COMPETITION COMMISSION

AG BARR p.l.c./Britvic plc

A report on the anticipated acquisition by AG BARR p.l.c. of Britvic plc by means of an all-share merger

9 July 2013

Website: www.competition-commission.org.uk

Members of the Competition Commission who conducted this inquiry

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The Competition Commission has excluded from this published version of the final report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets.

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Summary

1. On 14 November 2012, the boards of AG BARR p.l.c. (AG Barr) and Britvic plc (Britvic) (collectively ‘the parties’) announced that they had agreed the terms of an acquisition by AG Barr of Britvic by means of an all-share merger. The proposed merger was approved by shareholders on 8 January 2013 and the merged company would be named Barr Britvic Soft Drinks plc.

2. On 13 February 2013, the Office of Fair Trading (OFT) referred the proposed acquisition to the Competition Commission (CC) for investigation and report.

3. As a result of the OFT’s decision to refer the merger to the CC the offer by AG Barr to purchase the entire issued and to-be-issued share capital of Britvic lapsed on 13 February. However, on 14 February both parties announced that they would work closely with the authorities to expedite clearance of the merger.

4. We concluded that a relevant merger situation would be created by the merger and that we have the jurisdiction to consider whether the creation of that situation may be expected to result in an SLC within any market or markets in the UK for goods or services.

5. There are two broad categories of soft drinks: carbonated soft drinks (CSDs) and still drinks. CSDs include drinks such as colas, fruit flavoured carbonates and lemonade as well as carbonated energy drinks. Still soft drinks include fruit juice, water, juice drinks, squashes and sports drinks. Soft drinks producers sell to intermediaries (ie retailers (such as supermarkets or operators of pubs or restaurants), wholesalers or cash-and-carry outlets). These customers buy products for onward sale to the consumer (ie the final purchaser of the product). Retail sales of soft drinks in the UK amounted to £11.2 billion in the year to December 2012. Of this, £7.3 billion was in the off-trade (where soft drinks are purchased from a retail outlet for consumption off the premises), and £3.9 billion in the on-trade (where soft drinks are consumed on the premises) markets. Sales in the off-trade may be further subdivided into the take-home segment (where product is purchased for consumption later at home and accounts for 75 per cent of off-trade sales) and the impulse segment (where product is purchased for immediate consumption and which accounts for 25 per cent of off-trade sales).

6. Both companies manufacture and supply soft drinks, have a portfolio of proprietary carbonated and still brands and produce other brands under licence. IRN-BRU is the largest brand within AG Barr’s portfolio. [✂] per cent of IRN-BRU sales are in Scotland. AG Barr also manufactures and sells Orangina in the UK under licence from the Orangina Schweppes Group and produces and distributes Rockstar energy drinks in the UK and Republic of Ireland under a partnership arrangement with Rockstar, Inc. Britvic also manufactures and sells a number of major soft drink brands in Great Britain and has a long-standing exclusive bottling agreement with PepsiCo in Great Britain and Ireland for the manufacture and sale of Pepsi, 7UP, Gatorade, Mountain Dew and So Be V Water.

7. We concluded that the supply of CSDs in Great Britain was an appropriate relevant market within which to assess the competitive effects of the merger. We also considered the competitive effects specifically in Scotland because AG Barr has a particularly strong presence there.

8. We concluded that the appropriate counterfactual was a continuation of the existing situation with an independent AG Barr and Britvic both competing in the soft drink markets.

9. We assessed three possible competitive effects of the merger: the first was that prices might rise if the merger brings together brands that are close (although not necessarily the closest) substitutes for consumers (unilateral horizontal effects); the second was that the merger may adversely impact competition by increasing the parties' bargaining power to make customers stock more of their range at the expense of the smaller brands of smaller producers (portfolio effects); and the third was that the merger may make coordination more likely post-merger if there was none pre-merger, or make coordination more stable if there was evidence of pre-existing coordination (coordinated effects).

10. In our evaluation of unilateral horizontal effects we considered carefully the evidence on the existing level of competition between the parties and the incentive to increase prices post-merger. We noted that most customers thought there was some substitutability between AG Barr's and Britvic's products but they considered that the overlap was small. A survey conducted for the parties suggested there was some diversion between Orangina and Britvic brands and between IRN-BRU and Britvic brands. Another survey on customer segmentation conducted by the parties suggested that IRN-BRU was relatively distinct from other CSDs and therefore suggested that there would be low levels of substitution from IRN-BRU to other products.

11. Our econometric analysis did not find significant results for the diversion between Orangina and Britvic brands.

12. An analysis of Great-Britain-wide data did not show a statistically significant relationship for the diversion from IRN-BRU to Britvic brands. We focused our analysis on Scotland data to identify whether the greater market share of AG Barr in Scotland might make relationships between IRN-BRU and Britvic products more easily isolated statistically or whether the IRN-BRU customer and the position of IRN-BRU was different in Scotland.

13. In our analysis of multiple retailers in Scotland we used data provided by Tesco and the Co-op.[1] When the data from the two retailers was pooled, the data did not produce statistically significant results for the diversion between IRN-BRU and Britvic. When we looked at the data for the two retailers separately, both models appeared less reliable than when combined. The Co-op data did not produce statistically significant results but the Tesco data did. However, we were concerned about the reliability of our Tesco Scotland analysis. In general, we found that the demand estimation appeared more reliable the more that we pooled data.

14. We also analysed two sources of data for the impulse segment in Scotland. One data set (based on Nielsen Scotland impulse data) did not produce statistically significant results for the diversion from IRN-BRU to Britvic brands. The Litmus impulse data, although this also suffered from some limitations, produced statistically significant results and suggested that in Scotland Britvic brands are to some extent a substitute for IRN-BRU.

15. In our assessment of the effects of the merger we used the statistically significant result from the analysis of Litmus data in Scotland to estimate the illustrative price increase that might attend the merger. The diversion ratio of [✂] per cent from IRN-

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[1] The Co-operative Group Limited.

BRU to Britvic brands in the Scottish impulse segment implied an illustrative price increase of [✄] per cent.

16. We also considered whether the merger might lead to a price increase for IRN-BRU to on-trade customers but noted that the merger would make little difference since AG Barr already supplies IRN-BRU to Britvic for sale in its dispensers.

17. In our assessment of the evidence we noted that customers were in the main not concerned by the merger and said that the two companies' brands did not overlap substantially. We also noted the consumer segmentation survey, which suggested that IRN-BRU was distinct from other CSDs. In our econometric analysis we assessed a number of different sources of data and most did not produce statistically significant results for the relationship between IRN-BRU pricing and the level of Britvic sales. Overall our assessment did not suggest that the merger would create strong incentives for the parties to increase price. However, we noted that soft drinks producers and their customers negotiated on many other aspects in addition to price. These non-price factors could reduce to some extent any incentive for the parties to increase the price of IRN-BRU after the merger.

18. We concluded that there would not be significant harm to competition resulting from the merger as a result of unilateral horizontal effects.

19. To evaluate possible portfolio effects we examined whether a larger company was able to attain preferential distribution for its products compared with smaller companies. We found that although there was some evidence that on average larger companies were able to achieve somewhat better distribution for their products than would be expected simply on the basis of the sales of each brand, particularly in the impulse segment, we saw examples of smaller companies achieving high levels of distribution for their products compared with larger companies.

20. We considered whether the merged company would be large enough to allow it to achieve levels of distribution that were more like Coca-Cola Enterprises (CCE) and, if so, whether this would be to the detriment of smaller soft drink companies or new entrants. The merged company would still be less than half the size of CCE. We concluded that the merger would make little difference and would not mean new entrants and smaller soft drink companies would be disadvantaged significantly as a result of the merger.

21. We concluded that the merger would not result in significant harm as a result of portfolio effects.

22. We assessed whether the merger might give rise to coordinated effects between CCE and the merged company. We did not consider that all the necessary conditions for coordination in the off-trade apply in CSD pricing: *(a)* soft drinks producers do not directly observe competitor pricing terms and there are substantial additional payments made by soft drinks companies to customers which are highly complex and which a competitor would not be able to monitor; and *(b)* there is no clear coordination point. We also concluded that category captaincy status (where a supplier—usually a large supplier of branded goods—is appointed by the retailer to exchange information with the retailer to help the retailer manage the way that products within a particular category are presented and sold to consumers) would not facilitate price coordination between soft drinks producers.

23. We considered whether coordination would be more practical on promotions but did not find any evidence that promotions were currently the object of coordinated

strategies and noted that customers, who control promotions calendars, would have an incentive and the ability to disrupt any coordination.

24. The merged company would still be significantly smaller than CCE in the off-trade CSD market and this would continue to make coordination unlikely after the merger.

25. We considered whether the merger would make coordination more likely in the on-trade but noted that the merger would make little difference since Britvic already supplies IRN-BRU through its dispensers in Scotland and AG Barr's market share in the on-trade is low. Therefore we concluded that the merger would not have a significant impact on coordination in the on-trade.

26. We concluded that the merger would not result in significant harm as a result of coordinated effects.

27. We considered whether there would be countervailing factors that might mitigate the effect of the merger. We concluded that it was unlikely that the threat of new entry of a product that would compete with IRN-BRU would act as a significant constraint on the merged entity. We did not find other significant countervailing factors that might offset the effect of the merger.

28. We concluded that the merger would not be likely to give rise to an SLC in any market in the UK.

Findings

1. The reference

1.1 On 13 February 2013, the OFT referred the proposed acquisition by AG Barr of Britvic (collectively 'the parties') by means of an all-share merger.

1.2 The CC was required to decide:[2]

(a) whether arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

(b) if so, whether the creation of that situation may be expected to result in an SLC within any market or markets in the UK for goods or services.

1.3 Our terms of reference, together with information on the conduct of the inquiry, are set out in Appendix A.

1.4 This document, together with its appendices, constitutes our findings. Further information, including non-commercially-sensitive versions of the parties' submission and summaries of evidence from third parties, can be found on our website.[3]

2. Background to the industry and the parties

Soft drinks market size

2.1 There are two broad categories of soft drinks: CSDs and still drinks. CSDs include drinks such as colas, fruit flavoured carbonates (such as Fanta and Tango) and lemonade as well as carbonated energy drinks such as Red Bull. Still soft drinks include fruit juice, water, juice drinks, squashes and sports drinks.[4]

Sales channels and customers

2.2 Soft drinks producers do not sell directly to final consumers, but rather sell their products to customers who then sell on to final consumers.[5] Customers buy products in large quantities at wholesale prices for ultimate sale to consumers. There are two main channels through which products are sold to the final consumer: these are traditionally known as the off-trade channel and the on-trade channel:

(a) Sales through the off-trade channel are to retailer customers who sell to final consumers for consumption off the premises (eg bought in a shop or supermarket). Off-trade customers include grocery multiples,[6] cash-and-carry operators[7] and retail buying groups.[8]

(b) Sales though the on-trade channel are made to pubs, bars, restaurants and other food outlets which then sell soft drinks to final consumers. The products are consumed on the premises. On-trade customers include cash-and-carry oper-

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[2] Under section 36 of the Act.
[3] www.competition-commission.org.uk/our-work/ag-barr-britvic.
[4] For more detail on soft drink categories, see Appendix B.
[5] We note that the exception to this is cash-and-carry customers, which sell to retailers which then sell to consumers.
[6] For example, Tesco, Asda, Sainsbury's, Morrisons, Co-op, and 'limited assortment discounters' such as Lidl and Aldi.
[7] For example, Booker, Costco, Makro, Bestway.
[8] For example, Landmark, Musgrave, Nisa, Spar, Today's.

ators (some off-trade and on-trade customers also buy from cash-and-carry operators), wholesalers and distributors,[9] breweries and pubs[10] and restaurants.[11]

2.3 The off-trade channel could be further divided into the impulse segment where final consumers buy for immediate consumption and the take-home segment where the product is taken home for consumption later. Product sizes usually differ between the two, with take-home products generally being larger (eg two-litre bottles or multiple packs), while impulse products tend to be small bottles or cans sold individually. Approximately 75 per cent of off-trade product by value was sold to take-home consumers with 25 per cent sold to impulse consumers.[12]

2.4 In addition to selling branded soft drinks, grocery multiples and many other customers also sell private-label (own-brand) soft drinks, which are sold alongside branded products. In 2012, private-label sales of soft drinks represented 21 per cent of the UK off-trade channel, or £1.5 billion.

2.5 The on-trade channel includes soft drinks sold by pubs and bars, hotels and fast-food restaurants, leisure outlets and canteens for consumption on the premises. Soft drinks are sold in packaged form (bottles or cans) or through dispensers.[13] In 2012 54 per cent by value of on-trade sales by pubs and clubs[14] were through dispensers, in which soft drink syrup supplied in a 'bag-in-box' is mixed with carbonated water in a dispenser. The balance was sold as packaged products (eg bottles or cans).

2.6 Some soft drinks producers provide 'direct delivery' to specific customer groups (eg large customers including pub chains and wholesalers), whilst a variety of wholesalers and distribution specialists operate as intermediaries between the soft drinks producer and the customer.

2.7 Retail sales of soft drinks in the UK amounted to £11.2 billion in the year to December 2012. Of this, £7.3 billion was in the off-trade, and £3.9 billion in the on-trade.[15,16] Retail prices are substantially higher in the on-trade than the off-trade. Although the on-trade sales account for 35 per cent of total soft drink sales by value it accounts for approximately 9 per cent by volume.[17] Off-trade sales are split approximately 48 per cent carbonated and 52 per cent still, by value, while on-trade sales are split 70 per cent carbonated and 30 per cent still by value.[18] Table 1 shows the share of total retail sales for the main products.

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[9] For example, Brakes, Matthew Clark.
[10] For example, Mitchells & Butlers, Whitbread.
[11] For example, McDonalds, KFC.
[12] Britvic Soft Drinks Review 2013.
[13] Also called a fountain.
[14] Source: Britvic Soft Drinks Review 2013. Note, as discussed in paragraph 2.7 this does not include sales made from hotels or restaurants.
[15] Market data for the soft drinks market is collected by a number of companies, and among the most widely cited is Nielsen for the off-trade and CGA for the on-trade.
[16] Nielsen Scantrack and CGA data provided by the parties. The total on-trade channel reported by CGA is not the same as the total reported by Britvic in its annual Soft Drinks Review. Britvic does not include sales made by hotels or restaurants in the on-trade channel, whereas CGA does. CGA therefore reports a larger on-trade channel size (£3.9 billion) than Britvic (£2.7 billion).
[17] CC analysis based on Britvic Soft Drinks Review 2013.
[18] Britvic Soft Drinks Review 2013. Carbonated products include colas, lemonade, energy drinks and fruit and non-fruit-flavoured carbonates. Still products include pure juice, juice drinks, water, squashes, dairy and sports drinks.

TABLE 1 **Soft drink shares of product sales by value***

per cent

	Off-trade	*On-trade*
Carbonated		
Cola	46	53
Energy	25	10
Fruit flavoured carbonates	16	5
Lemonade	5	19
Mixers	4	10
Other	4	3
Total	100	100
Still		
Pure juice	32	36
Water	19	11
Juice drinks	15	25
Squashes	14	28
Dairy	11	0
Other	9	0
Total	100	100

Source: Britvic Soft Drinks Review 2013 and CC analysis.

*The percentages shown are based on the Britvic Soft Drinks Review 2013. As noted above, the on-trade percentages therefore exclude sales made from hotels or restaurants.

2.8 The regional distribution of Great Britain sales is approximately 90 per cent in England and Wales, and 10 per cent in Scotland. An exception is IRN-BRU, of which approximately [✂] per cent is sold in Scotland.

