on Day 2 of the application hearing in Case No. 1334/4/12/19 *Ecolab Inc. v Competition and Markets Authority* (*"Ecolab"*) that:

> "The CMA operates under a statutory timetable. It aims to complete its enquiry in 24 weeks. It doesn't treat the extension as a means of easing time pressure on itself or on the merging parties. It extends for special reasons and, therefore, it needs an exceptional case."

295. Cérélia referred us to the definition of "special" in the Oxford English Dictionary ("OED") in relation to an abstract concept. The OED refers to "out of the ordinary, unusual; exceptional in quality or degree".

296. Cérélia also argues that the CMA's approach would allow it to claim special reasons in all cases where it needed more time to finalise its report. Leading counsel for Cérélia argued at the Hearing that if, in fact, it is becoming difficult

for the CMA to handle large cases in the 24 weeks (whether because of reasons of greater volumes of data, more sophisticated analytical tools or size of transaction) that is a matter for Parliament (in terms of changing the time limits), not a matter for the Tribunal to stretch the meaning of "special reasons" beyond its proper meaning.

297. Cérélia also referred to the recent case of *Apple Inc v Competition and Markets Authority* [2023] CAT 21 ("*Apple*"), which considered the CMA's adherence to statutory time limits in relation to a market investigation reference.

(b) CMA's arguments

298. The CMA contends that the starting point is to look at the words used by Parliament in s.39(3) of the Act: Parliament did not use the words "exceptional circumstances" but "special reasons". Further, it is important for the Tribunal to note that the various extrinsic aids to construction that Cérélia refers to only plays a secondary role in the process of statutory interpretation and, in the present case, they do not shed any additional light on the meaning of the words "special reasons".

299. The CMA argues that "special reasons" are ordinary English words which are clearly intended to give the CMA a discretion to extend its investigation by a strictly limited period where it considers that the circumstances are special enough to require it. That is, the CMA must clearly have in mind and understand that an extension is not a routine step and requires specific justification in each case. At the Hearing this was refined into "a reason which arises from circumstances which prevent the CMA from fulfilling its statutory duty within the specified time despite all reasonable efforts to do so with all due expedition". The CMA maintains that it is not possible to be more precise, save to acknowledge that any judgement that it makes must be a rational one with a specific justification in each case. The CMA drew the Tribunal's attention to dicta of Lord Mustill in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 ("S*outh Yorkshire Transport")* at page 29C of "the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a serious degree of precision".

(c) Our assessment

300. While it may be the case that Parliament in enacting the Act in 2002 might not have intended to see a "special reasons" extension provision to be applied to half of all such cases, that does not itself help us to determine the legal definition of the phrase or whether or not there were special reasons *in this case*.

301. In relation to the CMA's arguments in *Ecolab*, the Tribunal's judgment ([2020] CAT 12) did not adopt the CMA's language. We are reluctant to hold that the language used by the CMA in court in one case necessarily should determine how we apply the law in a different case.

302. Parliament used the word "special" rather than "exceptional" though we note the OED definition of "special" refers to "out of the ordinary, unusual; exceptional in quality or degree" which might point back towards exceptional. On the other hand (and we note the CMA's views regarding the types of material Cérélia relies on as aids to interpretation), the record of the Public Bill Committee Debates on 30 April 2002 by the Standing Committee on Bills regarding the Enterprise Bill, which Cérélia seeks to rely on reflects the relevant minister explaining that, in relation to special reasons, "one reason for which an extension might be required is illness of members of the reporting groups which might seriously impede the [CMA's] work".

303. In our judgment it is reasonable to consider the whole statutory context: while Parliament wanted the CMA to perform its functions with appropriate expedition (s.103 of the Act), it can also be assumed that it wanted the CMA to perform its duties in an appropriately thorough way, providing reasons for its decisions and with time to evaluate the effectiveness of its proposed remedies and that this might take 32 rather than 24 weeks in some cases. The need for expedition therefore does not require us to take an unduly narrow approach to the concept of special reasons.

