Completed acquisition by C&C Group of the business and associated trading assets of Constellation Europe (trading as Gaymers Cider Company)

The OFT's decision on reference under section 22 given on 8 April 2010. Full text of decision published 21 May 2010.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **C&C Group plc ('C&C')** is a publicly traded company listed on the Irish Stock Exchange and the London Stock Exchange and its headquarters are in Dublin. C&C's main activity is the production of alcoholic beverages including cider, liquors, and spirits. Most notably, C&C produces the Magners brand of cider which it sells in the UK. In Northern Ireland and Scotland, C&C also wholesales beverages to the on-trade and off-trade.[1]

2. **Gaymers Cider Company ('Gaymers')** is a line of business within Constellation Europe Limited (which is part of the Constellation Group whose ultimate parent is Constellation Brands Inc. a company registered in the United States) which manufactures and supplies cider principally in Great Britain under the following brands: Addlestones, Blackthorn, Chapmans, Cider Master, Diamond, Gaymers, K, Natch, Olde English, Old Somerset, Orchard Mill, Special Vat, Taunton and White Star (the 'target brands'). Gaymers also produces private (or own) label ciders for a number

[1] C&C's wholesaling business sold small volumes of some Gaymers brands in Scotland and Northern Ireland pre-merger. However, given the extremely limited vertical link (in terms of volumes) between the merging parties and the fact that there are many other routes to these markets for the target brands it has not been necessary to consider this any further.

of off-trade customers. The UK turnover of Gaymers in the last financial year was £61 million.

TRANSACTION

3. On 15 January 2010, C&C acquired Gaymers from Constellation Europe Limited for £45 million.

4. As part of the transaction C&C acquired the target brands of Gaymers and its principal assets; a production facility at Shepton Mallet, an apple orchard in Beercrocombe, Somerset, apple supply contracts and warehousing and distribution facilities at Shepton Mallet and Bristol.

5. C&C entered into an agreement to purchase Gaymers from Constellation Europe Limited following a period of negotiation spanning over a year. The chronology of events leading up to the purchase is as follows: [2]

   (a) C&C first considered purchasing Gaymers in [ ], although at this point the parties explained that [ ].
   (b) C&C commissioned a report on the Gaymers business in April 2009 which was presented to the C&C board in May 2009.[3]
   (c) Due diligence was carried out from July to September 2009.
   (d) A proposal to purchase Gaymers was presented to the C&C board for approval in October 2009.
   (e) The transaction was approved by the C&C board in December 2009.

6. The parties notified the transaction on 9 February 2010. Accordingly, the administrative target date for the Office of Fair Trading (OFT) to announce a decision in this case is 8 April 2010.

JURISDICTION

7. The OFT believes that the transaction would result in two or more enterprises ceasing to be distinct for the purposes of section 23(1) of the Enterprise Act 2002 (the Act).

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[2] This chronology is particularly relevant to a theory of harm articulated below that unilateral effects would arise from Gaymers withdrawing from production of private label ciders.

[3] The parties submit that this report was produced before a due diligence exercise had been carried out and that some of its conclusions (particularly in relation to the production of private label cider) were based on untested assumptions.

8. The OFT believes that it is or may be the case that the share of supply test in section 23(2)(b) of the Act is met and, therefore, that a relevant merger situation has been created. This is because the parties' combined share of supply of cider in a substantial part of the UK, Northern Ireland (NI) is estimated to give rise to a share greater than 25 per cent.

RATIONALE FOR THE TRANSACTION

9. C&C informed the OFT that the main rationale for the acquisition was to assist it in establishing itself as a stronger player in the growing cider market and increase its scale and scope in the UK by adding the Gaymers brands to its portfolio. C&C also submitted that the acquisition would improve the route to market (in the off-trade) for its Magners brand as it would allow it to benefit from Gaymers' strong relationships with multiple retailers.