The parties

AG Barr

2.9 AG Barr is one of the leading soft drinks producers in the UK. It produced over 365 million litres of soft drinks during its 2012 financial year (ending 28 January 2012).[19] During its 2012 financial year, AG Barr generated total turnover (gross sales) of £223 million, of which 77 per cent was attributable to sales of carbonated drinks and 23 per cent to sales of still drinks.[20] Approximately 55 per cent of its turnover was generated through sales in England, Wales and Northern Ireland and 43 per cent through sales in Scotland, with the balance for sales outside the UK.[21] Earnings before interest, tax and amortization (EBITA) was £33.7 million and profit before tax (pre-exceptional and other items) was £33.6 million.[22,23] AG Barr's shares are traded on the London Stock Exchange. Approximately 20 per cent of the shares are held by the Barr family.

2.10 In Great Britain AG Barr produces, markets and sells soft drinks to customers (ie retailers, wholesalers and cash-and-carry operators) for ultimate sale to consumers.[24] It also operates a direct sales delivery operation that sells soft drinks to

[19] Shareholder Prospectus published by AG Barr dated 5 December 2012.
[20] ibid.
[21] ibid.
[22] ibid.
[23] Note that the figures reported in the Annual Report and Accounts 2013 for the year ending 26 January 2013 were: turnover £238 million (+6.6 per cent from 2012); EBITA £35.2 million (+3.4 per cent); and profit before tax (pre-exceptional and other items) £35.0 million (+4.3 per cent).
[24] When we refer to consumers we mean the final purchaser of the product. The customer of the parties is the intermediary (ie the retailer, wholesaler or operator of on-site facilities). Some customers such as cash-and-carry operators sell the product to retailers that sell the product to the consumer.

some smaller retailers and on-trade operators,[25] Nielsen data shows that AG Barr was the seventh largest supplier of soft drinks in Great Britain and the fifth largest supplier of CSDs in Great Britain.[26] AG Barr's head office is in Cumbernauld.

2.11 AG Barr has a portfolio of proprietary carbonated and still brands, including IRN-BRU, Tizer, D'N'B, KA, the Barr range, Barr's Originals, Strathmore spring water, St Clements juice drinks, Simply Fruity drinks, Sun Exotic and Rubicon exotic juice drinks. IRN-BRU is the largest brand within AG Barr's portfolio, with sales[27] of approximately £[✂] million during the company's financial year ended 26 January 2013 ([✂] per cent of AG Barr's total sales). [✂] per cent of IRN-BRU sales are in Scotland. AG Barr also manufactures and sells Orangina in the UK under licence from the Orangina Schweppes Group and has a partnership arrangement with Rockstar, Inc under which AG Barr sells and distributes Rockstar energy drinks in the UK and Republic of Ireland.[28]

Britvic

2.12 Britvic is the largest supplier of branded still soft drinks and the second largest supplier of branded CSDs in Great Britain. It sells 2.1 billion litres of soft drinks each year.[29] Its revenue for the 52 weeks ended 30 September 2012 was £1,256.4 million (of which 66.8 per cent was from sales in Great Britain). EBITA (pre-exceptional and other items) was £115.6 million and profit before tax (pre-exceptional and other items) was £84.4 million.[30] Britvic shares are traded on the London Stock Exchange and Britvic is a member of the FTSE 250 index.

2.13 In Great Britain, like AG Barr, Britvic markets and sells soft drinks to customers (retailers, wholesalers and cash-and-carry operators). In addition it has a significant on-trade business where Britvic products are supplied to on-trade operators to be sold to consumers. For the on-trade business Britvic's products are sold both in packaged form (ie in bottles and cans) and through dispensers where product syrups supplied by Britvic are mixed with carbonated water and sold to consumers.[31] Britvic has significant overseas interests. International sales account for 33.2 per cent of sales of which France accounts for 19.9 per cent and Ireland 11.7 per cent.

2.14 Britvic's major brands in Great Britain are Robinsons, J2O, Fruit Shoot, R Whites, Britvic, Purdey's, Juicy drench, drench, Pennine Spring and Tango. Britvic also has a long-standing[32] exclusive bottling agreement with PepsiCo in Great Britain and Ireland for the manufacture and sale of Pepsi, 7UP, Gatorade, Mountain Dew and So Be V Water, as well as an exclusive arrangement with Pepsi Lipton International Limited for Lipton Ice Tea. Britvic has the right of first refusal to all new carbonated drinks developed by PepsiCo for distribution in Great Britain and Ireland. Sales of Pepsi brands accounted for around [✂] per cent of Britvic's Great Britain sales in the financial year ended 30 September 2012.[33] Britvic buys the syrup used to make Pepsi drinks from PepsiCo, manufactures the drinks in its own facilities and then sells

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[25] Sales to retailers and cash-and-carry operators are defined by the parties as sales to the off-trade. Sales to operators of premises where the product is consumed on the premises, such as restaurants or bars, are referred to as the on-trade.
[26] This excludes private-label sales. Source: AG Barr.
[27] Sales after retailer discounts and other fixed payments.
[28] Net sales of Rockstar products amounted to around £[✂] million in the year ended 26 January 2013.
[29] Shareholder Prospectus published by AG Barr dated 5 December 2012.
[30] Britvic plc 2012 Annual Report.
[31] The dispensers are usually owned by the supplier of the product syrup so dispensers of Britvic products are usually owned by Britvic.
[32] The existing Great Britain contract for the Pepsi and 7UP brands extends at a minimum until 2023, but has a five-year extension beyond 2023 built into the agreement.
[33] CC analysis.

them through its distribution channels. PepsiCo is responsible for [✄] while Britvic is responsible for [✄].

2.15 The Britvic Exclusive Bottling Agreements (EBAs) with PepsiCo [✄]. PepsiCo is also a shareholder in Britvic, with a shareholding of 4.88 per cent, and nominates one director on to the Britvic board.

Market structure

Key competitors

2.16 In addition to the parties, key competitors in the Great Britain soft drinks market are:

(a) CCE is an independent bottler of brands owned by, among others, The Coca-Cola Company (TCCC). TCCC is the world's leading manufacturer, marketer and distributor of non-alcoholic beverage concentrates and syrups. CCE produces and markets TCCC brands in Great Britain (a portfolio of 21 brands) to the off-trade and on-trade segments. CCE's brands include Coca-Cola, Sprite, Fanta, Lilt, Dr Pepper, Relentless, Monster, Oasis, glaceau vitaminwater, 5 Alive, Ocean Spray and Powerade. TCCC also owns 60 per cent of Innocent soft drinks[34] and announced in February that it would raise its stake to 90 per cent.

(b) Glaxo Smith Kline (GSK) is a global healthcare company. GSK manufactures and distributes two soft drinks brands—Lucozade and Ribena. On 24 April 2013 GSK announced that following a strategic review it had made a decision to pursue divestment of Lucozade and Ribena subject to the realization of appropriate value for shareholders.

(c) Danone is a French company that sells a range of soft drinks. Its main focus is bottled water, including the Evian, Volvic and Badoit brands.

(d) Nichols is a UK-based soft drinks business. Its main brands are Vimto, Panda, Ben Shaws & Dayla. Nichols markets both CSDs and still drinks. Its subsidiary, Cabana, supplies dispensed soft drinks.

(e) Red Bull, an Austrian company, markets Red Bull energy drinks in the UK.

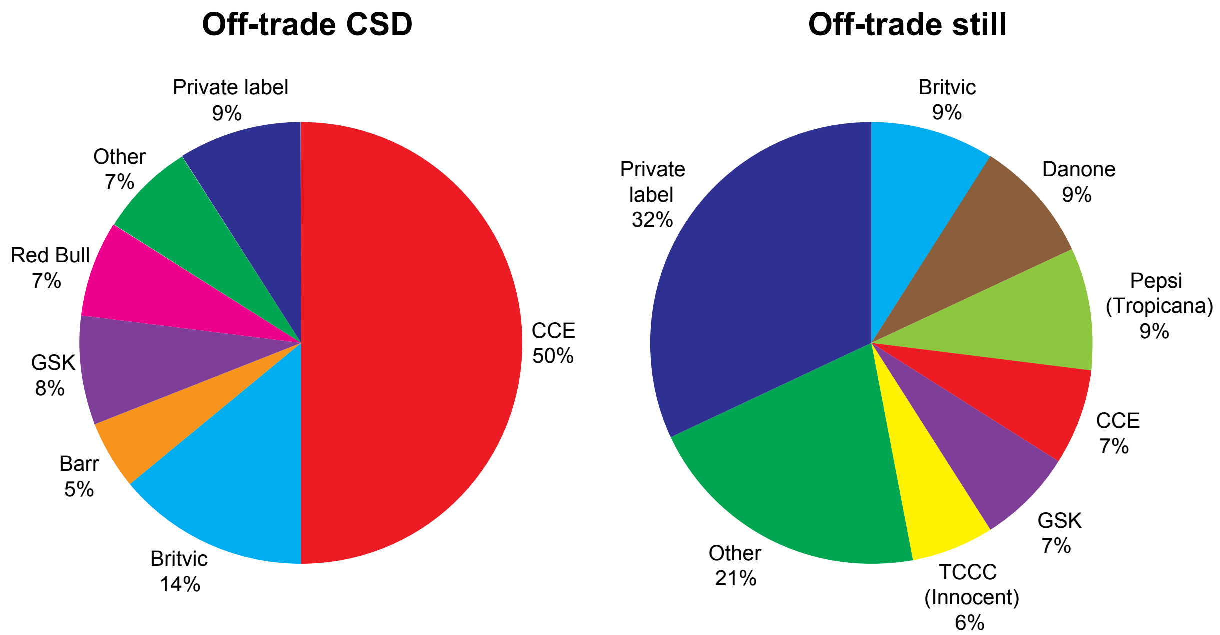
Market shares

2.17 Market shares for the companies are shown in Figures 1 and 2 below. The charts show that CCE has a leading position in both the off-trade and on-trade for CSDs. Britvic's CSDs are second in both markets but Britvic has a stronger market share in the on-trade where it is close in size to CCE. AG Barr has the fifth largest market share in the off-trade CSD market and is smaller in the on-trade CSD market. Britvic has a strong position in the on-trade still market with a market share twice that of CCE. The off-trade still market shows a high penetration of private-label products.

[34] Text of OFT decision on the anticipated acquisition by the Coca-Cola Company of full control of Fresh Trading Limited published on 20 May 2013.

FIGURE 1

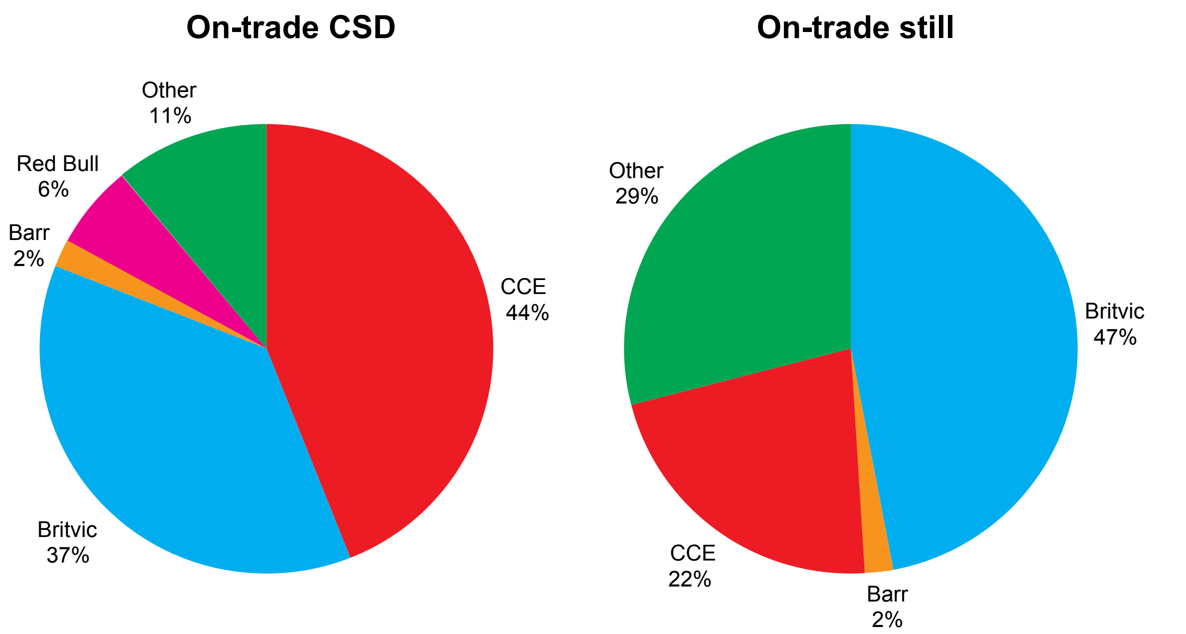
Off-trade segment shares (by value)



Source: The parties based on Nielsen data.

FIGURE 2

On-trade segment shares (by value)



Source: The parties based on CGA data.

2.18 In the on-trade we found that there are three competitors for supplying on-trade outlets with dispensers and the CSD flavours. The two main competitors are the largest soft drinks producers: CCE and Britvic. AG Barr does not offer dispensers but it has a long-term distribution arrangement with Britvic to enable Britvic to offer IRN-BRU in Britvic's dispensers where there is customer demand, eg in Scotland.

AG Barr also supplies IRN-BRU to Cabana, which also supplies on-trade outlets with dispensers and the CSD flavours.[35]

2.19 Further background information on the industry is shown in Appendix B.

3. The merger and the relevant merger situation

Outline of merger situation

3.1 On 14 November 2012, the boards of AG Barr and Britvic announced that they had agreed the terms of a recommended all-share merger of AG Barr and Britvic. It was intended that the merger would be effected by a Court-sanctioned scheme of arrangement of Britvic under Part 26 of the Companies Act 2006 pursuant to which AG Barr would acquire the entire issued and to be issued ordinary share capital of Britvic.

3.2 The merger would have resulted in Britvic shareholders holding approximately 63 per cent and AG Barr shareholders approximately 37 per cent of the issued share capital of the merged company at the time of the merger.[36] The merger represented a reverse takeover for AG Barr under the UK Listing Authority's Listing Rules, and as such was conditional, among other things, on the approval of AG Barr's shareholders and Britvic's shareholders. It was also conditional on the merger not being referred by the OFT to the CC. As a result of the OFT's decision to refer the merger to the CC the offer by AG Barr to purchase the entire issued and to-be-issued share capital of Britvic lapsed on 13 February. However, on 14 February both parties announced that they would work closely with the authorities to expedite clearance of the merger.

The rationale for the merger

3.3 AG Barr and Britvic said that there was a high degree of complementarity between the two businesses' brands, sales channel presence and geographic presence within the UK.[37]

3.4 The parties told us that there was relatively little overlap between the two brand portfolios, and that the combined business would have an attractive portfolio of strong and differentiated brands. The parties believed that the two companies would also benefit from each other's complementary sales and distribution networks that would permit enhanced routes to market, which the parties expected would increase revenue. Britvic's international presence in France, the Republic of Ireland and elsewhere would also be used to facilitate increased international distribution of AG Barr's brands.