304. Neither party in this case argued that the advances in data quantity and quality, economic and related analyses or sophistication in antitrust analysis over the 20 years or more since the Act was enacted should mean that what might have been

regarded as "special" at the beginning of the regime was now becoming more common or that the phrase should otherwise be applied flexibly to accommodate current practices. Perhaps the CMA came closest to this in arguing for a purposive approach and quoting extensively from the way Lord Mustill interpreted "substantial" in *South Yorkshire Transport*. However if we are to avoid a circular approach that allows "special" to apply whenever the CMA says it needs an extra 8 weeks it is important that "special reasons" has a meaning and imports a degree of qualification that separates such cases from the norm.

305. Consequently, mindful of Lord Mustill's dicta in *South Yorkshire Transport* of the need to avoid redefinition we think that s.39(3) requires special reasons in the form of good, case- specific reasons which justify an extension of the normal time limit for the management and conclusion of Phase 2 cases. We do not think it is either necessary or helpful for the Tribunal to seek to put a gloss on the natural meaning of the word "special".

(4) Did the CMA have special reasons in this case?

(a) Cérélia's arguments

306. Cérélia says that the "special reasons" to which the CMA made reference in the notice of extension were: (i) the purported complexity of the inquiry; (ii) the need to consider issues raised by the parties and third parties, including the broad scope of Cérélia and GMI's submissions in response to the Annotated Issues Statement and Working Papers; and (iii) the need to reach a fully reasoned final decision within the statutory timeframe. Cérélia argues that none of these purported "special reasons", even if they were all present in this case, *quod non*, appear "special" at all. Rather, they appear to be features that would be present in every Phase 2 investigation. If that were the case, the statutory requirement for "special reasons" would be meaningless.

307. Cérélia says further that this is not a complex merger. The DTB market and DTB products are straightforward and the CMA ought to be very familiar with the UK grocery market (and its participants and processes) as a consequence of prior investigations the CMA, the OFT and the Competition Commission have

carried out. There are a small number of market players and the data and documentary evidence are not heavy compared to most Phase 2 merger investigations.

308. Cérélia says that, to the extent the CMA regarded the volume of Cérélia's submissions to be unusually broad, that was "a reflection of the many errors that characterised the CMA's investigation and its analysis, and which Cérélia and GMI had to address".

309. Cérélia contends that the more likely explanation for the CMA's need to allow itself an additional 8 week period, including a further 4 week period to prepare its PFs, is that the CMA's investigation had been thrown into disarray. The CMA likely realised belatedly that it had entirely overlooked a relevant supplier and had built its case around a theory of harm in respect of which it had no documentary evidence whatsoever, in respect of which the evidence from retailers was inconsistent and ambiguous and which neither Cérélia nor GMI recognised as consistent with the operation of the market.

310. Moreover, Cérélia argues that the CMA's proffered explanation is irrational as there is nothing in the documents disclosed by the CMA to suggest that any steps were taken to assess whether the issues in the case were in fact especially complex, or the submissions particularly extensive or if there was anything "special" at all, or identified any factors other than the usual stresses of conducting an in-depth inquiry to a statutory deadline, and the need to review and act upon submissions by the Parties on the CMA's emerging thinking compared to the many mergers considered by the CMA.

(b) CMA's arguments

311. The CMA says that its reasons in this case related to the complexity of the inquiry, not the market and that its previous cases did not include recent detailed consideration of the DTB market.

312. The CMA denies that there were any material errors in the CMA's investigation or analysis prompting the extension. Rather, it said, it was the fact that the

Parties were alleging that there were such errors meant that the CMA was required to give full and proper attention to the points raised by them: such circumstances were plainly capable of justifying an extension of the statutory timetable. Further, the Parties' responsive submissions were not confined to correcting purported errors but included, for example, completely new pieces of economic analysis in relation to the Annotated Issues Statement and Working Papers (e.g. on Foreclosure Incentives and Entry and Expansion), which all needed to be conscientiously considered.