MARKET DEFINITION

10. The parties are both active in the supply of cider in the UK; C&C supplies cider under the Magners brand and Gaymers under the target brands. Gaymers is also active in the supply of private label cider to the off-trade.

Previous decisions

11. The OFT has not previously looked at the supply of cider. However, in a previous case, the Competition Commission (CC) concluded that cider did not form part of the same product market as beer *(*Interbrew/Bass).[4] The European Commission considered there was a separate market for cider in Scottish & Newcastle/HP Bulmer, in which (as here) the parties overlapped in the production and supply of cider.[5] No evidence was supplied in this case, either by the parties or third parties, to suggest that this conclusion does not remain valid.

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[4] Report on the acquisition by Interbrew SA of the brewing interests of Bass plc, 3 January 2001, paragraph 4.22.

[5] Case No. COMP/M.3182, Decision of 30 June 2003.

Product market

12. The parties submitted that no distinction should be drawn between (i) on-trade and off-trades, (ii) apple and pear cider, (iii) different qualities of cider (premium, mainstream and economy), (iv) branded cider and private label cider or (v) the different packaging formats (glass bottle, plastic bottle or can). The OFT has considered each of these possible distinctions in turn.

On and off-trade retail channels

13. In line with the Scottish & Newcastle/HP Bulmer decision made by the European Commission the OFT has considered whether the market can be further subdivided between on-trade[6] and off-trade[7]. In Interbrew/Bass, the CC found that at the retailing level, the on-trade and the off-trade can be considered to be different markets.[8] In its AB/InBev decision[9], the OFT did not conclude on whether the on and off-trade constituted separate markets, however, it did examine the merger separately in each of these retail channels.

14. Factors such as pricing (on-trade pricing of comparable products is significantly above that of the off-trade), drinking experience and product range (which is generally much more limited in on-trade premises compared to supermarkets), for example, tend to suggest that such a distinction is a valid one in this case. It is also the case that some of the competition concerns raised by third parties affect either the on-trade or off-trade separately.[10]

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[6] This refers to pubs, bars and restaurants where consumers drink on the premises.
[7] This refers to supermarkets, off-licences and other outlets where consumers purchase alcohol for consumption off the premises, typically at home.
[8] Paragraph 4.25.
[9] Anticipated acquisition by InBev NV/SA of Anheuser-Busch Companies Inc,18 November 2008.

[10] Furthermore, in C&C/Tennents (Completed acquisition by C&C Group plc of the Tennents' business of the InBev NV/SA Anheuser-Busch Group, decision of 17 December 2009), the OFT notes that that demand-side substitution between on and off-trade sales is not symmetrical: it is plausible that a sufficient number of customers would switch to purchasing in the off-trade following a 10 per cent price increase in the on-trade to render that price increase unprofitable. However, it is implausible that a sufficient number of customers would switch to purchasing in the on-trade following a 10 per cent price increase in the off-trade to render that price increase unprofitable. Although, this analysis was in relation to beer, it is plausible that this would apply similarly to cider.

15. In light of the above, on a cautious basis, the OFT has assessed the impact of the transaction considering the on and off-trade channels both separately and together.

Apple and pear cider

16. The parties have argued that both types of cider, that is both the apple and pear varieties, form part of the same market. C&C and Gaymers produce both apple and pear varieties of some of their cider brands.

17. In terms of the product itself, other than the obvious difference that the main fruit used in the cider may differ, the process, and other ingredients for making apple or pear cider are largely the same, that is (apple/pear) juice, sugar and yeast. Pear cider can include up to 25 per cent apple juice and apple cider can include up to 25 cent pear juice.[11]

18. The latest Mintel report covering cider[12] supports this assertion and does not differentiate between the different fruit varieties. In addition, there are no significant pricing differences based on the fruit used in each of the varieties of cider.

19. In any case, whether pear and apple are considered separately or together, no competition concerns arise on the basis of low market shares and the remaining competitive constraints. As a consequence, the OFT has not needed to conclude on this issue. The OFT has therefore conducted its assessment on the basis of apple and pear cider taken together.