3.5 The parties also said that there would be significant cost savings and revenue synergies. They told us that by 2016 they would be able to achieve recurring annual cost savings of £35 million a year[38,39] and annual revenue synergies[40] of at least £5 million a year. Cost savings would result from elimination of duplicated corporate

[35] Cabana is owned by Nichols.
[36] The prospectus in relation to AG Barr valued AG Barr at approximately £552 million and Britvic at £935 million based on the 3 December 2012 AG Barr share price. Market capitalizations on 1 July 2013 were approximately £590 million for AG Barr and £1.25 billion for Britvic (source ft.com).
[37] Shareholder Circular published by AG Barr dated 5 December 2012.
[38] The parties estimate that approximately [✂] million would be achieved through variable cost savings.
[39] In its interim results announced on 22 May, Britvic identified £30 million of cost savings for the stand-alone Britvic business that are likely to reduce those identified from the merger (see paragraph 6.140).
[40] After deducting additional delivery costs and revenues lost where the parties' product portfolios overlapped.

overheads and savings in procurement costs coming from greater scale in procurement of key overlapping raw materials, as well as in indirect procurement such as media, trade marketing and third party external production. Combined operations should also benefit from manufacturing and logistics efficiencies. Revenue synergies were expected to arise through utilization of the combined distribution channels, brand portfolios and geographic presence of the merged entity.

Relevant merger situation

3.6 The test to determine whether the arrangements will result in the creation of a relevant merger situation has two limbs:

(a) first, we are required to decide whether two or more enterprises would have ceased to be distinct; and

(b) second, we are required to test whether the transaction has sufficient nexus in the UK by assessing the turnover of the 'enterprise being taken over' and/or the share of supply of the merger enterprises.

Enterprises ceasing to be distinct

3.7 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'. 'Business' is defined as 'including a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied other than free of charge'.[41]

3.8 In this case we are satisfied that AG Barr and Britvic are businesses for the purposes of the Act as both are incorporated entities and listed on the London Stock Exchange. We are therefore satisfied that the activities carried on by AG Barr and Britvic are enterprises for the purposes of the Act.

3.9 We are also satisfied that had it completed, the transaction described in paragraphs 3.1 and 3.2 above would have resulted in the creation of a combined entity, Barr Britvic Soft Drinks plc, which would have held the assets of both AG Barr and Britvic. By this means the enterprises of Britvic and AG Barr would have ceased to be distinct as they would have become parts of the combined entity.

Turnover and share of supply tests

3.10 The Act requires the CC to establish that the transaction has a sufficient nexus with the UK to give us jurisdiction to consider the reference. This will be the case if either the turnover test or the share of supply test is satisfied.[42] The turnover test is met where the value of the turnover in the UK of the 'enterprise being taken over' exceeds £70 million. Section 28 of the Act provides a mechanism for determining what must be taken into account in determining the turnover of the 'enterprise being taken over'. In this case the transaction involves the acquisition by AG Barr of the entire issued and to-be-issued ordinary share capital of Britvic, we are satisfied that Britvic is the entity being taken over. The turnover of Britvic in the UK was

[41] Section 129(1) and (3) of the Act.
[42] Section 23 of the Act.

£864 million in the 2012 financial year.[43] We are therefore satisfied that the turnover test is met and we do not need to consider the share of supply test.

3.11 For the reasons given above we are satisfied that a relevant merger situation would be created by the all-share merger between AG Barr and Britvic and we have jurisdiction to consider whether the creation of that situation has resulted or may be expected to result in an SLC within any market or markets in the UK for goods or services.

4. Market definition

4.1 Our Merger Assessment Guidelines (the Guidelines)[44] state that the purpose of market definition in a merger inquiry is to provide a framework for the analysis of the competitive effects of the merger. The Guidelines go on to state that the CC will identify the market within which the merger may give rise to an SLC, and that this will include the most relevant constraints on the behaviour of the merger firms.

4.2 The Guidelines also note that in practice, the analysis leading to the identification of the market or markets and assessment of competitive effects will overlap, with many of the factors affecting market definition being relevant to the assessment of competitive effects and vice versa.[45] The relevant market contains the most significant competitive alternatives available to the customers of the merger firms. It includes the most relevant constraints on the behaviour of the merger firms.[46]

4.3 In this section, we set out the relevant market and segments within this market in which we have assessed the effects of the merger.

4.4 Both parties produce and sell an overlapping range of CSDs to similar customer bases for onward sale to the consumer within Great Britain (see Appendix B, paragraphs 16 to 21). Both parties also produce and sell still soft drinks but the overlap in this market is minimal (see paragraph 2.17). We therefore consider that the supply of CSDs in Great Britain is an appropriate relevant market within which to assess the competitive effects of the merger. In our view the overlap in customers and products indicates that this market definition provides an appropriate framework for evaluating constraints on the merged firm's conduct in relation to the overlap products.

4.5 We have assessed the importance of constraints from products both inside and outside the relevant market in our analysis of the competitive effects of the merger. We note that within the relevant market there are segments where the conditions of competition may differ and where appropriate we have considered this in our assessment of the competitive effects of the merger.

Product segments

4.6 We have considered a number of factors when assessing market segmentation. Our focus in evaluating the competitive effects of the merger has been in CSDs where most of the overlap between the parties appears to take place.[47,48]

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[43] Britvic 2012 annual report.
[44] CC and OFT, *Merger Assessment Guidelines, CC2 (Revised)*, September 2012, paragraph 5.2.1.
[45] The Guidelines, paragraph 5.1.1.
[46] The Guidelines, paragraph 5.2.1.
[47] The consumer survey commissioned by the parties suggests very little substitutability from CSDs to still soft drinks.
[48] We note that in most cases soft drinks producers supply both CSDs and still drinks. In our assessment of competitive effects we refer to soft drinks producers generally and to the CSD market.

4.7 We looked at the means of distribution and end use (see paragraphs 4.4 and 4.5) and considered whether the means of distribution formed different segments within the market. We looked at the types of products bought for sale through each channel and the way the products were sold to customers.

4.8 We looked at the types of products and how they were sold to the off-trade customers (paragraphs 6.16 to 6.28). We observed the nature of the product mix sold and the nature of the sales agreements (generally annual individually negotiated joint business plans (JBPs)) and concluded that the off-trade was a separate segment of the market.

4.9 We assessed segmentation in the off-trade between the impulse and take-home segment[49] and evaluated whether the competitive effects are different within each segment. We noted that the take-home, impulse and on-trade segments are not independent from the point of view of supply, and soft drinks producers do not have complete freedom in the pricing that they apply to each channel since customers are able to buy from intermediaries that sell across channels (paragraph 6.56).

4.10 The parties are suppliers of branded soft drinks, and argue that retailers' own-label products compete with theirs, to varying degrees depending on the product. In our assessment of competitive effects we have assessed the degree to which the branded products are constrained by own-label products (paragraph 6.81).

4.11 We noted that for the supply of soft drinks including CSDs in the on-trade there are different buying practices and delivery patterns. The key focus is the contract for the provision of the dispenser with which the supplier will also seek to supply other packaged products; thereafter, the ability for third party soft drinks producers to supply other packaged products is constrained by the relatively limited shelf space available. Moreover, we noted that products were sold on different terms compared with the supply to the off-trade. Customers also purchased packaged products[50] from the same producer and/or from other soft drinks producers. For these reasons we concluded that the on-trade could form a separate segment of the market.

Geographic markets

4.12 We note that a large majority of the parties' businesses are represented by customers supplied nationally or on national terms.[51] AG Barr told us that it made [✂] sales in Northern Ireland[52] and there was minimal overlap there. We therefore consider the relevant geographic market to be Great Britain.

4.13 We have also considered the impact of the merger specifically in Scotland because AG Barr has a particularly strong presence there, which we expect may influence the national terms it negotiates with retailers (paragraphs 6.42 to 6.53). Given the possibility of consumer preferences being different in Scotland and England and Wales, especially for sales of AG Barr's largest brand, IRN-BRU, we examined whether it might be possible to set different prices in different regions. This could be done by negotiating different regional prices with national distribution chains, or by setting different prices to intermediaries who are predominantly in one geographic location or

[49] For the purposes of our empirical work, we have taken the take-home segment to be the same as purchases from grocery multiple chains. This is only an approximation, in that some take-home sales occur outside of the multiples, and some purchases at multiples are for immediate consumption.
[50] Products in cans or bottles.
[51] The parties said that [✂] per cent of AG Barr's business by value was represented by customers supplied nationally or on national terms and [✂] per cent of Britvic's customers were supplied on national terms.
[52] AG Barr told us that less than [✂] per cent of its sales were to locations in Northern Ireland.

the other. Large retailers and wholesalers told us they priced nationally and that they would not accept different prices in different parts of the country. AG Barr told us that [✂]. We considered that customers' national pricing and the practicability of arbitrage across regions would undermine the effectiveness of a regional pricing strategy.

4.14 We considered whether soft drinks producers could achieve different prices in different regions by varying the amount of promotional activity. We have received evidence from customers that there are regional variations in promotions. Most of the promotional offers are the same across Great Britain but IRN-BRU may be more prominently displayed (eg on a gondola end[53]) in Scotland. Some customers said they occasionally had a Scotland-specific promotion of IRN-BRU to reflect Scottish events such as Hogmanay. Finally others said they ran local promotions at the local manager's discretion (paragraph 6.13).

4.15 Consistent with the guidelines,[54] the evidence that we have gathered suggests that the CSD market would satisfy the hypothetical monopolist test. From our competitive assessment, we did not reach a firm view on whether specific subsets of the segments identified would form a market that would satisfy the hypothetical monopolist test. We are satisfied that we have identified and considered all relevant competitive constraints in our assessment and no reasonable alternative market definition would have led to a different conclusion regarding the substantive effects of the merger.[55]

Conclusion on market definition

4.16 We conclude that the supply of CSDs in Great Britain is an appropriate relevant market within which to assess the competitive effects of the merger. We have also considered the impact of the merger specifically in Scotland because AG Barr has a particularly strong presence there.

5. Counterfactual

5.1 Consideration of whether the merger may give rise to an SLC involves a comparison of the prospects of competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.[56] The Guidelines explain[57] that we may examine several possible counterfactual scenarios based on evidence obtained during the course of our inquiry. The CC must select the most likely scenario absent the merger (which may or may not be the continuation of the pre-merger situation). The Guidelines note that 'the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments'.[58]

5.2 We observe that at present AG Barr and Britvic are independent competitors and saw no evidence that they would not be likely to remain so in the absence of the merger. The parties submitted that the transaction should be assessed against the prevailing conditions of competition.

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[53] Gondola ends are the space at the end of an aisle in a retailer's store.
[54] The Guidelines, paragraph 5.2.1. The Authorities will ensure that the relevant market they identify satisfies the hypothetical monopolist test.
[55] We note that the relevant market may not be the narrowest market that satisfies the hypothetical monopolist test (the Guidelines, paragraph 5.2.3).
[56] The Guidelines, paragraph 4.3.1.
[57] The Guidelines, paragraphs 4.3.1 & 4.3.7.
[58] The Guidelines, paragraph 4.3.6.

5.3 We also considered whether either company would withdraw from a subset of soft drinks products such that there was no longer an overlap in the products offered by each company. We noted that the existing Britvic Pepsi agreement runs until 2023. AG Barr produces Orangina under licence. However, if the Orangina licence were not renewed for any reason it would not be likely to alter the counterfactual in view of our conclusions on the assessment of competition between Orangina and Tango.[59]

5.4 Britvic told us that [✂].

5.5 AG Barr is constructing a new manufacturing and distribution plant in Milton Keynes (MK). AG Barr told us that the purpose of the plant was to support the anticipated growth of AG Barr across the UK. The MK site will also alleviate current capacity constraints in can production, optimize UK production and distribution [✂]. The parties noted that the building of the new plant reflected that there was relatively greater potential for AG Barr to grow in England as compared with Scotland but AG Barr said that absent the transaction, growth would nonetheless continue to be relatively slow. Therefore we do not consider that the MK plant would have affected substantially competition in the counterfactual compared with the level now.

5.6 We therefore considered it was unlikely in the foreseeable future that either party would withdraw from a subset of soft drinks and we concluded that the most likely counterfactual is a continuation of the existing situation with an independent AG Barr and Britvic both competing independently in the soft drink markets.

6. Assessment of the competitive effects of the merger

6.1 In this section, we assess the competitive effects of the acquisition.[60] We begin by describing the nature of competition between soft drinks producers. We then discuss the theories of harm that we set out in our issues statement[61] and which we proposed to investigate in our assessment of the competitive effects of the merger. These theories of harm are discussed below. During our inquiry, we did not identify any other relevant theory of harm and none was put to us.

6.2 In paragraph 2.15 we noted that the Britvic EBAs with PepsiCo [✂]. We did not consider that [✂] there would be a significant impact on competition for cola, limeade or lemonade.

6.3 For each theory of harm we assess the existing competition between soft drinks producers. Then we consider what the likely effect of the merger would be on competition under the theory of harm.

The nature of competition between soft drinks producers

6.4 As discussed in paragraph 2.2, the parties compete with other soft drinks producers for the wholesale supply of CSDs to retailers that sell to the consumer or to other intermediaries such as wholesalers or cash-and-carry operators that then sell to retailers for sale to the consumer.[62] Consumers are not direct customers of the soft drinks producers. Soft drinks producers compete with one another to obtain listings for products and to obtain promotions at the customer's premises, to increase the visibility of products (for example, through gondola end promotions) and thereby the

[59] We assess competition between Orangina and Tango in paragraph 6.54.
[60] Section 36 of the Act.
[61] Issues statement published on 25 March 2013.
[62] We include within retailers on-trade operators that sell to consumers for consumption on the premises.

level of sales. Soft drinks also compete with other (non-soft-drink) products for promotions.

Customer negotiations: off-trade

6.5 There are a complex series of pricing and product positioning aspects to the negotiations between the soft drinks producer and its customers. Negotiations extend beyond prices to include details of promotions and fixed payments from producers to retailers for listing and promotions. These are described below. The aim of these negotiations from the soft drinks producer's point of view is to ensure that its aims are aligned with those of the retailer to drive sales to the consumer. The aim of the retailer is to increase footfall and overall sales and profitability at its stores.[63]

6.6 With large customers there are usually direct, often intense, negotiations between the soft drinks producer and the customer.[64] The nature of the agreement is usually set out annually in a JBP. The agreements amount to complex tariffs, covering a range of aspects that help to align the incentives of the soft drinks producer and its customers.[65,66]

6.7 A JBP with a grocery multiple usually contains the following:

(a) a set of wholesale prices for each product (ie unit prices) for on and off promotion periods (subject to specific promotions);

(b) recommended retail prices;[67]

(c) discount terms related to the level of total sales across all products;

(d) discount terms related to the sales of specific products;

(e) payments from producers to retailers for the visibility of products on shelves and on gondola ends, in promotional literature and online;[68] and

(f) agreements on the number, type and timing of promotions to run during the year.

6.8 In the CSD market, 'high/low pricing'[69] is frequently used and products are on promotion frequently. The parties told us that promotions on soft drinks and CSDs in particular drive incremental consumption. AG Barr told us that customers expected to see frequent promotions for soft drinks and these expanded the market so that

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[63] The retailer will consider the overall effect of a promotion on overall sales at its stores including their effect on overall footfall and possible reductions in sales of other competing products caused by the promotion.

[64] A price request increase might at first be received with a request to understand the reasons for the price rise. [✂] has indicated that it will try to find ways to mitigate an increase—for example, by offering to increase distribution. In the case of the 2012 negotiations between AG Barr and [✂], however, the process resulted ultimately in a flat refusal to consider the JBP, and commercial relations proceeded without an agreement, based on previous prices.