313. In response to the suggestion that the extension was driven by it having overlooked a relevant supplier the CMA says this was "simply a repackaging of substantive complaints" by Cérélia and "misconceived" and not part of the CMA's reasoning.

314. The CMA says that it asked itself the question whether there were special reasons for the extension. In other words, it directed itself in accordance with the correct statutory test. Insofar as Cérélia was here suggesting that the CMA ought instead to have asked itself whether there were exceptional circumstances justifying an extension, that depended on a gloss that Cérélia had wrongly placed on the relevant statutory test.

315. As to the suggestion that the CMA failed to ask itself how the volume of material or complexity of the issues raised by Cérélia's submissions compared to the position in *other* Phase 2 investigations, the CMA says that this was hopeless. The CMA argues it was not obliged to carry out a comparative exercise before deciding that the circumstances of the present case justified an extension. Cérélia's claim that "around 50%" of Phase 2 investigations are extended for "special reasons" was similarly irrelevant: the question for the Tribunal was whether it was irrational for the CMA to conclude that there were "special reasons" for an extension in *this* case.

(c) Our assessment

316. Merging parties can be expected to respond at length and in detail and with further and more particularised materials, including economic and survey

evidence through the course of a Phase 2 investigation. That is particularly the case where they have the sense that they have a *prima facie* case to answer or the CMA is taking a markedly different view of the issues than they are. The investigative process needs to be flexible enough to accommodate that.

317. In this case the CMA's statement of reasons for the extension was quite broad and generic. Its references to the need to consider the "issues raised" and to "the need to reach a fully reasoned decision" do not disclose anything that is specific to this case. They may reflect a realisation that the Parties were likely to take issue with many points and that there was a real risk of a subsequent application for review in this case but these are points applicable at least to the high proportion of Phase 2 investigations that involve an SLC finding at the stage of the PFs and arguably to all Phase 2 investigations regardless of their outcomes.

318. The references to the "complexity of the inquiry" and "the broad scope of the submissions made by the Parties" are case specific but on their face rather vague. What emerges from a review of the state of the case at the time of the Extension Decision (in light of a review of Cérélia's responses to the Annotated Issues Statement and Working Papers) are the following features:

(1) In contrast to Cérélia's position on Ground 4 that this was a simple case, this was not a case where the issues were narrowing to a clearly defined and uncontroversial analysis of closeness of competition and alternative constraints. Instead Cérélia was continuing to contest whether this was a horizontal case at all; it was contesting the nature of the overlap in the Parties' activities; it was contesting the closeness of competition; it was contesting the evidence on customer and end consumer behaviour; it was contesting the picture on alternative constraints. In light of our conclusions on Grounds 1 and 2 it cannot be said that these were a function of "errors" in the CMA's process or thinking to that point.

(2) Consequently it was open to the CMA to consider that it would need to revisit its analysis so far and to test its views on the Merger through these various lenses in order to ensure a fair hearing to Cérélia's case; the fact that the battle lines in the case were clearly going to be broader than in

a standard horizontal merger case (or indeed a standard vertical case) and that the CMA would need to justify both its own approach and its rejection (if that were to be the outcome, as proved ultimately to be the case) of Cérélia's case clearly added to the CMA's burdens in this case.

319. Ideally these features would have been more explicitly particularised and dealt with by the CMA, whether in the extension notice or in correspondence with Cérélia and that might, perhaps, have addressed Cérélia's objections at the time. Nevertheless they support the proposition that this was an unusual case in terms of how little common ground there was at that stage of the inquiry. It was both necessary and appropriate for the CMA to carry out the further investigation and analysis that it in fact did. No doubt Cérélia would have criticised it if the CMA had not.

320. The fact that, in the event, the CMA conducted the Further Consultation into matters raised and particularly the issue of alternative competitive constraint involved the further testing of the CMA's thinking and Cérélia's responses in a way that partially (albeit *ex post*) justified the extension.