Economy, mainstream and premium cider

20. The parties did not consider the market should be segmented into economy, mainstream and premium cider on the basis that there is little difference in the production process and precise classification is difficult.

21. Third party responses generally supported the proposition that there is no clear delineation for the purposes of market definition between premium, mainstream and economy ciders. In any case, if economy, mainstream and premium ciders are considered separately, no competition concerns arise on

[11]The fermentation process and yeast type may vary depending on the particular style of apple or pear cider but they can otherwise be produced using exactly the same process.
[12] Mintel Report on Cider (November 2008), page 2.

the basis of low shares of supply and the competitive constraint placed on the parties by other suppliers.

22. Given the above, and in line with the OFT's findings in HP/Bulmers, the OFT has conducted its assessment on the basis of all ciders taken together.

Private label and branded ciders

23. The OFT considered whether private label and branded cider (in the off-trade) were in the same market.[13]

24. The majority of the cider market is made up of branded cider (only around 15 per cent of the off-trade cider market is made up of private label products). In the present case, the majority of private label (around 80 per cent) falls into what can generally be categorised as the economy segment. Within this segment in particular, brand does not generally appear to be a key factor in driving sales.

25. The OFT has generally been sceptical about the constraint private label products are able to place on branded products in past decisions.[14] If any constraint at all exists it appears to be asymmetric. The parties provided some evidence of private label responding to branded product developments but there is very little to show any response from brands to private label. The parties provided examples of private labels copying successful brands.

26. It was not necessary for the OFT to reach a conclusion on this issue since no competition concerns were raised which were contingent on this categorisation. The OFT has therefore conducted its assessment on the basis of private label and branded considered together.

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[13] See section below on 'Unilateral effects in the off-trade from withdrawal from private label production'. The parties do not overlap in the production of private labels as only Gaymers was active in this area. The issue was, however, considered relevant in the context of this merger given that the parties' internal documents revealed [ ].

[14] For example, Anticipated Acquisition by Premier Foods plc of RHM plc, decision of 5 February 2007.

Packaging Formats

27. The OFT has recently considered segmentation of the supply of alcoholic beverages by type of packaging in C&C/Tennents.[15] In that case, the OFT considered that it was not necessary to segment the market by type of packaging.

28. In the present case, the parties submitted, in respect of both on and off-trade, that given the same brand of cider may come in several packaging formats and that the cider brand itself may act as a driver for sales, it would be inappropriate to segment the market by packaging formats. Further, the parties submitted that consumers do not differentiate between differently packaged ciders.

29. The OFT considered whether to segment the market separately by packaging type in respect of on and off-trade separately. Cider is available in on-trade outlets in draught and packaged formats. Most cider sales (75 per cent) are of packaged cider (that is to say, bottled or canned) as opposed to draught. The price of draught and bottled appears to be very similar in the on-trade – the parties gave the example of a pint bottle of Magners which was only 3p more expensive than its draught counterpart. Some market research submitted by the parties indicates that consumers view draught and packaged as substitutable.[16]

30. Cider is available in the off-trade in several packaging formats (that is, glass bottles, cans, and plastic). The packaging format chosen is based largely on the brand image that the producer is trying to create, with premium brands more often packaged in glass bottles. Economy brands are often sold in PET bottles (one or two litre plastic bottles). Cans are used with all types of ciders, from economy to premium brands, for example, Magners is sold in both can and glass bottle format. In support of this proposition, the parties submitted that over 80 per cent of off-trade ciders were of brands available in both canned and bottled format. No evidence was provided to show whether or not consumers differentiate between differently packaged ciders.

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[15] The Completed acquisition by C&C Group plc of the Tennents' business from Anheuser-Bush InBev NV/SA Group of 17 December 2009.
[16] TGI Survey Data for 12 months from October 2008 to September 2009.