[65] There are a number of reasons why the incentives of the manufacturer and the retailer might not be aligned. A simple case arises where the retailer is constrained in the amount of high-value promotional locations in-store that it can deploy. In such cases, and absent any transfers, it would simply allocate space to the products that it could expect would make it the highest profits on promoted sales. But a manufacturer might have an incentive to make a transfer payment in order to be selected for a promotional slot that on pure sales-profits grounds it would not otherwise have. In this example, the manufacturer would like the retailer to be selling more product than the retailer would choose to do. In this sense, the example is like the classic 'double marginalization' problem faced by firms in a vertical chain.

[66] [✂], for example, told us that '[✂] will make payments to customers to incentivise the customer to market our products effectively – this includes payments to support promotions and payments for listings and shelf space'. Britvic told us that the structure of conditional payments allowed it [✂].

[67] This has been seen with some retailers but not others.

[68] [✂] said that there was a fixed element to running promotions which the soft drinks producer invested in. GSK said that most retailers would have a rate card for the cost of a gate fee for a promotion.

[69] By 'high/low pricing' we are referring to all pricing behaviours in which periods of high prices are frequently punctuated by periods of much lower prices.

consumers bought more product overall than they would if the average price were the same but there were no promotions. [✂] said that 'always on promotion' strategies led to a significant reduction in profits because with this strategy consumers cut back on overall spending.[70] Promotions may be very deep, for example, a 'buy one get one free' promotion (BOGOF) represents a 50 per cent price reduction.

6.9 The off-promotion price also appears to be important to producers and retailers despite the intensive use of promotions in the industry. Britvic said that the un-promoted shelf price was important because many promotions (for example, BOGOFs) defined the promoted price with reference to the un-promoted price.

6.10 Volume discounts to customers are a characteristic of this market. Soft drinks producers have an incentive to run their plant at full capacity because of the fixed costs of manufacturing and of marketing their products.[71] Many of the JBPs that we examined had volume discounts to reflect the soft drinks producer's aim to increase sales of particular products.

6.11 Retailers aim to maintain and grow their gross margins.[72] AG Barr told us that if it did not satisfy the margin expectations of a retailer, the retailer might ask for a payment to make up the shortfall.

6.12 Competition between soft drinks producers is evident in the mixture of variable fees (ie the unit price and volume discounts) and fixed transfers (usually payments made for product positioning and display). This raises the possibility that changes in buyer or seller power might be felt through changes in fixed transfer payments rather than through changes in variable product price. [✂] said that it thought sellers with stronger brands would be able to secure better terms for obtaining display space than sellers with less strong brands.[73]

6.13 In grocery multiples with national coverage, pricing to consumers is usually national although the display of products may vary to reflect regional differences. This is particularly the case with IRN-BRU which is more prominently displayed in Scotland than in England and Wales with substantially larger amounts of shelf space.[74]

6.14 Negotiations with cash-and-carry wholesalers are similar to those with multiples with volume discounts, promotions and fixed and variable payments. However, we have found that in general [✂].[75]

6.15 Wholesale prices are individually negotiated in most cases through the JBP but some wholesale sales are made at listed wholesale prices. In particular AG Barr sells directly to some convenience stores at the prevailing list wholesale prices.

Customer negotiations: on-trade

6.16 We noted in paragraph 2.5 that around 55 per cent of on-trade sales are through dispensers. The two major competitors are CCE and Britvic.[76] There is direct

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[70] Britvic gave us the example of [✂], which tried this approach on its [✂] range.
[71] For example, the cost of advertising.
[72] [✂] said that it would seek to maintain its per cent margin and the soft drinks producer would contribute towards that but [✂] would contribute an element of the cost as well. [✂] said that the soft drinks producer would fund a proportion of the promotion which the customer would see and get the benefit of. BP said that it would have to invest margin to hit some of its price points.
[73] It said that it charged a fixed fee, irrespective of volume sold.
[74] [✂] said that while the offer was the same nationally it might instruct a promotion of IRN-BRU to be more prominently displayed (eg on a gondola end) in Scotland. Bestway said that it had local promotions.
[75] We have established this by direct examination of the JBPs of cash-and-carry companies and multiple retailers.
[76] Cabana (Nichols) purchases Pepsi from Britvic for its dispensers.

competition between these companies to supply the dispenser with cola and therefore the resulting range of the company's brands. A cola, lemonade and a lemon and lime drink would generally be supplied, along with others. In Scotland and northern England Britvic dispensers would typically include IRN-BRU, under existing arrangements between the parties. Competition to supply the CSDs in the dispenser system is usually through a tender process and supply arrangements are frequently for several years. The dispense equipment is usually owned by the soft drinks producer and this might give the incumbent a cost advantage at the time of retendering. Generally the main features of on-trade contracts are similar to those for the off-trade although the contracts tend to have longer terms than off-trade contracts:

(a) Terms often three years with RPI-based price escalation clauses.

(b) Volume discounts.

(c) Product-specific discounts.

(d) Payments by the soft drinks producer for display space (mainly on menus or posters).

6.17 On-trade customers also sell alternative branded goods in cans or bottles, stored in chillers.

Consumer price sensitivity

6.18 Unlike in the off-trade, where promotions attract consumers to purchase increased amounts of soft drinks including CSDs, consumers in the on-trade do not appear to be particularly responsive to changes in drinks prices. In research groups, consumers often cannot recall the prices of drinks.[77] Therefore competition for consumers centres on making the product available and visible on the customer's premises so that consumers will purchase it.[78]

Summary of the nature of competition between soft drinks producers

6.19 In summary, the JBPs and contracts which result from negotiations between soft drinks producers and their customers in both the on-trade and the off-trade have a large number of terms and include payments in both directions between customers and soft drinks producers.[79] They are the result of brand owners seeking to align their aims with those of the customer by attracting consumers to the customers' premises and encouraging the consumer to buy the brand owners' products. Soft drinks producers compete by negotiating JBPs and contracts with customers, which offer volume discounts and promotional opportunities so as to increase sales to and increase brand awareness among consumers.

Theories of harm

6.20 We have investigated three theories of harm:

[77] Whitbread said that customer research suggested that its consumers were not very responsive to small changes in drinks prices.
[78] There are exceptions to this. Whitbread told us that it had started to offer 'bottomless' promotions on its' dispense sales, with unlimited refills, and noted that this had had a substantial impact on volumes sold.
[79] In practice the payments are usually netted off the soft drinks producer's invoices.

(a) *Unilateral horizontal effects.* The first theory of harm is that prices might rise if the merger brings together brands that are close (although not necessarily the closest) substitutes for consumers. For example, if the price of IRN-BRU before the merger is constrained by competition from Britvic's products among others, the wholesale price of IRN-BRU might increase after the merger. The ability to increase the wholesale price resulting from the merger might be mitigated if customers have good enough alternatives to resist price increases. Currently, for example, if IRN-BRU is a must-stock brand in Scotland, the threat to switch some off-trade shelf space to other products, including Britvic products, may act as a restraining factor on IRN-BRU's price. This restraint would be weakened following the merger to the extent that Britvic brands were alternatives to IRN-BRU. We focused on IRN-BRU and Orangina because the parties' survey indicated that there was [✄] diversion by consumers between IRN-BRU and Britvic products and between Orangina (marketed by AG Barr) and Tango (marketed by Britvic).

(b) *Portfolio effects.* The second theory of harm is that the merger may adversely impact competition by increasing the merged entity's bargaining power to make customers stock more of their range at the expense of smaller competitors. Under this theory of harm, the merger could lead to a situation in which consumers face reduced choice. In the longer term, competition in the industry might be reduced if small competitors exit the market.

(c) *Coordinated effects.* The third theory of harm is that the merger would reduce the number of large competitors, particularly in Scotland. This may make coordination more likely post-merger if there was none pre-merger, or make coordination more stable if there was evidence of pre-existing coordination.

Unilateral horizontal effects

6.21 Our first theory of harm was that the merger might create incentives for the merged entity to increase prices if it brought together brands that were close (although not necessarily the closest) substitutes for consumers. To understand the incentives that exist for prices to increase following the merger, we assessed the closeness of competition that currently exists between the CSD brands of AG Barr and Britvic in Great Britain and then considered the effect of the merger. We then considered the balance of bargaining power between the parties and their customers to assess whether any incentive to increase price would be affected by the merger.

Closeness of competition between AG Barr and Britvic

6.22 We used the following evidence:

(a) surveys commissioned by the parties;

(b) third party views on substitute products for the parties' products; and

(c) a detailed econometric analysis.

Surveys

6.23 The parties commissioned a consumer survey which was conducted in September–October 2012.

6.24 We assessed the methodology of the consumer survey and we had some reservations. [✂][80]

6.25 The survey suggested a moderate degree of substitutability between IRN-BRU and various Britvic brands. A useful way to measure substitutability is through diversion ratios. The parties estimated a diversion ratio from IRN-BRU to all Britvic brands of [✂] per cent from the survey data but noted that this might be an overestimate because they thought a correction needed to be made for consumers diverting to goods other than CSDs.[81] The survey also suggested that Tango sales might act as a constraint on Orangina pricing.[82] The diversion from Orangina to Britvic was estimated to be [✂] per cent from the survey. The other diversion ratios identified by the survey were: from Tango to AG Barr brands, [✂] per cent; from the AG Barr range to Britvic brands, [✂] per cent; Pepsi to AG Barr brands, [✂] per cent; 7UP to AG Barr brands, [✂] per cent.[83]

6.26 The parties argued for diversions to be calculated at the product level without adjustment of diversion to products already owned by the merging company.[84] They also said that inferences regarding diversion ratios calculated from the survey should take account of the ability of retailers to influence downstream diversion through their stocking and promotion decisions. The parties said that in particular, retailers had the proven ability to influence the relative rate of diversion from IRN-BRU to Britvic brands post-merger, via shelving decisions (eg dropping Pepsi from a gondola end and replacing it with Coke); and the ability to delist some of the smaller Britvic brands that contributed to the diversion to Britvic. The parties said that diversion ratios should also take account of the possibility of diversion to an 'outside good'.[85] The parties said these factors would have reduced the estimated diversion from IRN-BRU to the Britvic portfolio.

6.27 We agreed with many of the proposed adjustments that the parties offered for the calculation of diversion ratios. We did not agree with the parties that the actual value to use for the adjustment for diversion to the outside good ought to be set at an arbitrarily chosen [✂] per cent. We concluded that the survey itself provided an estimate of this diversion, and that this value ought to be used.

6.28 Britvic also commissioned a detailed consumer segmentation survey for its own marketing purposes.[86] This provided useful qualitative information about IRN-BRU. It [✂]. The survey tends to reinforce the view of IRN-BRU as a relatively distinct product. [✂] This would suggest that there would be low levels of substitution from IRN-BRU to other products because IRN-BRU was relatively distinct from other CSDs. The evidence provided useful context, but its extreme level of detail made specific inference difficult.

6.29 We considered the possibility that private-label products might constrain pricing, especially of IRN-BRU. [✂] We noted that the consumer survey showed a diversion ratio of [✂] per cent from IRN-BRU to own-label, suggesting that own label is unlikely to exert a strong competitive constraint on IRN-BRU. This is consistent with

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[80] OFT/CC, *Good practice in the design and presentation of consumer survey evidence in merger inquiries*, March 2011.
[81] Appendix C outlines their concerns in more detail.
[82] AG Barr told us that Orangina was a completely different product from Tango and was marketed differently.
[83] These diversion ratios adjust for the 'outside good' by taking respondents who said they would not have bought a drink as opting for an outside good. Appendix C, Annex 3, contains an extended discussion of this question.
[84] The OFT had calculated diversions based on the parties' survey as the diversion to another company. They therefore excluded from the total being diverted the quantity diverted to the company's own products.
[85] The survey suggested that diversion from IRN-BRU to the outside good was around [✂] per cent, although the parties suggested that the figure should be [✂] per cent. We calculate that, including the [✂] per cent figure the diversion from IRN-BRU to Britvic would be [✂] per cent. See Appendix C for a more complete discussion.
[86] [✂]

previous CC analysis of the CSD market, which provided evidence that there was little consumer substitution between branded and private-label products.[87]

6.30 We treated the survey evidence overall as helpful to our understanding of the market. However, in our view it was not sufficient on its own to give an accurate view of diversion so we also assessed diversions through the econometric analysis detailed in paragraphs 6.33 to 6.54.

Third party views on competition between AG Barr and Britvic

6.31 Generally customers thought that although there was an element of substitutability between the companies' products there was not a large amount of overlap. Customers were asked about substitutability both from their own perspective and from that of their customers (usually these were the consumers). Customers considered that there was no difference between the two—and that their own substitution choices were reflections of what they thought their customers wanted. Mostly, customers expressed the view that IRN-BRU was a stand-alone product with no obvious competitor. [✂] said that the Britvic and AG Barr range competed generally for consumer spend but believed that the two companies offered products that were distinct from one another and did not particularly compete with one another. [✂] said it did not have a quantitative sense of the degree to which the Britvic range and the AG Barr range competed from the point of view of its consumers but thought that within the subcategories there would be an element of substitutability. Booker did not think there was much competition between the companies' products but thought there was some overlap with certain customer types. Bestway thought that AG Barr and Britvic did not compete with one another. BP said it saw transferability between flavoured CSDs. [✂] view was that products such as Tango, Tizer and Orangina would compete closely with IRN-BRU.

6.32 We asked grocery multiples and cash-and-carry operators what the best alternative was to IRN-BRU. None of them mentioned a Britvic brand as either the first or the second best. [✂] We found that third party views on substitution between AG Barr and Britvic products were helpful but views were mixed with some seeing substitution and others not.

Econometric assessment

6.33 We have supplemented this evidence with quantitative analysis of consumer demand for CSDs. This approach uses evidence on actual purchases by consumers to assess substitution between brands of CSDs in response to changes in relative prices. There are some limitations to this analysis, and we have taken these into account in our overall assessment. Further detail is set out in Appendix C and in paragraphs 6.39 to 6.53.

6.34 We used electronic point of sale (EPOS) scanning data, which captures the price and volume of sales for each product in a given period. For each product, the econometric model assessed the effect of changes in the price of a product on its volume of its sales (the own-price elasticity).[88] The own-price elasticity describes the percentage change in volume sold of a product when the price changes by a given percentage. The model also assessed the effect on sales of changes in the prices of other CSDs (the cross-price elasticity). The cross-price elasticity describes the per-

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[87] See Cott Beverages Ltd and Macaw (Holdings) Ltd merger report, 2006, paragraphs 4.33–4.39 and Appendix B.
[88] We used the Almost Ideal Demand System framework (Deaton and Muellbauer, 1980). Details are provided in Appendix C.

centage change in the volume sold of a product (eg Pepsi) that is associated with a given percentage change in the price of another product (eg IRN-BRU).

6.35 We used the results of the econometric model to estimate the proportion of sales captured by other CSDs when the price of a product is increased (the diversion ratio). If, when the price of IRN-BRU increased, substantial numbers of final consumers switched to Britvic products, Britvic would be an important alternative to IRN-BRU and would exert an important competitive constraint on its price.[89] The larger the diversion between the merger parties' products, the closer substitutes they are and the greater the incentive to increase prices post-merger.

6.36 We note that the parties do not control the retail prices or positioning of products within a store. Retail prices are the result of a complicated and sophisticated negotiating process between the soft drinks producers and their customers. The econometric analysis provides insight into consumer preferences by measuring the impact of changes in the prices paid by consumers on their purchasing decisions. Consumer preferences affect both the pricing decisions of soft drinks producers and those of their customers.[90] In particular, the extent of substitution between the merger parties' products affects the strength of their incentives to change prices as a result of the merger. We consider how these incentives would be affected by the role of intermediaries in paragraphs 6.6 to 6.19 and 6.69 to 6.90 and in particular how the incentives of manufacturers and retailers come to be aligned through JBPs. We consider that the analysis of retail prices provides important indications about the likely direction in which parties might seek to change JBPs as a result of the merger.