321. In light of these factors we conclude that there were special reasons for the extension in this case and the CMA was justified in so concluding. We do not consider that the CMA acted irrationally or beyond its margin of appreciation when it decided that it had "special reasons", such as would justify intervention by the Tribunal on judicial review grounds. We note however that in the future the CMA should do rather more to explain its position in cases involving extensions to the Phase 2 statutory timetable pursuant to s.39(3) of the Act.

(5) What is the legal consequence if the CMA does not have special reasons?

322. In light of our conclusion that the CMA had special reasons in this case to extend the Phase 2 statutory timeframe under s.39(3) of the Act, this issue no longer falls for determination. However as the point was fully argued on both sides, it is appropriate for us to express our views on this issue. We therefore proceed to consider what would have been the legal consequences in the event that we had found that there were no special reasons.

(a) Cérélia's arguments

323. Cérélia argues that if the Extension Decision was not made for special reasons within the meaning of the Act then the extension is not valid and the Decision was made outside the applicable statutory time limit. It says in its post-Hearing submissions that s.41(1) of the Act made the CMA's power to impose a remedy expressly contingent on a final report published within the deadline:

> "Subsection (2) [the duty to impose a remedy] applies where a report of the CMA has been prepared and published under s.38 within the period permitted by section 39".

324. Cérélia says these limits are conditions precedent to the existence of the CMA's powers, because the proper construction of the Act is that in respect of mergers, time is of the essence and so time limits must have meaning, and that the CMA should not have power to intervene in mergers outwith (or substantially outwith) those times (*R v Soneji* [2005] UKHL 49 ("*Soneji*")).

325. Cérélia says that an *ultra vires* act is void, regardless of any order made to quash it, which is no more than clarificatory: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 ("*Anisminic*") at page 196B per Lord Pearce and *A v HM Treasury* [2010] UKSC 5 at [4]. Accordingly, the absence of special reasons removes the basis for the extension, and had the automatic consequence that the Decision and decisions contained within it were void. Further, no new reference could be made (due to the long-stop at ss.22(3) of the Act), and so no new decisions could be taken.

326. In the alternative, Cérélia argues that if the Tribunal takes the view that it has a discretion not to grant a remedy to be made in the event we decide that the extension is outside s.39(3) of the Act, then we should quash the Decision and decisions within it because the discretion should be exercised with restraint. It "may make inroads upon the rule of law, and must therefore be exercised with the greatest care" (Forsyth & Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, 2022) page 570). See also *R (Edwards) v Environment Agency* [2008] UKHL 22 ("*Edwards*") at [63].

327. One reason for exercising such a discretion is that the public law wrong was not material, causing no prejudice or injustice (Fordham, *Judicial Review Handbook* (7th edn, 2020) §4.2). This is reflected in the so-called second limb of *Soneji*, incorporating considerations of substantial compliance and prejudice.

328. An often-cited instance of this principle is the *Simplex* test (*Simplex GE (Holdings) Ltd and another v Secretary of State for the Environment* [1988] 3 PLR 25) ("*Simplex*"), focusing on the outcome of the flawed decision making. However, and as reflected in *Soneji*, Cérélia says that the *Simplex* test is not well suited to errors comprising the breach of a time limit, as it will always be open to the authority to say that the outcome would "inevitably" have been the same. The better approach is to focus on the issue of materiality (or substantiality) of the error, and prejudice to the applicant. In any event, the Tribunal cannot be satisfied that the outcome would have inevitably been the same had the CMA not taken an extra 8 weeks, and the Tribunal plainly cannot proceed on a basis that the CMA would have issued the same decision but without any proper foundation and supported by evidence.

329. In the present case Cérélia says that it was clear both that: (a) there was substantial non-compliance with the deadline and (b) this caused material prejudice to Cérélia.

330. Cérélia cites *Apple* and *BMW v Competition and Markets Authority* [2023] CAT 7 in written and oral submissions as examples of cases where the Tribunal had not shied from making rulings on the application of the correct interpretation of the law even where this caused administrative prejudice to decisions of the CMA which otherwise appeared appropriate on their merits.