31. In respect of the supply of cider to both the on and off-trade segments, the OFT considers, in this case, that there is limited evidence to show that segmentation by packaging format is appropriate. In any case, if packaging formats are considered separately, no competition concerns arise on the basis of low shares of supply and weak competition between the parties. The OFT has therefore conducted its assessment on the basis of all packaging formats taken together although, it has not been necessary to conclude on this issue given that a decision does not turn on this point.

Geographic market

32. The parties submitted that it was appropriate for the OFT to follow the approach taken by the European Commission in Scottish & Newcastle/HP Bulmer which concluded that the geographic scope for cider is national.[17] However, the OFT notes that in recent cases relating to beer, the OFT and the CC have adopted a cautious approach and considered Great Britain (GB) and NI separately.

33. The OFT accepts that the routes to market for cider in NI may differ slightly from GB as do the presence of competitors - it appears that Gaymers' brands are weaker in NI than they are in GB.[18] Third parties tended to support the view that NI and GB were in the same market. Given that no specific concerns arise in relation to NI in any case, it has not been necessary to conclude on whether NI forms a separate market.

34. In light of the above the OFT has assessed the transaction in relation to a geographic market comprising the UK. The OFT has not, however, needed to conclude on market definition any more precisely than this as it does not materially affect the assessment in this case.

Conclusion on market

35. The OFT notes that market definition is an analytical framework used to aid an assessment of the relative competition pressures that different suppliers place upon each other. It is not an end in itself. In the present case, the

[17] Paragraph 15
[18] The combined market share of the parties in NI is [70-80] per cent in the on-trade and [50-60] per cent in the off-trade, however this in almost entirely made up of the Magners brand with the increment being [less than one] per cent and [two - seven] per cent in the on and off trade respectively.

starting point for possible market segmentation has been driven by categories typically used by the industry, that is by fruit type (apple or pear), type of cider (economy, mainstream or premium), branded and private label or by form of packaging. However, given the OFT has no competition concerns in any of these possible segmentations, it has not been necessary for it to conclude on whether there are separate markets based on the categories above. The nature of the potential adverse effects does rely, however, on a segmentation of the cider market between the on-trade and off-trade. The OFT has, therefore, considered the potential effects of the merger on the market for cider in the on-trade and the off-trade in the UK both separately and when taken together.

HORIZONTAL ISSUES

Shares of supply

36. On a UK-wide market for cider (both on and off-trade taken together) the parties have a combined share of supply of [20-30] per cent with an increment of [five-10] per cent.

37. On a UK-wide market for cider in the on-trade the parties have a combined share of supply of [20-30] per cent (with an increment of [five-10] per cent).

38. On a UK-wide market for cider in the off-trade the parties have a combined share of supply of [20-30] per cent (with an increment of [10-15] per cent).

39. Heineken is very much larger with a share of supply in the on and off-trades respectively of around [55-65] and [45-55] per cent – primarily through the strength of its Strongbow and Bulmers[19] branded ciders.

40. Despite the presence of Heineken, which is far larger than the merged entity, the merger does bring together the second and third largest producers of cider in the UK and on that basis has raised some third party concerns. In assessing the level of concern relating to this, the OFT has sought to consider the closeness of competition between: (i) the parties

pre-merger (including as between each of their main brands), (ii) the parties and Heineken and their respective brands, and (iii) the parties and other cider producers other than Heineken

41. As a cross check, the OFT also looked at whether based on shares of supply on any other possible segmentations of the market considered above would give any cause for concern. However, none of these gave rise to concern.[20]

42. A number of other possible concerns were also raised by third parties and these are considered below.

Loss of competition between the parties

43. A number of third parties raised concerns that the merger resulted in the UK cider market being dominated by the two largest players in both the cider market generally and in the on and the off-trade taken separately and that the merger resulted in a loss of choice from three viable suppliers to two. A third party asserted that other than Heineken, there did not appear to be any other cider producer able to compete strongly with the brands held by either of the parties.