6.37 We focused our econometric analysis on the closeness of substitution between IRN-BRU and Britvic brands and between Orangina and Britvic brands because the parties' consumer survey suggested that of the merger parties' brands, these may be close substitutes. We had no other evidence to suggest that other brands directly affected by the merger might be close substitutes.[91]

6.38 We used different data sets that allowed us to assess the degree of substitution between the merger parties' brands for different geographic regions and for different retail channels. One data set (Nielsen Scantrack) covered all sales by the major grocery multiple retailers across Great Britain. Three data sets (Tesco, the Co-op and Tesco and the Co-op together) covered sales by a subset of grocery multiple retailers in Scotland only. Two further data sets (Litmus and Nielsen Impulse) covered sales through the impulse channel in Scotland only.

6.39 We assessed the performance of the model for each data set using three criteria. First, we checked whether the results implied a sensible relationship between changes in the sales of a product and changes in its own price. For example, the model performed well when the results suggested that an increase in the price of a product was associated with a reduction in its sales. Second, we checked whether the results implied a sensible relationship between the changes in the sales of a product and changes in the price of a substitute. For example, the model performed well when the results suggested that an increase in the price of a substitute product was associated with an increase in sales. Third, we checked whether the results

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[89] An alternative reaction on the part of final consumers to a price rise—for example, a rise that comes from IRN-BRU coming off promotion—would be to switch to a retailer where IRN-BRU was on promotion. In this case, the end of the promotion would reduce sales of that retailer but would not change AG Barr's overall sales level.

[90] Customers said they negotiated with the consumer in mind. [✂] told us that it aimed to achieve the right consumer offer and [✂] told us that its consumers told it how important it was to stock a particular brand (see paragraph 6.72).

[91] We note that the parties both supply exotic-flavoured soft drinks—AG Barr supplies the Rubicon range, and Britvic J2O. However, Rubicon is marketed as an [✂] drink and is stocked in the 'World Food' aisles of the multiples while J2O is marketed as a sophisticated non-alcoholic drink. It is our view that they currently operate in different markets.

suggested substitution between brands that was consistent with other evidence. For example, in our view the model performed well when the results implied that Coke and Pepsi were close substitutes, which is consistent with other evidence.[92] We placed more reliance on the results where the model performed well against our criteria.

6.40 In the following paragraphs we describe the results of our analysis using these data sets and we set out how well the model performs using each data set. Further details of the analysis are provided in Appendix C.

- *IRN-BRU-Britvic effects*

6.41 We began by considering Great-Britain-wide effects. We analysed the data set that included sales by the major multiple retailers for the whole of Great Britain.[93] We did not identify a statistically significant relationship between the price of IRN-BRU and any Britvic products. We assessed how well this analysis performed against our criteria and found that it performed reasonably well.

6.42 We then considered Scotland-only data. We thought there were a number of reasons why we might expect different results from an analysis of consumer behaviour in Scotland alone (some of which may imply that the competitive environment is different in Scotland compared with Great Britain as a whole). First, it may be easier to isolate any underlying relationship using Scottish sales data, given the concentration of IRN-BRU sales in Scotland relative to Great Britain as a whole. Second, given the high volume of IRN-BRU sales in Scotland (see Table 2), and the Scottish heritage of AG Barr products, consumers in Scotland may have different tastes for IRN-BRU and Britvic products. Consistent with this, we noted that the parties' consumer survey showed that [✂] per cent of Scottish IRN-BRU consumers would have gone to another retail outlet to buy IRN-BRU if it was not available compared with [✂] per cent on average across Great Britain as a whole. We noted that AG Barr has previously pursued a number of strategies that suggest it differentiates Scotland from the rest of Great Britain. We also noted the comments of some third parties that suggested the IRN-BRU customer and the position of IRN-BRU may be different in Scotland.[94,95]

[92] For example, a shopper panel-based study conducted by Nielsen consistently showed that households switch between Coke and Pepsi.
[93] The multiple retailer data mainly concerns the take-home segment but not exclusively since many larger retailers have smaller store formats that will also sell significant amounts to the impulse customer.
[94] [✂] said that in Scotland the positioning may change due to higher demand for IRN-BRU versus other CSDs. It said that in Scotland, because of its volume, IRN-BRU would be sold from merchandisable units, which were wheeled pallets that would sit in the colas category. [✂] said that in Scotland Pepsi would be the third brand in the hierarchy behind Coca-Cola and IRN-BRU. [✂] said that in Scotland IRN-BRU was such a popular drink that was borne out in its offering and how it looked to service its customers in Scotland. Whitbread said that it did not tend to see any particularly strong regional differences, with the exception of IRN-BRU in Scotland. Booker said that it would give more fixture space to IRN-BRU in Scotland and have a broader range of products. BP thought that the Scottish market had particular tastes that it separated out while it treated the rest of the UK the same. Red Bull noted that there was the possibility that the Scottish consumer might decide not to buy a Red Bull and buy an IRN-BRU instead, whereas maybe in the South they maybe decided to buy a Coke instead or a Lucozade.
[95] AG Barr adopted [✂].

TABLE 2 **IRN-BRU sales by type and region**

million litres

IRN-BRU sales 2012	*Scotland*	*England and Wales*
Multiples	[✂]	[✂]
Impulse and HoReCa*	[✂]	[✂]
Direct store delivery	[✂]	[✂]
Total	[✂]	[✂]

Source: AG Barr data.

*Hotels, restaurants and catering.

6.43 The parties said that the IRN-BRU consumer in England and Wales was no different to one in Scotland and there was no reason to expect diversion to be greater in Scotland than in England and Wales. They also told us that Britvic brands did not have a stronger presence in Scotland than in England and Wales, and that Britvic's presence was [✂] in the impulse channel in Scotland. Most retailers told us that they operated national pricing and operated the same promotions across Great Britain.[96]

6.44 We used Scottish sales data from Tesco and the Co-op to assess the effect in multiple retailers. We separately assessed data for the Scottish impulse segment.

6.45 When we pooled the Scottish sales data for the Co-op and Tesco we did not identify a statistically significant relationship between IRN-BRU and any Britvic brands. This model performed reasonably well against our criteria. In general, we found that the demand estimation in Scotland appeared more reliable the more that we pooled data over store types and store chains.

6.46 We also analysed the data for sales in Scotland at Tesco and the Co-op separately. These models did not perform as well against our criteria as the model using pooled data. The analysis of the Co-op data did not identify a statistically significant relationship between IRN-BRU and any Britvic products but the analysis of the Tesco data did. The Tesco Scotland results suggested that a 1 per cent increase in the price of IRN-BRU is associated with a statistically significant increase in sales of Pepsi of [✂] per cent and implied a diversion ratio of [✂] per cent. We also further disaggregated the Tesco and Co-op Scotland data into individual store types. These models did not perform well when assessed against our criteria.[97]

6.47 We analysed the impulse segment in Scotland. The Nielsen impulse (Scotland) data set aggregates volumes and averages prices over all impulse chains.[98] Analysis of this data did not identify any statistically significant relationships between IRN-BRU and any Britvic products. However, the model did not perform well when assessed against our criteria.

6.48 The parties replicated our model using data for the Scottish impulse sector and we reproduced their analysis. This analysis used the Litmus impulse (Scotland) data,

[96] [✂] said that it promoted nationally with rare exceptions such as IRN-BRU at Hogmanay which might be on promotion in Scotland but not elsewhere in the UK. [✂] said that the IRN-BRU offer would be the same nationally but with more space allocated to IRN-BRU in Scotland to reflect the greater rate of sale. BP said that its promotions were national. Bestway also said that promotions were national. Red Bull said that promotions were national and driven by the structure of the UK market. [✂] said that it ran promotions across the country.

[97] We discuss the results and the limitations in full in Appendix C. In particular, we noted that the model of [✂] store data gave a particularly high and in our view unrepresentative diversion to Britvic and we were concerned that not only was this unreliable but also it may have affected the overall Tesco Scotland results. Note that this does not mean the data provided was unreliable but only that the model based on the data did not produce results that we considered were reliable.

[98] In other words, the entire impulse segment is represented by a single set of data with prices and volumes for each brand.

which pools data from different impulse chains.[99] The analysis identified a statistically significant relationship between IRN-BRU and Britvic brands and suggested that a 1 per cent increase in the price of IRN-BRU is associated with a statistically significant increase in the volume of Pepsi of [✂] per cent. This implies a diversion ratio of [✂] per cent to Pepsi, and the overall diversion to Britvic brands was [✂] per cent. The model performed reasonably well according to our pre-established criteria.

6.49 The parties noted some concerns with the approach. These focused on the results that were counter-intuitive, such as negative cross-price elasticities, the absence of expected cross-price elasticities (for example, from Pepsi to Coca-Cola in the Tesco Scotland result), and improbably high diversion ratios. They also included methodological concerns, especially around omitted variables and the construction of our price series.[100]

6.50 We have examined their concerns carefully. In our view, on the whole the model performed reasonably well and hence is considered informative. We noted that the model did not perform well with some data sets. In particular, where the number of negative cross-price elasticities was large, we put less weight on the results. We do not believe that these occurrences invalidate the model as a whole. We performed sensitivities around the construction of our price series. Although some price elasticities changed, our findings with respect to the diversion from IRN-BRU to Britvic brands were robust. We ran sensitivities by including temperature as an added control variable, a variable that the parties said had been omitted, and concluded that it did not affect our results. We recognized that in-store advertising might be an important omitted variable. We have taken into account these limitations in our assessment of the model results and we appropriately reflect them in the weight that we put on the model's result in our overall view.

° *Assessment of Scotland analysis*

6.51 In the multiple retailer analysis we noted that we found the more we pooled data the more reliable the results were when assessed against our criteria, and the pooled data (ie the Tesco and Co-op data combined) did not show significant results. The analysis of sales by Tesco in Scotland did suggest a statistically significant relationship but we noted that this analysis did not perform as well against our criteria as the pooled data. We also had concerns about the Tesco Scotland model because of the unreliable result for the model of [✂] store data which formed a component of the model. Our concern was not just the disaggregated result, but the general performance of the Tesco Scotland model.

6.52 In support of the Tesco Scotland analysis the predicted diversion ratios appeared broadly to reflect the market shares of IRN-BRU and Britvic at Tesco stores in Scotland and were also consistent with the parties' survey. However, we noted that there were problems with both these alternatives for predicting diversion ratios and we did not rely on them.[101]

6.53 The analysis of Litmus data on the impulse segment in Scotland performed reasonably well against our criteria and suggested a statistically significant relationship

[99] Each chain has prices and volumes for each brand, and the data for each chain is used separately in the statistical estimation.
[100] These are analysed in more detail in Appendix C.
[101] The survey suffers from a number of drawbacks [✂]. Market shares are also unreliable because they assume that a consumer switching from IRN-BRU is an 'average' consumer. We note that the product characteristics of IRN-BRU (see paragraph 6.28) suggest that it is dissimilar to other CSDs. Therefore we would expect market shares to overestimate the degree of diversion from IRN-BRU to other brands.

between IRN-BRU prices and the sales volume of some Britvic brands. In our view it provides some evidence, despite model limitations, that consumers in Scotland view IRN-BRU and Pepsi as substitutes to some extent in the impulse segment. We used this result to estimate the illustrative price increase arising from the merger (paragraph 6.63), though we were careful to take account of the limitations of the quantitative diversion analysis.

- *Orangina-Britvic effects*

6.54 AG Barr told us that Orangina was a different product that competed with a different set of products to Britvic's. In view of the high levels of diversion from Orangina to Britvic found by the parties' survey (see paragraph 6.23), we performed a similar econometric analysis on the relationship between Orangina and Britvic. We did not establish any significant effect of Orangina prices on Tango sales. When we added Orangina to our CSDs in the demand model, we found no statistically significant relationships between Orangina and Britvic products. This is consistent with AG Barr's view that Orangina does not compete with Britvic's products.

- *On-trade*

6.55 Our quantitative assessment of the closeness of substitution has focused on the behaviour of consumers in grocery multiples and impulse chains. We have qualitative evidence that the on-trade consumer is less sensitive to soft drink prices than the off-trade consumer (see paragraph 6.18).

6.56 Although the different market channels—take-home, impulse and on-trade—may all have different consumer characteristics, it should be noted that they are not independent from the point of view of supply, and producers will not have complete freedom in the pricing that they apply to each channel. In particular cash-and-carry outlets supply smaller grocery stores and the on-trade segment. Thus, although consumers are not particularly price sensitive in the on-trade segment, it would be hard for soft drinks producers to take advantage by increasing prices in that channel since on-trade premises could buy supplies from alternative and cheaper sources.

Conclusions on the pre-merger closeness of competition

6.57 We assessed evidence from the parties' survey of consumers, their internal documents and the views of third parties. We also examined diversions from IRN-BRU to Britvic in Great Britain as a whole and in Scotland. An analysis of Great-Britain-wide data did not show a statistically significant relationship for the diversion from IRN-BRU to Britvic. We recognize that there are limitations with the econometric analysis. We found that in general the demand estimation appeared more reliable the more that we pooled data in our econometric analysis.

6.58 In our assessment of Scottish multiple retailer data, when the Tesco and Co-op Scotland data was pooled it did not produce statistically significant results for the diversion between IRN-BRU and Britvic. When we looked at the data for the two retailers separately, both models appeared less reliable than when the data was combined. The Co-op data did not produce statistically significant results but the Tesco data did. However, we were concerned about the reliability of the Tesco result.

6.59 We also analysed two sources of data for the impulse segment in Scotland. One data set (based on Nielsen Scotland impulse data) did not produce statistically significant results for the diversion from IRN-BRU to Britvic brands. The Litmus impulse data, although this also suffered from some limitations, produced statistically significant results and suggested that in Scotland Britvic brands are to some extent a substitute for IRN-BRU in the impulse segment.

6.60 We did not find a statistically significant relationship between Orangina and Britvic products and conclude that Orangina does not compete with Britvic's products.

6.61 We conclude that it would be hard for soft drinks producers to increase prices in the on-trade channel since on-trade premises would be able to buy supplies from alternative and cheaper sources.

Effect of the merger

- *Customer views*

6.62 In general customers did not express competition concerns about the merger but there were exceptions. Bestway did not object to the merger and thought it would be good for the industry. [✄] did not expect that the merger would have a significant effect on its customers. [✄] did not object to the merger. Booker said the merger would have a neutral effect on the market. BP had no concerns with the proposed merger. Whitbread, commenting in relation to the on-trade, also did not object to the merger. However, one company had concerns. [✄]

- *Indicative price increase for IRN-BRU*

6.63 In order to assess the possible effect of the merger we used the diversion calculated from the Litmus impulse data, together with estimates of producer variable margins to assess whether there might be an incentive to raise the price of IRN-BRU after the merger because of the internalization of diverted sales from IRN-BRU to Britvic products.

6.64 An important variable in assessing the magnitude of the incentive to raise prices is the margin that can be earned on the product that benefits from a diversion. The shift we were most interested in is the one from IRN-BRU to Pepsi. This is because, for the sales that are diverted to Britvic, most are diverted to Pepsi. [✄] This would affect the incentives of the producer. The margin also varies according to the wholesale prices which are individually negotiated with the intermediary.