(b) CMA's arguments

331. The CMA argues in its post-Hearing submissions that it is well-established that a failure to comply with a statutory time limit (or other procedural requirement) does not without more render a subsequent decision a nullity. Rather, "the correct approach to the legal consequences of a failure to observe procedural provisions is to ask whether Parliament must have intended invalidity ... to

follow": *R v Guraj* [2016] UKSC 65 at [16]. In the present case, the Act does not specify the consequences that follow if a decision to 'block' a merger follows from an extension decision that was subsequently held to be unlawful. In the circumstances, Parliament cannot be presumed to have intended that a decision to extend the statutory timetable, taken in good faith, would (if later shown to be unlawful) necessarily result in a merger being treated as cleared despite the existence of a decision finding that the merger concerned had given rise to an SLC. Such an outcome would be contrary to the public interest. See, by analogy, *Soneji*, which considered whether there remained a power to make a confiscation order after the expiry of a statutory time limit. In holding that the power remained, Lord Steyn (with whose reasons and conclusions Lords Carswell and Brown agreed) observed at [24] that any prejudice to the accused was "decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than *bona fide* errors in the judicial process".

332. The CMA says that it is relevant, in this context, that the CMA is under a statutory duty, once a reference under s.22 of the Act has been made, to decide whether a relevant merger situation has been created and if so whether this has resulted or may be expected to result in an SLC: see s.35(1) of the Act. The fact that the CMA has (*ex hypothesi*) unlawfully extended the period within which it must comply with the duty under s.35(1) cannot absolve it of the duty, and nothing in the statute suggests otherwise: cf. *Soneji* at [30], [33], [39]-[40], [57] and [80]. Further, in contrast with the position under s.22(3)(za) the Act (which expressly provides that "[n]o reference shall be made" if the 40-day period for making a reference under s. 34ZA has expired), there is no provision that prevents the CMA from fulfilling its duty under s.35(1) to determine (following a reference) whether there is an SLC (and its consequent duty to impose a remedy under s.41) in circumstances where the CMA has in good faith extended time on the basis of "special reasons" that are (retrospectively) held to have been absent.

333. The CMA says that the Tribunal's remedial powers on review applications in merger cases are discretionary in nature (including, in particular, its power to quash a merger decision): see s.120(5) of the Act ("The Competition Appeal

Tribunal may – (a) dismiss the application or quash the whole or part of the decision to which it relates"; emphasis added). Therefore, even if (*quod non*) a flaw in the Extension Decision affected the lawfulness of the Decision, the Tribunal has no obligation to quash it (given that, for the reasons the CMA has advanced, the Decision would not be a nullity). Instead, the Tribunal would have a discretion as to whether in the circumstances of this case the Decision should be quashed. By analogy, the CMA directed us to *Tesco Plc v Competition Commission* [2009] CAT 9 at [30]-[32], in which the Tribunal accepted that its discretion to remit a merger case to the Competition Commission was a "real" one and that "in certain circumstances it can be appropriate not to refer back", such as where doing so would be "otiose, because the ultimate outcome would be the same whether or not a referral was made".

334. In that regard, the CMA says it has long been established in the judicial review context that a court may properly refuse relief if satisfied that the outcome would inevitably have been the same: see *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [267] and *Edwards* at [63] and *Simplex* at page 42. This principle applies equally where the Tribunal is hearing an application under s.120 of the Act. In the present case, if the error (assumed for present purposes) in relation to the Extension Decision had not occurred and the timetable had therefore not been extended, the CMA says it is inevitable that the CMA would have reached the same substantive decision in relation to the adverse effects of the Merger on competition. It is unreal to suppose that if the CMA had had less time to consider the matter it would have arrived at different PFs or that it would subsequently have departed from its PFs in the Decision – given that the further enquiries it conducted and consulted upon during the extended period led it to confirm its decision in the Decision. The CMA notes that the PFs were made on 4 November 2022, *before* the expiry of the original (unextended) investigation period (which would have ended on 29 November 2022 in the absence of the extension).