44. C&C argued, however, that competition between the merged parties was not strong pre-merger. The Magners brand, they argued, was focused on the on-trade primarily in bottled (premium) form (although C&C has recently introduced a draught version of Magners for the on-trade). In this sector, bottled Magners ([35-45] per cent of packaged on-trade cider) competed strongly against Heineken's Bulmers brand ([30-35] per cent) but less so against Gaymers ([5-10] per cent). In draught, Heineken dominated (with over [65-75] per cent of supply) with some competition from Gaymers ([15-25] per cent) and Magners, as yet, still a minor presence ([0-5] per cent).

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[19] Heineken markets cider under the 'Bulmers' brand in the United Kingdom – this is generally viewed as the brand which is most directly in competition with the Magners brand. C&C also markets cider under a 'Bulmers' brand in the Republic of Ireland.

[20] Only in the segment for on-trade packaged cider did the parties hold significant market share with around [45-55] per cent. However, the increment was small ([0-5] per cent) and the high market share was pre-existing through C&C's control of the Magners brand. The Magners brand would continue to face significant competition from Heinekens' Bulmers brand post merger.

45. In the off-trade, the share of supply figures also supported the contention that competition was mainly between C&C and Heineken (in bottles, [15-25] and [35-45] per cent respectively) or Gaymers and Heineken (in cans, [10-15] and [65-70] per cent respectively and plastic bottles [10-15] and [40-45] per cent respectively). There is a long tail of other brands making up the remainder of the market some of which, such as Kopparberg, have a strong following and have gained market share over a short period. It is clear that brands such as this compete directly with the Magners brand.

46. The extent to which any of the target brands were in direct competition with Magners is therefore questionable. There is, by contrast, evidence from internal monitoring documents of C&C and from third party comment that the Magners and Bulmers (Heineken) brands compete against each other strongly in both the on-trade and off-trade channels.

47. Given the modest combined shares of supply, the lack of direct competition between Magners and the target brands, and the continued presence of strong competition in all possible market sectors, the OFT does not believe that the merger can be expected to give rise to a realistic prospect of a substantial lessening of competition with respect to standard unilateral effects in either the on-trade or the off-trade.

Unilateral effects in the off-trade from withdrawal from private label production

48. Due to third party complaints and the parties' own internal documents (see below), the OFT also considered closely whether unilateral effects might arise if the merged entity were to withdraw from private label production for retail customers in the off-trade channel. Private label ciders are produced for off-trade customers who either sell the cider under their own brand (e.g. Sainsbury's) or under another brand to which they own the exclusive rights. The predominant customers for these are the multiple retailers and some cash and carry chains. They account for differing proportions of the cider category for each of their customers, although as a general observation they tend to make up a small proportion of sales in comparison to branded cider. Although private label cider comes in economy, mainstream and premium varieties, a high proportion (around 80 per cent) is focused on high strength 'economy' brands at the lower end of the price range.

49. The parties estimate that private label cider production is worth around £70 million of which Gaymers produce an estimated £[ ] million. Although, the parties do not overlap in the production of private label cider, Gaymers is a significant private label supplier, with [25-35] per cent of its total cider production dedicated to private label. A third party raised the possibility that competition concerns could arise if Gaymers withdrew from the supply of private label cider. Specifically, it considered:

    a. that there may not be sufficient existing (or potential) spare capacity in the private label segment to be able to satisfy current demand in the event of Gaymers' withdrawal from private label and as a result the price of private label supply to the off-trade might increase

    b. as a consequence of a) above, and the resultant inability of customers to obtain private label products, customers would be compelled to purchase higher levels of premium branded ciders (in particular, Magners) which are more profitable.

50. C&C's own internal documents supplied to the OFT appeared to provide some support for these propositions. In particular, [ ][21] Further, this report anticipated [ ].

51. The same report also highlighted an industry wide concern about an anticipated increase in cider duty which they expected would affect most of private label (and particularly the economy high strength ciders).[22] Some concerns were also raised that the juice content of cider might be set at a higher level (25 per cent) – much of the high strength 'white cider' produced by Gaymers had a juice content of only 10 per cent.