6.65 The diversion ratio of [✄] per cent from IRN-BRU to Britvic brands in the Scottish impulse segment implies an illustrative price increase of [✄] per cent.[102]

Conclusions on the effect of the merger on closeness of competition

6.66 We note that in general customers were not concerned about the merger (paragraph 6.62). We also note the comments of customers who suggested mainly that the two companies' products did not overlap substantially (paragraph 6.31) and the survey conducted by Britvic (paragraph 6.28) which suggested low levels of substitution between IRN-BRU and other CSDs.

6.67 We also considered whether the merger might lead to a price increase for IRN-BRU to on-trade customers but noted that the merger would make little difference since AG Barr already supplies IRN-BRU to Britvic for sale in its dispensers.

[102] We assume for simplicity in this calculation that all the diversion is to Pepsi. We expect that this is a conservative assumption, [✄].

6.68 The econometric analysis suffered from a number of limitations but suggested the merger would not create a strong incentive for the parties to increase wholesale prices.

Impact of bargaining power of the parties and customers on pricing

6.69 We considered whether retailers' bargaining power would be likely to mitigate any incentive to increase wholesale price rises as a result of the merger although we note we do not consider the merger would create strong incentives for the parties to increase wholesale prices. We gathered evidence on the nature of negotiations and assessed the extent of retailer bargaining power in negotiations.

Views of the parties

6.70 The parties said that buyer power was a key feature of the UK soft drinks industry and acted as a significant constraint on producers' pricing decisions. They said that they faced a significant degree of buyer power which was exerted by a large part of their customer base. The parties provided examples of buyer power and referred to the CC Groceries market investigation report as evidence of buyer power in the groceries market.[103]

6.71 The parties said that customers could exercise buyer power through delisting threats, through reducing the number of lines of a particular brand which were stocked, reducing the amount of shelf space made available, limiting promotional activity associated with a particular brand and through the development and promotion of private labels that were designed to take sales away from brands. AG Barr said that there was an important difference for a brand between must-stock (as is IRN-BRU in Scotland) and must support and that it was important for soft drinks producers that the retailer support its products. AG Barr said that it wished to expand its market southward for IRN-BRU and [✂].[104] The parties provided examples that they said illustrated the exercise of buyer power by customers.[105]

Customer views on bargaining

6.72 Customers said that they negotiated with their consumers in mind. [✂] said that it aimed to achieve the right consumer offer and most compelling deal for its consumers to shop in [✂] rather than any other retailer. [✂] said that its consumers told it how important it was to stock a particular brand. It said that the consumer demand for the brand and the competitive dynamic across the market between the retailers would determine the relative strength or weakness perceived by both the buyer and the seller. [✂] both stated that IRN-BRU was one of the products that they used to benchmark their prices against the prices of rivals. Almost all customers stated that IRN-BRU was a must-stock brand in Scotland.[106]

6.73 [✂] said after the soft drinks producer had informed it of a price increase, it would go back to request a full explanation for the price increase. [✂] would seek to negotiate in various different ways to minimize the impact of the price increase on its

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[103] The report found that all large grocery multiples, wholesalers and buying groups had buyer power in relation to at least some of their suppliers but this buyer power was reduced in the case of most prominent branded goods. (CC, *The supply of groceries in the UK market investigation*, 30 April 2008.)
[104] We note that AG Barr has built a new packaging and distribution centre at MK, partly to support this aim.
[105] These covered instances from 2005 to 2013.
[106] The definition of must-stock proposed by a number of customers was a product that is important in determining whether a consumer chooses that retailer as the place to shop.

consumers. It said that it would seek to avoid delisting wherever possible where the consumer still required the brand and would instead always look for a collaborative solution such as seeking to grow the soft drink producer's business, for example by stocking more range if there were products of the soft drink producer that were not currently listed within [✂]. [✂] said that it would work with its suppliers on a collaborative basis. Bestway said that its soft drinks producers usually proposed price increases annually and it had 'a civil conversation and meetings about the increases to ask for an explanation'. However, Bestway also told us that in the past it had refused to promote a major soft drinks producer's products because of a dispute over trading terms. BP said that it frequently delisted products based on their performance. It also said that it [✂] that BP considered to be unreasonable. BP noted [✂] (see Appendix D).

6.74 [✂] said that own label was quite separate and was not part of any negotiation. It said that own label had been around in the soft drinks category for some time and acted as an entry point into the category and most soft drinks producers accepted that there was a role to play for [✂] own-label products. [✂] also said that own label would not form part of a negotiation with a brand holder (ie the soft drink producer). However, it said that the brand holder would be aware of [✂] own-label product as a competitor and might flex its proposals according to whether it perceived that the own-label product would be a threat. Booker said that the uniqueness of IRN-BRU meant that while there were own-label variants of IRN-BRU in the market they did not tend to pose a strong constraint on IRN-BRU.

6.75 In relation to the on-trade, Whitbread said that when a product was particularly strong in a category the negotiation became harder, but also thought that it was an attractive customer for many soft drinks producers to have, and in negotiations that gave it some leverage.

Views of other soft drinks producers

6.76 Other soft drinks producers suggested that customers had buyer power. GSK said that if it took a cost-price increase to a retailer, it gave the retailer an opportunity to negotiate. Nichols said that the big grocers had the ability to delist its products if it did not do what the retailer needed. [✂] said that it had been delisted on a number of occasions in both on-trade and off-trade as part of negotiations, discussions and range reviews.

Our assessment

6.77 We noted above (paragraph 6.72) that the large majority of customers regard IRN-BRU as a must-stock brand in Scotland. For must-stock products customers would be particularly sensitive to the possibility that they might face price increases that were not imposed on their competitors. While customers may be particularly sensitive to the wholesale price of brands that they consider to be must-stock, they may also have less power to help them obtain low prices for these products. In this section we assess the distribution of margins between soft drinks producers and customers. We then assess the bargaining strength of soft drinks buyers and sellers.

- *Assessment of distribution of margins*

6.78 We assessed the distribution of value added between soft drinks producers and their customers and our results are set out in Appendix D. Our analysis suggests that bargaining predominantly occurred on a brand-by-brand basis, with must-stock brands earning a higher share of value added for soft drinks producers than their other brands. We did not find that company size in itself had a significant impact on bargaining outcomes.

- *Assessment of bargaining strength of soft drinks buyers and sellers*

6.79 We assessed the bargaining strength of buyers and sellers by considering each party's outside options—where we assessed how the profits of each party to the bargain would be affected by not reaching agreement with the other party. We note the analysis is complicated because of the following factors:

(a) Buyers and sellers are in a long-term relationship. The history of deals made affects the range of possible deals that can be made and the terms of a deal in one year might affect the terms in the future.

(b) The number of factors that are part of the negotiation is large. These include: changes to fixed or variable payments; volume discounts; rates and depth of promotions; promotional calendars; on-shelf positioning; off-shelf display; the range of products stocked; regional variations in display and listing; prices for display of products; as well as each element of product price.

6.80 Our review suggests that:

(a) The outcome for must-stock brands is a balance between buyer and seller power. Ultimately, the power that the sellers possess arises from consumer loyalty to the brands they supply, making customer profits lower than if they were not to stock those brands.

(b) Must-stock brands earn their sellers a higher share of the total value added than non-must-stock brands, reinforcing the view that sellers with strong brands have some bargaining power in the CSD market (see Appendix D).

(c) Our demand modelling work allows us to estimate the profit-maximizing level of AG Barr margins on IRN-BRU based on its own-price elasticity.[107] [✂][108] We note [✂].[109] This suggests that AG Barr has some seller power in relation to its customers.

6.81 We assessed the examples provided by the parties that they said illustrated the exercise of buyer power by their customers (paragraph 6.71). Two were threatened delistings related to pricing issues and one was a threatened range reduction in retaliation for a price rise. Four were actual pricing-related delistings and six were instances where the retailer rejected a price increase. There were two instances of retailers reneging on a promotion. There was one case of a delisting caused by a product not performing. In our view this collection of examples does not establish that buyer power is a binding constraint on soft drinks producers' pricing in this market. The largest category of cases, rejected price increases, would be observed in any negotiating situation. For further details see Appendix D.

6.82 In our view, while a threat to delist a product may reflect the weakness of brands which are not must-stock items, a threat to delist a brand as strong as IRN-BRU may not be regarded as credible. We note there was one instance of a threat to reduce range in response to a price increase—[✂] in 2012, but we note that was a threat

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[107] [✂]
[108] [✂]
[109] AG Barr also said that it would explore with the customer ways that the customer could grow its margin by growing its impulse business or stocking new products with higher margins.

rather than an actual case. The parties and their customers have emphasized that they negotiate on a brand-by-brand basis and not across a portfolio (see paragraphs 6.95 to 6.99) which suggests that this type of bargaining behaviour would be unusual. We also note the margin analysis detailed in paragraph 6.78 and Appendix D also suggests that bargaining predominantly occurs on a brand-by-brand basis.

6.83 We note that AG Barr said a retailer could decide to allocate limited or unfavourable shelf space to IRN-BRU (paragraph 6.71). However, it did not seem likely to us that a customer would, having decided that a brand was must-stock (such as IRN-BRU in Scotland), fail to support that product by reducing its display or the number of lines it sold. Consumer demand for a must-stock brand is substantial, and failure to support the brand would be costly for a retailer.

6.84 We also did not consider, in view of the substantial price differences between own-label and branded products[110] and the comments of customers (paragraph 6.74), that own-label products would be a significant factor in negotiations between the customer and the soft drinks producer.

6.85 The large number of factors that are subject to negotiation opens up the possibility that requested price rises might be resisted in a more constructive way than that suggested by the parties, ie that the key negotiating tool was the threat of delisting. We considered the parties' and third party comments in paragraphs 6.70 to 6.76. These suggested that there was a balance between strong buyers and sellers.

6.86 Several customers said they would try to trade a price increase for other aspects that the party might be interested in, like better distribution on some brands (see paragraph 6.73). Increased access to valuable promotional slots might be traded against a price rise. IRN-BRU is only a must-stock brand in Scotland and AG Barr has a strategic aim to [✂]. Trading increased distribution of IRN-BRU in [✂] may be a rational negotiating outcome for both AG Barr and customers.

Effect of the merger on the balance of bargaining power

6.87 We assessed the change in bargaining power brought about by the merger. The parties said that after the merger, [✂]. Whitbread, an on-trade customer of Britvic's, expressed the view that it might be able to achieve better terms for IRN-BRU because its current negotiations were solely for that product. It said that there was less scope currently for an 'in-the-round' deal whereby, for example, increased distribution for a new product, promotional support for a core set of products and brand visibility on menus might altogether create an attractive package that would make a lower IRN-BRU price more attractive to the parties.

6.88 We considered the effect of the merger on the current balance of power between the parties and their customers. If the bargaining power of the parties is increased or remained the same, we could conclude that AG Barr would [✂]. We would normally expect that since the merger would result in the loss of a competitor the merger would worsen customers' outside options and thus would increase the power that the parties have to set their preferred price for IRN-BRU. Customers' profits would be reduced as the best alternative to a 'no deal' becomes worse to the extent that Britvic products are substitutes.

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[110] We note that there are generally substantial price differences between own-label products and their branded equivalents. For example, we note that on 21 May 2013 Pepsi and Coke two-litre bottles were sold on promotion at Tesco.com at 10p/100 ml while Tesco own-label cola was sold at 3p/100 ml.

6.89 We noted the parties' arguments that [✄] (paragraph 6.87). Of the examples of buyer power provided by the parties, one was a threat to reduce range in retaliation for a price increase but this was a threat and the range reduction did not occur. We also note that AG Barr has a number of brands which are not must-stock [✄]. Therefore we do not consider that the [✄] would be a substantial impediment to the parties in increasing the price of IRN-BRU. We noted Whitbread's comments about negotiating an 'in the round' deal for IRN-BRU (paragraph 6.87). We note that where Britvic is supplying IRN-BRU in dispensers to the on-trade the merger will eliminate one level of intermediary and this may result in some downward pressure on IRN-BRU prices in this specific case because there is one less margin being taken.

Conclusion on the bargaining power of the parties and customers

6.90 In view of the assessment in paragraphs 6.77 to 6.89 we conclude that there is presently a balance between strong buyers and the parties as strong sellers. We do not consider that the merger would weaken the ability of the parties to increase the price of IRN-BRU, if anything the merger would increase the negotiation strength of the parties in relation to their customers because the internalization of some sales would weaken customers' outside options. However, we note that price would only form one aspect of the annually negotiated JBPs and other aspects could be traded that might to some extent reduce any incentive for the parties to increase price after the merger, particularly given AG Barr's strategy [✄].

Conclusions on unilateral horizontal effects

6.91 In view of the assessment in paragraphs 6.21 to 6.90 we conclude that there would not be significant harm to competition resulting from the merger as a result of unilateral horizontal effects.

Portfolio effects

6.92 Our second theory of harm was that the merger might adversely impact competition by increasing the parties' bargaining power to make customers stock more of their range at the expense of smaller brands of smaller producers. Under this theory of harm, a lessening of competition could occur if the merged firm found that it could press more small brands on retailers, crowding out smaller competitors from the limited shelf space available. The harm would be in consumer choice and in the possible exit, longer term, of competitors.

6.93 We investigated whether a larger company was able to attain preferential distribution for its products, thereby putting smaller rivals and new entrants at a disadvantage.

6.94 We examined the parties' JBPs and found they frequently contain terms which could reward the listing of small brands of larger soft drinks companies and achieve preferential distribution, including: [✄].

6.95 Terms *(a)* and *(d)* above create an explicit relationship between the purchases of one product and the price paid for another, although there is not an explicit relationship between total price (or discount) and total of products bought across the range. We note that although these mechanisms could lead to preferential distribution, they might result in some benefits for the customer, for example lower prices (to the extent that wider distribution was achieved by offering larger discounts) and potentially lower prices to the consumer.[111]

6.96 The parties said that all negotiations took place on a brand-by-brand basis. They said that shelf space was determined by the rate of sales and the size of the owner was irrelevant to the amount of shelf space that a product achieved. AG Barr said that contractual terms which made a deal conditional on a specified range of products being offered should not be interpreted as an attempt at giving some weaker brands an advantage. They said that if a brand did not sell, the retailer would simply stop stocking that brand.

6.97 The parties also said that portfolio effects did not apply in the on-trade segment, where customers often contracted for a single soft drinks producer to supply dispenser-served drinks. The parties pointed out that many on-trade sales were made through drinks in chiller cabinets that might not be procured through a formal tender process.

6.98 In contrast, however, the parties also said that customers were able to [✂] (paragraph 6.71). They said that [✂], implying that negotiation may occur across a soft drink producer's product lines.[112]

6.99 Customers said that the size of a soft drinks producer in total was less important than the individual brand. They said that stocking decisions were ultimately based on rate of sales rather than buyer size. For example, [✂] said that there might be small brands that were in high demand from their customers. It said that it looked at individual products and brands and the individual qualities of the products were more important than whether the products were from the same company or from separate producers. [✂] said a larger player would not necessarily have a large advantage in launching new products and the key driver would be the level of consumer demand for the new product. BP said that the most important thing was the rate of sales of the individual products. Bestway said that it only listed products if they had been marketed well in its sector. However, Whitbread said that it would obtain better terms from a soft drinks producer for stocking more of that producer's products. It said that it might obtain better terms from a portfolio negotiation that included IRN-BRU than from a negotiation for IRN-BRU alone (paragraph 6.87).

6.100 [✂] said that all of its brands competed on their own merits.

Off-trade assessment

6.101 We examined empirically whether the small brands of large soft drinks producers achieved disproportionate distribution[113] compared with smaller competitors. For this analysis, we considered all soft drinks brands (excluding water) and not CSDs alone. Figure 3 shows the individual brands of the 61 largest producers ranked by size against the volume-weighted average distribution depth.[114] The chart shows a generally downward trend, where larger soft drink brands and larger soft drinks producers achieve greater distribution than smaller ones. However, the chart shows that many smaller soft drinks producers also achieve a high degree of distribution.