335. Further, the CMA submits that this is a plain case in which the Tribunal should not exercise its discretion to grant relief in relation to Ground 4 in the form of an order quashing the Decision, given the clear harm to the public interest that would result. Should there be any retrospective criticism of the basis for the

Extension Decision by the Tribunal, the Tribunal would be entitled to allow its judgment to "speak for itself" and it would not be required to grant any further relief: *R (Purja) v Ministry of Defence* [2003] EWCA Civ 1345 at [73].

(c) Our assessment

336. The first question is whether, if we found that the CMA did not have special reasons for the extension, the Tribunal would have a discretion as to remedy under s.120 of the Act or whether, as Cérélia contends, the Extension Decision and Decision would be void without more.

337. The CMA pointed us in its post-Hearing submissions to Chapter 4 of *De Smith's Judicial Review* (9th edn, 2023) and the authorities cited there to support its case that the courts have moved away from references to voidness as used in *Anisminic* (which was relied on by Cérélia): see especially §4.065 and the cases cited there.

338. This is not a situation in which the challenged decision affects large numbers of subjects (in contrast to the immigration or confiscation cases most often cited before us). The call to looking at broad Parliamentary intention arising from those cases therefore seems less helpful; in any event it arguably would be ambiguous: Parliament wanted mergers to be considered expeditiously but it also wanted the CMA to investigate and remedy SLCs. Consequently we find those cases of only limited assistance.

339. What is particularly striking is that the provision which most specifically governs the Tribunal in this situation is s.120 of the Act which is very explicitly drafted in permissive terms: "The Competition Appeal Tribunal may quash …; and where it quashes …, refer the matter back to the original decision maker to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

340. As a result we consider that were we to find that the Extension Decision was outside s.39(3) of the Act then we would have a discretion as to remedy despite

the wording of s.41 of the Act as to the imposition of a remedy in relation to a report published within the time permitted.

341. In the circumstances of this case where the CMA has made an SLC Finding and where we have upheld the substance of the CMA's Decision in the respects in which it has been challenged we would not grant relief.

342. We would exercise our discretion having regard to the following considerations.

(1) First, we would not grant relief on the basis of the importance of remedying, mitigating or preventing the SLC that has been identified.

(2) Second, we are satisfied that absent the extension it is inevitable that the CMA would still have concluded that there was an SLC requiring divestiture, even if the Decision may have been rather rushed and may not have been as well reasoned or worded.

(3) Thirdly, we acknowledge that Cérélia may have been prejudiced to a limited extent by the delay in the CMA's decision making and by the outcome of the CMA's investigation. However, Cérélia chose to complete this transaction prior to the final outcome of the merger control process in the UK and therefore accepted the risk of an adverse outcome. Further Cérélia provided to the CMA a great deal of material in the form of submissions and evidence which it wanted the CMA to consider, and which was considered. Consequently we are not persuaded that the prejudice to Cérélia outweighs the wider interest in upholding the SLC Finding and remedy decisions in this case.

M. CONCLUSIONS AND DISPOSITION

343. This case was presented as a root and branch attack on the CMA's assessments of the evidence obtained during the Merger inquiry. In order to reach our conclusions on Cérélia's Grounds for review, the Tribunal was therefore required to consider a large amount of material in detail, including in many instances the original documents that were before the CMA as part of the

Merger inquiry. This is unusual given the relevant standard of review in s.120 applications, as covered in Section F above. In order not to lengthen an already lengthy Judgment, however, we have endeavoured to summarise our positions on the evidence rather than recounting the minutiae of each argument put forward by Cérélia and the CMA.

344. For the reasons given in this Judgment, Grounds 1A and 1B and Grounds 2 to 4 of Cérélia's application are dismissed.

Hodge Malek K.C. Chair	Michael Cutting	Derek Ridyard

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 1 September 2023