52. C&C acknowledged the contents of the report but argued that this was produced prior to their undertaking due diligence on the Gaymers business, and stated that it was merely one of a number of options for consideration by the C&C board. The chronology leading up to the conclusion of the

[21] [ ]

[22] There appears to have been some concern in the cider industry regarding an increase in duty primarily targeted at high strength (mostly private label and economy) ciders with the government aim of reducing 'binge' drinking. The parties say that they believed that this would increase the cost of private labels to the point where there would be little, if any, pricing difference between them and branded ciders, making them less attractive to consumers. A duty increase would apply across the board to all producers and any effects would not be merger specific.

transaction has been set out at paragraph 5 above. As can be seen, at April 2009, C&C had not undertaken full due diligence on the Gaymers business and therefore it argued that it relied upon limited knowledge (and a lack of expertise in private label production) [ ]. Once due diligence had been undertaken in July to September 2009, culminating in a final bid in December 2009, [ ].[23] C&C therefore submitted that it currently has no intention of withdrawing from the supply of private label ciders.

53. Moreover, C&C added that should the proportion of juice in cider be set at 25 per cent as anticipated, then the merger created an opportunity for the business since [ ]. All these factors, they submitted, changed C&C's opinion of the value of private label and by the time the transaction was presented to the board in October 2009, [ ]. This had been confirmed in discussions with private label customers.

54. Although, the OFT finds the explanation by C&C plausible, it would have expected there to be internal documents to clearly show this about-turn in thinking, especially given the proportion of Gaymers' business which private label occupies and the importance of this to the transaction. Convincing documents of this nature were not provided to the OFT.

55. Therefore, taking a cautious view, the OFT proceeded to consider the competitive impact of the transaction should Gaymers decide to withdraw from private label production.

Competitive impact of withdrawal of Gaymers' private label production

56. A third party submitted that there did not appear to be a surplus of private label supply capable of replacing the capacity which would be lost if Gaymers were to withdraw from producing private label cider. It submitted that there was only one other key private label supplier (Aston Manor) and that therefore the exit of Gaymers from private label cider production could result in any remaining private label producers having the ability to increase prices[24]. The same third party submitted that the low margins in private label cider would not be sufficient incentive for new entry/expansion into private label production.

[23] [ ].

57. The OFT's investigation showed that, in addition to Aston Manor, there were a number of alternative sources of private label supply with sufficient capacity to meet customer demand in the event of Gaymers withdrawal:

    (b) One major supermarket informed the OFT that it had received quotes for the entirety of its private label demand from two suppliers other than Gaymers.
    (c) UBL, a producer of private label beverages (which has recently been acquired by Heineken) currently has substantial spare capacity ([ ] million hectolitres). It submitted that it would easily be able to take on any capacity lost through Gaymers' withdrawal.
    (d) A multiple retailer told the OFT that it believed there to be at least six or seven other providers who could supply private label cider, albeit this would require them to multisource.
    (e) Several other retailers told the OFT that it was possible to obtain some supplies from the continent (prices from the continent were said to range from 20 per cent less to 10 per cent more expensive than their current UK sourced supplies) and the price of importation would not be prohibitive.

58. Apart from the complainant, all respondents (both private label cider suppliers and customers), agreed that there were a sufficient number of suppliers in the market, together with sufficient excess capacity, such that Gaymers withdrawal would still leave them with adequate choice.

59. Given the existence of other suppliers of private label cider, evidence of excess capacity and willingness of multiple retailers to switch, the OFT considers that even if Gaymers were to exit private label cider production (which C&C has said it does not intend to do) this would not give rise to any competition concerns in the supply of private label cider.