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[111] [✂] said that there were some advantages from a soft drinks company offering a wider product range. One was supply-chain efficiencies and the second was around knowledge and experience of categories. [✂] said that Britvic had a broad portfolio already and had good category understanding and knowledge while AG Barr would be deemed as an expert in the Scottish market.
[112] Although this comment was made in the context of multiple retailers, we note that it would also apply to the on-trade.
[113] ie not in proportion to the sales the brand achieves.
[114] Distribution depth is defined as the total turnover of stores where the product is listed divided by the turnover of all stores.

6.102 We note that CCE had entered into binding commitments with the EU not to use its stronger brands to oblige customers to purchase other CCE brands but note that the commitment expired in 2010. Since we are considering 2012 data we do not expect the commitment to have affected our analysis.[115]

FIGURE 3

Individual distribution depth for soft drink brands ranked by 2012 sales

[✂]

Source: CC analysis.

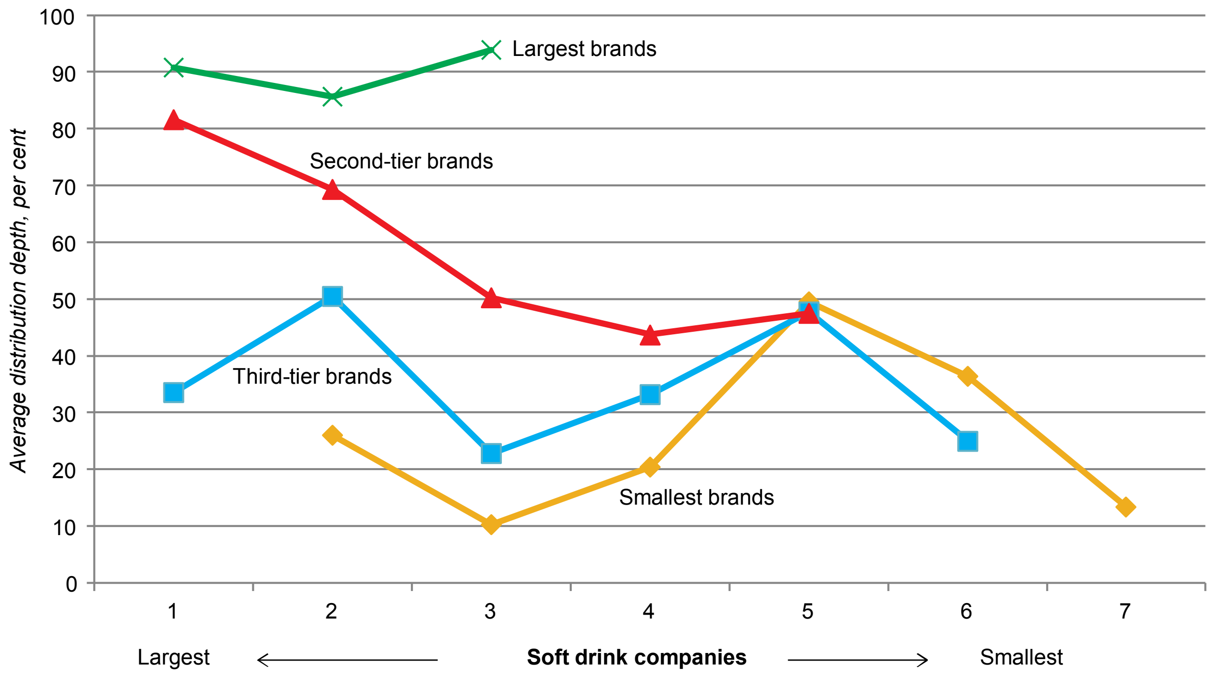
6.103 Figure 4 summarizes the relationship between the overall size of the soft drinks producer and the distribution depth of their brands. We have defined four groupings of brands, with the largest 25 per cent of brands (irrespective of their brand owner) in the top tier down to the smallest 25 per cent of brands in the smallest tier. We regarded brands within each of the four tiers as broadly equivalent, however, we appreciate that even within a tier there will be some significant differences in brand strength. We have also defined seven groups of soft drinks producers. [✂] is shown as the largest. The remaining 60 soft drinks producers were divided across six further groupings of companies.[116]

[115] In 2005 TCCC, CCE and two other bottlers entered into binding commitments with the EU, inter alia, *(a)* not to make agreements for the purchase of TCCC-branded cola CSDs or TCCC-branded Orange CSDs conditional on the purchase of additional TCCC-branded drinks; *(b)* not to condition rebates on a customer's reaching individually set purchase thresholds during a prescribed reference period for any product or product group that includes TCCC-branded CSDs or on achieving associated purchase thresholds or growth rates; and *(c)* not to condition a payment on a customer agreeing that the relevant Coke company's CSD's comprise a specified percentage of the total number of CSD SKUs listed by the customer in the previous year. These commitments expired in 2010.

[116] Generally ten producers were included in each group. The second group included nine producers and the seventh group included 11.

FIGURE 4

Distribution depth by soft drinks producer size



Source: CC analysis.

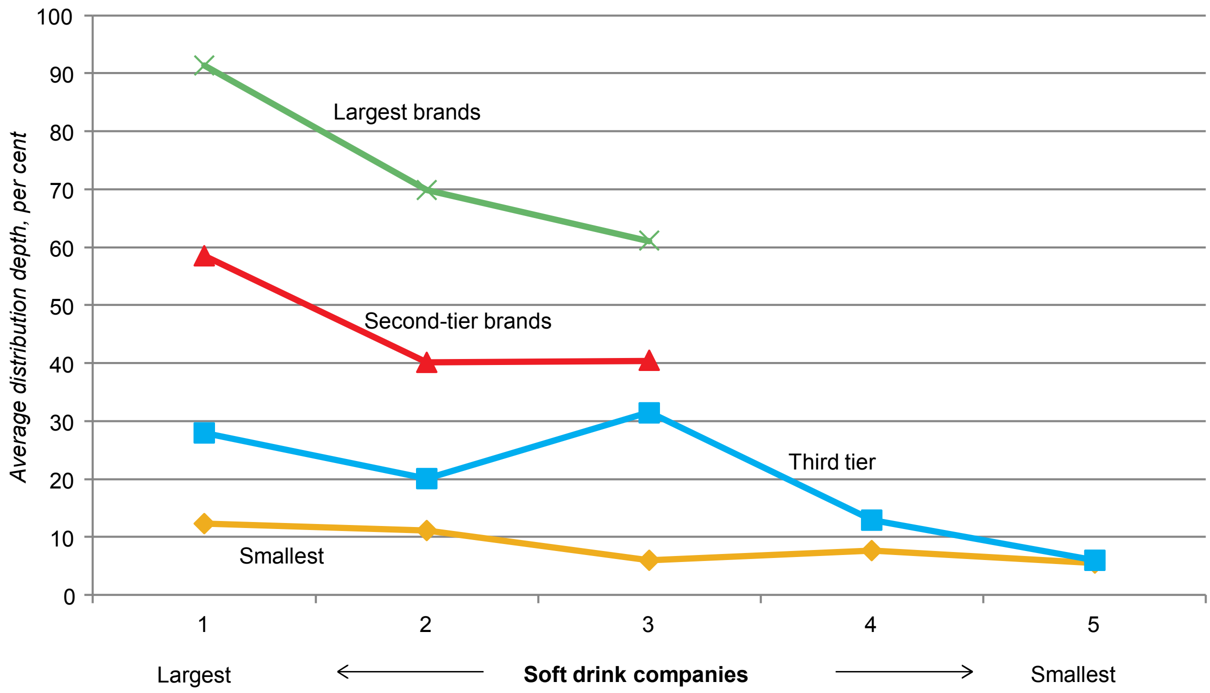
6.104 For the smallest and the third-tier groups of brands there is no systematic relationship between size and distribution depth. The second tier of brands appear to show a tendency for distribution to fall as soft drinks producer size falls but the largest tier of brands shows no advantage for size. This effect is strongly associated with [✂]. This chart may weakly suggest that [✂] (see Appendix E for further details).

Assessment of impulse segment

6.105 We conducted a similar analysis on the impulse segment. Figure 5 summarizes the relationship between the overall size of the soft drinks producer and the distribution depth of their brands for the impulse segment. For the smallest and third-tier brands there appears to be no advantage to size although we note that the average level of distribution of the third tier and the smallest brands appears lower on average than in Figure 4. We also note that there are fewer soft drinks company groups, with groups 6 and 7 not being present in the impulse chart.

FIGURE 5

Distribution depth by soft drinks producer size—impulse segment



Source: CC analysis.

6.106 There appears to be some evidence of an advantage to size in the average distribution depth of the largest and second-tier brands. However, some of the smaller company brands have comparable distributions to those of [✂] (see Appendix E).

6.107 The impulse segment typically faces more space constraints than the grocery multiples because a greater proportion of sales take place in smaller establishments (such as petrol forecourts and convenience stores). Products are typically sold chilled and space constraints on shelves and in fridges mean there will be less space for products that sell less well. Therefore we would expect to see a greater differentiation in the distribution depth of the larger brands compared with smaller brands in this segment and would expect to see a more limited selection of soft drinks, with brand-specific qualities more important. We also note that our analysis assumes all brands within a tier to be equivalent. There are differences in the size and brand strength of brands within a tier and we note that the apparent advantage of size in this channel might be the result of brand-specific qualities of the brands of the larger producers. We also note the comments of BP, which said the most important thing was the rate of sale of the individual products (paragraph 6.99). Since BP is heavily focused on the impulse segment we regard this evidence as particularly relevant.

Conclusions on pre-merger portfolio effects

6.108 We examined the relationship of average distribution depth, brand size and soft drinks producer size for the take-home and impulse markets.

(a) In the take-home market, we found that smaller soft drinks producers were able to achieve comparable distribution levels to all but [✂] (and there were instances of smaller producers that obtained comparable distribution for their brands to the largest brands of [✂]).

(b) We found that the impulse market is more constrained when it comes to distribution of smaller brands with generally lower distribution for smaller brands, reflecting the constraints on space in the impulse segment. There was no difference between the small brands of large soft drinks producers compared with smaller soft drinks producers. Small brands in general appear to be at a distribution disadvantage in the impulse segment. For the largest and second-tier brands [✄] on average appears to achieve slightly better distribution than smaller companies. This may be because of the intrinsic qualities of the [✄] brands, which are more important in the impulse segment because of space constraints. However, although the average distribution for [✄] was higher we noted that there were individual brands that achieved similar coverage to that of the largest [✄] brands.

6.109 Overall we did not consider that large companies were able to achieve preferential distribution to the extent that the brands of smaller competitors and did not consider that new entrants were at a significant disadvantage.

Impact of the merger on portfolio effects

6.110 GSK was concerned that an enlarged company might be able to use its size to hamper the distribution of products owned by itself or other soft drinks producers with a limited number of brands. [✄] was also concerned about portfolio effects of the merger. It said that the merged entity could negotiate more fiercely with retailers to stock all products, with the result that the merged entity would capture more shelf space, and require its customers to favour the parties' brands over others.

6.111 We considered whether the change brought about by the merger (ie making a stronger number 2 player) could allow the parties to achieve better distribution because they had become more like CCE and if so whether this would be to the detriment of smaller soft drinks producers and new entrants.

6.112 We found that the difference in size between CCE and the merged company would continue to be significant (CCE would have a market share in off-trade CSDs of 50 per cent compared with the market shares of Britvic at 14 per cent and AG Barr at 5 per cent—see Figure 1). In our view, the difference in size post-merger would mean that customer perceptions of the merged company would not be changed sufficiently for them to replace the brands of smaller competitors with the merged company's brands.[117]

Conclusions on the impact of the merger on portfolio effects

6.113 We found that it is unlikely that the effect of the merger would be to put new entrants and smaller soft drinks producers at a significant disadvantage as a result of portfolio effects. In view of the assessment in paragraphs 6.92 to 6.112 we concluded that the merger would not result in significant harm as a result of portfolio effects.

Coordination

6.114 Our third theory of harm was that the merger may adversely impact on competition through coordinated effects, specifically between CCE and the merged company. Coordinated effects may arise when firms operating in the same market recognize

[117] We also note that we have not established that the distributional advantages of the [✄] are due to its size. It may be instead that on average the company has stronger brands or better sales teams in each product size range.

that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate (either explicitly or tacitly) to limit their rivalry.[118]

6.115 When assessing coordinated effects, the CC will analyse the characteristics of the market that could be conducive to coordination and assess whether there is evidence that the firms in the market were coordinating pre-merger. If so, it will examine whether the merger makes coordination more stable or effective, given the characteristics of the market. If there is no evidence of pre-merger coordination, it will examine whether the merger makes it more likely that firms in the market will start to coordinate, given the characteristics of the market.

6.116 There are three necessary conditions for coordination to be sustained, and the CC will use these to assess the probability of existing or future coordination. These are:

(a) the ability to identify a focal point for coordination and to monitor deviations from it;

(b) internal stability—the ability of the firms to make deviation from the coordinated point costly; and

(c) external stability—the absence of strong competitive constraints from competitors, entrants or customers.

6.117 The parties said that the requirements for coordination were not met and there was no evidence to suggest that coordination had previously occurred in the soft drink market:

(a) CCE and the merged company would not be able to reach and monitor an understanding on coordination given the complexities and lack of transparency of the market;

(b) the conditions for internal sustainability were not met, in particular there were significant asymmetries in size between Britvic and CCE and there were large rewards for deviation; and

(c) given strong competitors and sophisticated customers with buyer power that could destabilize coordination the conditions for external sustainability were not met.

6.118 The parties also argued that they were not able to use category captaincy to coordinate with CCE, arguing that retailers used category captains to achieve growth across the soft drinks category and that retailers were highly sophisticated buyers where recommendations made by a category captain were ultimately considered in the round (often alongside input from other soft drinks producers).

Our assessment

6.119 We do not consider that all the necessary conditions for coordination presently apply in soft drinks pricing.

(a) Soft drinks producers do not directly observe what competitor pricing terms are and there is no clear focal point for coordination. Parties do not appear able to

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[118] The Guidelines, paragraph 5.5.1.

reliably reverse-engineer the prices that other soft drinks producers charge their customers from observed retail prices.[119,120]

(b) Wholesale price in any event is only one aspect of the arrangements between the soft drinks producer and retailer. There are substantial additional payments set out in the JBPs (see paragraph 6.7) and no obvious way of a competitor being able to monitor what these payments are.

(c) We also considered whether category captaincy could facilitate coordination on price. Most customers and soft drinks producers[121] agreed with the parties that category captaincy facilitated the overall growth of soft drinks in a retailer and there were strict operating protocols to protect individual soft drinks producers' data. Customers emphasized that they determined the consumer price and had their own sources of information to determine price. We concluded that category captaincy status would not facilitate price coordination between soft drinks producers.

6.120 We also considered whether coordination on promotions was possible. The existence of a promotion is public, so monitoring of the existence of a promotion is possible. Intense promotional competition may be detrimental to profits, so that soft drinks producers would together benefit from lowering the intensity of promotions. However, the parties told us that promotions expanded total sales of products and it would not be in their interest to reduce the number. Customers agreed that promotions were able to generate incremental sales in the category.[122] We have not found any evidence that promotions are currently the object of coordinated strategies.