Potential for unilateral effects on premium brands

60. This concern, which was expressed as a potential extension of (a), considered above, was based on the premise that a reduction in private label supply (were Gaymers to exit) might give rise to switching to branded cider products. For this theory of harm to benefit C&C and be merger

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[24] It later transpired, during the course of the OFT's investigation, that the third party was aware of other private label suppliers and had indeed received alternative quotes for supply from them.

specific such switching would have to be to the Magners brand since Gaymers would already, pre-merger, have been able to benefit from any switching to the Gaymers' target brands.

61. The parties made the point that C&C's brand (Magners) is positioned as a premium cider and, as such, is highly unlikely to benefit from any sales uplift as a result of a weaker private label offering. Substitution, they believed, would generally be towards the lower priced ciders, that compete more strongly with private label cider. Moreover, C&C would not be able to control any diversion by consumers, this would be totally in the hands of the multiple retailers and wholesalers that ultimately control access to shelf space and promotions and thus the 'choice' that consumers will have.

62. The parties provided the OFT with calculations based on a number of plausible assumptions which supported the contention that the level of diversion to the Magners brand – or indeed the Magners and Gaymers brands combined – would have to be implausibly high for such a strategy to be beneficial. This analysis is consistent with the comments made to the OFT by third parties that branded premium ciders such as Magners are not particularly substitutable for most private label ciders.

63. For all the reasons above, the OFT does not therefore believe that the evidence supplied by third parties showed that withdrawal from private label by Gaymers (even were it to happen) would be likely to lead to switching to Magners in sufficient amounts as to make this a viable and profitable strategy and does not therefore consider that the transaction raises concerns.

Loss of a maverick

64. One on-trade third party told the OFT that it regarded Gaymers as a 'maverick' whose role as an independent competitor was proportionally greater than its market share would suggest.[25] The third party suggested that Gaymers was aggressive in relation to the pricing of its draught cider brands and that it was innovative in its marketing approach by, for example, promotions at music festivals and other events.

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[25] OFT Substantive Assessment Guidance, paragraph 4.8.

65. C&C submitted that Gaymers was far from being an innovator and that the pricing of Gaymers' brands reflected its relative weakness in comparison to Heineken in particular. Gaymers' strategy was reactive to the pricing of competitors' brands such as Strongbow (Heineken) to which it had to price at a substantial discount in order to maintain its market share. This is confirmed by the fact that that Gaymers brands have not gained market share in recent years. The parties also provided customer survey evidence[26] which showed that customers were in general agreement with this view – in response to a question whether Gaymers had strong and known brands, it was ranked 22 out of 22 by off-trade customers, [ ] out of [ ] by wholesale/convenience customers and [ ] out of [ ] by on-trade customers.

66. In the off-trade, C&C submitted that Gaymers' pricing was heavily influenced by the buyer power of the multiple retailers. This was supported by evidence[27] which indicated that multiple retailers felt able to negotiate prices from Gaymers which enabled them to obtain margin levels which they considered favourable.

67. Third parties were in general agreement with C&C that Gaymers did not play the part of a maverick, for example, with innovative product developments (such as bottled cider, cider served over ice, or pear cider) or with innovative marketing strategies which enable it to capture share. Rather, it was viewed as a 'me too' competitor, able to copy the innovations of its competitors but not the first to market them. A survey submitted by the parties[28] appeared to add support to this since Gaymers' customers viewed it as the least innovative of 22 cider producers in the survey.

68. Overall, the OFT does not believe that the evidence suggests that Gaymers was a maverick. Far from 'punching above its weight', Gaymers' brands were viewed as weak by its customers and any product innovation had been largely of the 'copycat' kind.

[26] 'Advantage Group Survey' 2009. This was a survey conducted by an independent research company for Gaymers which looked at how its customers perceived it in relation to its competitors.
[27] 'Advantage Group Survey' 2009.
[28] 'Advantage Group Survey' 2009.

COORDINATED EFFECTS

69. The OFT received two complaints expressing concerns that the enlarged C&C group would be in a position to coordinate with Heineken over pricing in both the on and off-trade.