6.121 Both soft drinks producers and customers have described the competition for promotional slots. The customer controls the promotional calendar and is concerned with the effect of promotions on incremental sales and profits across the store. Competition between soft drinks producers results in lower consumer prices and/or better funding from the soft drinks producers to the customer (for example, through increased fixed payments for product positioning or in the form of better margin maintenance).

6.122 We consider that there are a number of factors relating to external stability that reduce the likelihood of coordination on promotions:

(a) Retailers who control the promotional calendars might have an incentive to disrupt a coordinated outcome. We have been told by several retailers that the sale of must-stock soft drinks are important in attracting customers to their shops. Retailers are in a good position to disrupt any coordination—for example, by unilaterally switching the promotional calendar around or by replacing soft drinks promotions with other promotions.[123] However, we note that there are moderating factors to the customers' incentives to disrupt coordination. Soft drinks compete with other product sectors for promotional space, and customers may be able to

[119] No parties have suggested that wholesale prices could be inferred from retail prices.
[120] We considered whether coordination might apply to quantities or market shares instead, since these are observable. Although theoretically possible, the great variability in both shares and volumes suggested that it would be difficult to coordinate on either because monitoring deviations would be very difficult given this variability.
[121] Including [✂], [✂], Bestway and [✂]. However, GSK said it got a little worried if it heard that Britvic was category captain since Britvic did not have much expertise within sport and energy. Britvic said that it had never been category captain for sport and energy.
[122] [✂] said that promotions did drive incremental sales within a category and it would look at how different brands could target different consumer groups. [✂] said that soft drink sales were expandable and promotions would deliver increased sales overall and not necessarily cannibalise other sales.
[123] Britvic told us about an instance of [✂] disrupting important aspects of the promotional calendar by switching a Pepsi promotion for a Coke promotion at the last minute.

replace a soft drink promotion with other profitable opportunities. We also note, however, that if all retailers are equally affected, the competitive pressure to disrupt coordination is lessened.

(b) The coordinated outcome would have to include other large soft drinks producers to avoid disruption by competitors who could take up the reduced number of promotional slots and gain sales at the expense of the coordinating firms.

Conclusions on pre-merger coordination

6.123 In summary, pre-merger coordination on wholesale prices is unlikely. While coordination on promotions might be more plausible, specific external aspects of the market and the incentives of customers to disrupt coordination, would appear to make pre-merger coordination unlikely in the off-trade segment.

The effect of the merger on coordination

6.124 The parties said that the merger would not serve to increase the likelihood or effectiveness of coordination. The parties said that the merger would not materially alter the concentration or number of large players. However, GSK told the OFT that the merged firm would account for a high market share in England and Wales and Scotland in cola, flavoured CSDs and lemonade CSDs and that the merger could result in coordination.

6.125 We note that GSK's concern centred on the combined share of the merged entity in cola, flavoured CSDs and lemonade CSDs. Figure 1 shows that CCE would still be substantially larger than the merged company in the off-trade CSD market. CCE has a market share of 50 per cent compared with the combined market share of 19 per cent for the merged entity (14 per cent for Britvic and 5 per cent for AG Barr)[124] and this would continue to make coordination unlikely.[125] The external constraints on coordination through promotions come in the form of other competitors and sophisticated buyers who could disrupt coordination. Neither of these is reduced by the merger, and therefore coordination on promotions is unlikely to be externally sustainable after the merger.[126]

6.126 We also considered whether the merger would make coordination more likely in the on-trade. We note that the merger would make little difference. Britvic already supplies IRN-BRU through its dispensers in Scotland. AG Barr's market share in the on-trade is low. Therefore we concluded that the merger would not have a significant impact on coordination in the on-trade.

Conclusions on the effect of the merger on coordination

6.127 We considered that the merger would have little impact on coordination in the off-trade segment because the conditions that prevent coordination on soft drinks pricing before the merger (paragraph 6.122) would continue to apply after the merger and the external constraints on coordination through promotions (which come in the form of other competitors and sophisticated buyers who could disrupt coordination) would

[124] Although we note that the companies would be of similar size in the off-trade still market.
[125] Figure 1 shows that in the off-trade CSD market CCE would be substantially larger than the merged company (although the companies would be of similar size in the off-trade still market).
[126] We considered whether it might be possible to have coordination on promotions only in Scotland. We judge this to be very unlikely because no brand apart from IRN-BRU is able to secure Scotland-only promotions, and even these are very rare.

be unaffected by the merger. Therefore coordination on promotions would be unlikely to be externally sustainable after the merger.

6.128 We also considered whether the merger would make coordination more likely in the on-trade. We note that the merger would make little difference. Britvic already supplies IRN-BRU through its dispensers in Scotland. AG Barr's market share in the on-trade is low. Therefore we concluded that the merger would not have a significant impact on coordination in the on-trade.

6.129 As a result of the assessment in paragraphs 6.114 to 6.128 we concluded that the merger would not be likely to result in significant harm to competition as a result of coordinated effects.

Countervailing factors which might offset the effect of the merger

Market entry/expansion

6.130 In line with the Guidelines (paragraph 5.8.3), we assessed whether entry by new firms or expansion by existing ones might mitigate any effect of the merger on competition that might otherwise arise. We considered whether market entry may be able to mitigate the effect of a price increase in IRN-BRU. Market entry is discussed further in Appendix F.

6.131 The parties have told us that they considered barriers to entry overall to be relatively low.[127] However, AG Barr said it considered that the chance of a major new brand such as Red Bull or Innocent entering the market in the next two years to be low. Instead AG Barr said it expected to see a high level of entry from small new brands and companies, consistent with the type of activity witnessed over several years.

6.132 In assessing barriers to entry, we considered the likelihood of new brands entering the market (whether from existing or new soft drinks producers), whether such entry was likely to be timely in terms of providing potential competition to the parties' brands, and whether new brands entering the market were likely to provide a competitive constraint to the parties' existing brands.

Likelihood of successful entry

6.133 We note that entry could range from a new pack format for an existing product or a new flavour, to a similar product to one already produced by a competitor, or to a completely new product.

6.134 There have been some instances of successful large scale new entry of a completely new product such as Red Bull or Innocent. Based on past history, we expect that some new brands will be launched by existing soft drinks producers over the next three to five years. It is possible, though in our view much less likely, that a completely new soft drinks producer could enter the market over the same time period, as was the case with Red Bull or Innocent. These appear to be rare events and would most likely occur in new areas that would expand the soft drinks market. The historical evidence is that some of the new product entries (whether from existing soft

[127] Joint initial submission, paragraph 185.

drinks producers or new market entrants) will succeed, but for each launch the probability of success is low.[128,129]

6.135 It is possible to enter using outsourced production facilities to reduce entry costs. However, the most significant barrier to entry appears to be the development and maintenance of a successful brand and achieving sufficient distribution of the product at retail outlets. It is difficult to estimate the cost of developing a new brand accurately, but we have been told the cost would be in the range of £[✄] million for each entry irrespective of its success.

6.136 We consider that the cost of entry is likely to be substantially higher for a completely new product than for a new pack format for an existing product or for a similar product to one already produced by a competitor. In view of the low likelihood of success of each new entry the cost of successful new entry is likely to be high. This cost is likely to be more for a mainstream CSD such as a cola or IRN-BRU where the new entrant would be competing against a strong brand with an entrenched position. The case study of Virgin Cola (see Appendix F) suggests that such entry would be unlikely to succeed.

6.137 The rapidity at which sales of a new brand build up will depend on the attractiveness of the brand and the success of the soft drinks producer's marketing and distribution strategies, but to build a new brand that represented credible competition to one of the parties' brands would be likely to take several years. The views of AG Barr support this. AG Barr said that it had made IRN-BRU available for more than 50 years in England [✄]. AG Barr said that it would be reasonable to expect that, in the absence of the transaction, the position would not change to any material extent.

Conclusions on entry and expansion

6.138 We conclude that, over the medium term (three to five years), new soft drinks brands are likely to be launched (most likely by existing soft drinks producers) but the probability of success for each new entry is low. The most significant barrier to entry, particularly in CSDs, appears to be the development of a successful brand identity and associated marketing strategy together with achieving distribution. We consider it unlikely that the threat of new entry of a product that would compete with IRN-BRU would act as a significant constraint on the merged entity.

Buyer power

6.139 We considered the balance of negotiating power between the parties and their customers in paragraphs 6.69 to 6.91. We did not consider that the merger would reduce the ability of the parties to increase price but noted that soft drinks producers and their customers negotiated on many other aspects in addition to price. These non-price factors could reduce to some extent any incentive for the parties to increase the price of IRN-BRU after the merger. We considered the ability of customers to disrupt coordination in paragraphs 6.122 and considered that customers may have the ability to disrupt a coordinated outcome.

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[128] Red Bull said that there had been many examples of new products being launched and then dying away. It said there was a constant stream of ineffective new product development within the category.
[129] Booker told us that every week it would have two or three people making contact with a new product (usually with a new energy drink or a bottled water product). However, it said that hardly any succeeded.

Other countervailing factors

6.140 We noted in paragraph 3.5 that the parties said they would be able to achieve £35 million of cost savings as a result of the merger. The parties said that around £[✂] of these savings would be variable cost savings which they said would increase rivalry. We have not verified how likely it is that these cost savings would be achieved but note that only a small proportion of any cost savings would be likely to affect IRN-BRU pricing directly and provide an incentive to reduce the price of IRN-BRU. We also note that in its interim results announced on 22 May, Britvic identified £30 million of cost savings for the stand-alone Britvic business. We understand from Britvic that these savings are likely to reduce those identified from the merger by £[✂].

6.141 We have not found any other countervailing factors that might offset the effect of the merger.

Summary of findings on competitive effects

Unilateral horizontal effects

6.142 We assessed the closeness of competition between the parties. We considered the evidence on the existing level of competition between the parties and the incentive to increase price post-merger. We noted that most customers thought there was some substitutability between AG Barr's and Britvic's products but the overlap was small. A survey conducted for the parties suggested there was diversion between Orangina and Britvic brands and between IRN-BRU and Britvic brands. Another survey on customer segmentation conducted by the parties suggested that IRN-BRU was relatively distinct from other CSDs and therefore suggested that there would be low levels of substitution from IRN-BRU to other products.

6.143 While the parties' survey evidence suggested there was [✂] diversion between the IRN-BRU and Britvic brands and between the Orangina and Britvic brands the econometric evidence did not find statistically significant results for the diversion between Orangina and Britvic and this is consistent with the view expressed by the parties that Orangina does not compete with Britvic CSDs.

6.144 We examined diversions from IRN-BRU to Britvic in Great Britain as a whole and in Scotland. An analysis of Great-Britain-wide data did not show a statistically significant relationship for the diversion from IRN-BRU to Britvic.

6.145 We focused our analysis on Scotland data to identify whether the greater market share of AG Barr in Scotland may make relationships between IRN-BRU and Britvic products more easily isolated statistically and whether the IRN-BRU customer and the position of IRN-BRU were different in Scotland which may mean that the competitive environment was different in Scotland compared with Great Britain as a whole. We found that the demand estimation appeared more reliable the more that we pooled data.

6.146 We analysed data provided by Tesco and Co-op to assess the relationship in Scottish grocery multiples. When the data from the two retailers was pooled, the data did not produce statistically significant results for the diversion between IRN-BRU and Britvic brands. When we looked at the data for the two retailers separately, both models appeared less reliable than when combined. The Co-op data did not produce statistically significant results but the Tesco data did. However, we were concerned about the reliability of this model result.

6.147 We also analysed two sources of data for the impulse segment in Scotland. One data set (based on Nielsen Scotland aggregated impulse data) did not produce statistically significant results for the diversion from IRN-BRU to Britvic brands. The other, based on Litmus impulse data, produced statistically significant results (although this also suffered from some limitations) and suggested that in Scotland Britvic brands are to some extent a substitute for IRN-BRU.

6.148 In our assessment of the effects of the merger we noted that in general customers were unconcerned about the merger. We used the statistically significant result from the analysis of Litmus data in Scotland to estimate the illustrative price increase that might attend the merger. The diversion ratio of [✂] per cent from IRN-BRU to Britvic brands in the Scottish impulse segment implied an illustrative price increase of [✂] per cent.

6.149 We also considered whether the merger might lead to a price increase for IRN-BRU to on-trade customers but noted that the merger would make little difference since AG Barr already supplies IRN-BRU to Britvic for sale in its dispensers.

6.150 Overall, taking account of the results obtained from a range of data sets, the econometric analysis did not suggest that the merger would create strong incentives for the parties to increase wholesale prices.

6.151 We considered whether retailers' bargaining power would be likely to mitigate any wholesale price rises whose desire had been induced by the merger. We gathered evidence on the nature of negotiations and assessed the extent of retailer bargaining power in negotiations. We conclude that there is presently a balance between strong buyers and the parties as strong sellers. We do not consider that the merger would weaken the ability of the parties to increase the price of IRN-BRU. If anything the merger would increase the negotiation strength of the parties in relation to their customers because the internalization of some sales would weaken customers' outside options. However, we note that soft drinks producers and their customers negotiate on many other aspects in addition to price. These non-price factors could reduce to some extent any incentive for the parties to increase the price of IRN-BRU after the merger, particularly given AG Barr's strategy [✂].

6.152 We conclude that there would not be significant harm to competition resulting from the merger as a result of unilateral horizontal effects.

Portfolio effects

6.153 We examined whether a larger company was able to attain preferential distribution for its products compared with smaller companies. We found that although there was some evidence that on average [✂] was able to achieve somewhat better distribution for its products than would be expected simply on the basis of the sales of each brand, particularly in the impulse segment, we saw examples of smaller companies achieving high levels of distribution for their products compared with larger companies.

6.154 We considered whether the merged company would be large enough to allow it to achieve levels of distribution that were more like CCE and, if so, whether this would be to the detriment of smaller soft drink companies or new entrants. We found that the difference in size between CCE and the merged company was not changed sufficiently for it to be able to replace the brands of smaller competitors with the merged company's brands. We concluded that the merger would not mean new entrants and smaller soft drink companies would be disadvantaged significantly as a result of the merger.

6.155 We conclude that the merger would not result in significant harm to competition as a result of portfolio effects.

Coordinated effects

6.156 We assessed whether the merger may give rise to coordinated effects between CCE and the merged company. In the off-trade we do not consider that all the necessary conditions for coordination apply in CSD pricing: *(a)* soft drinks producers do not directly observe competitor pricing terms; *(b)* there is no clear coordination point for reaching agreement; and *(c)* there are substantial additional payments made by soft drinks companies to customers that a competitor would not be able to monitor. We also concluded that category captaincy status would not facilitate price coordination between soft drinks producers.

6.157 We considered whether coordination would be more practical on promotions but did not find any evidence that promotions were currently the object of coordinated strategies and noted that customers, which control promotions calendars, would have an incentive and the ability to disrupt any coordination.

6.158 The merged company would still be significantly smaller than CCE in the off-trade CSD market and this would continue to make coordination unlikely after the merger.

6.159 We considered whether the merger would make coordination more likely in the on-trade but noted that the merger would make little difference since Britvic already supplies IRN-BRU through its dispensers in Scotland and AG Barr's market share in the on-trade is low. Therefore we concluded that the merger would not have a significant impact on coordination in the on-trade.

6.160 We conclude that the merger would not result in significant harm to competition as a result of coordinated effects.

Countervailing factors

6.161 We consider it unlikely that the threat of new entry of a product that would compete with IRN-BRU would act as a significant constraint on the merged entity. We did not find other significant countervailing factors that might offset the effect of the merger.

7. Conclusions on the SLC test

7.1 We conclude that the merger would not be likely to give rise to an SLC in any market in the UK.