70. The top three players in the cider market pre-merger were Gaymers, C&C and Heineken. Between them, the merged entity and Heineken hold around an 80 per cent share of the UK on-trade cider market and around 70 per cent in the off-trade. They hold six of what are generally considered the top brands[29] in the on-trade and seven of the top ten brands in the off-trade,[30] with many smaller independent providers making up the remainder. It has been argued that the increment added to C&C by this acquisition (especially given the marginality of other cider producers) creates a duopoly which makes co-ordination more likely.

71. The key issue, when assessing coordinated effects, is whether the merger creates or enhances the likelihood of successful coordination (tacit or explicit) occurring or strengthens existing co-ordination. Coordination can occur on prices, volumes, capacity, customer or sales area allocation, or other aspects of competition.

72. In brief, the conditions for coordination to be successful and stable are that firms have the ability and mutual incentive to align their behaviour and sustain a coordinated outcome, and that such an outcome is also sustainable in the face of external factors. If these conditions are present and a merger strengthens any of these elements, then coordinated effects may arise from the merger.

73. First, the parties submitted that they have no ability to align their behaviour with that of Heineken because there is insufficient transparency in the UK cider market. Contracts are individually negotiated and price coordination appears to be more difficult across the portfolio given that the merger provides C&C with a much wider range of products. Furthermore, Heineken will remain a significantly larger competitor and holds significant power through its Strongbow and Bulmers brands which suggests that the merger is unlikely to give rise to a change in market structure in the UK such that coordinated effects would become more likely. The parties also submitted

[29] Strongbow, Magners, Bulmers Original, Blackthorn, Woodpecker, Bulmers Pear Cider.

that unlike C&C – which operates through independent wholesalers (in England and Wales) - Heineken has two direct routes to market (through its own sales team and WaverleyTBS (WTBS), its wholly owned wholesaler), and because of this alignment of prices would be extremely difficult.

74. Second, the parties submitted that they have no incentive to maintain coordinated behavior. The parties submitted that they will continue to compete vigorously and have provided evidence of this in relation to their objective of gaining share from Bulmers. The asymmetry of the size of C&C compared to Heineken, the parties submitted, would reduce the incentive for C&C to sustain coordinated behaviour since it has more to gain from deviating.

75. Third, the parties submitted that coordination would not be sustainable primarily because there are other suppliers present in the market who are currently have market share or are growing market share such as Kopparberg, Aston Manor, Westons, and Thatchers. Any attempt to coordinate by Heineken and C&C would be disrupted by their presence. The parties also submitted that any attempt to coordinate would be strongly resisted by customers with buyer power, particularly in the off-trade. In the on-trade, pub groups and wholesalers also exert pressure on the parties with the threat of de-listing and the parties are reliant on good relationships with them to get their brands to the market.

76. In conclusion, the OFT has received no evidence to suggest that the merger makes coordination between the merged entity and Heineken any more likely.

CONGLOMERATE EFFECTS

77. A third party raised concerns that the merger adds mainstream and economy brands to C&C's offering (Magners) and that as a result the enlarged C&C will be able to leverage this power in the on-trade to disincentivise publicans from multi-sourcing and taking independent brands such as Thatchers, Westerns or Kopparberg.[31] Heineken is the only other

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[30] Strongbow, Magners, Frosty Jacks, Blackthorn, Olde English, Scrumpy Jack, White Star.
[31] This would necessarily assume that economy, mainstream and premium brands are each in separate markets, in respect of which, as discussed above the OFT has not found it necessary to conclude on due to the absence of concerns in this possibly narrower segmentation.

producer able to compete on this level as it too also has a full product range covering premium, mainstream and economy brands.

78. In addition, it has been suggested that this issue is further compounded in Scotland, where C&C holds the Tennents lager brand and has non-exclusive distribution rights to Stella Artois, Budweiser and Becks for the on-trade only. The concern expressed is that C&C might be able to leverage the power it has in its beer brands to encourage the on-trade to take on its full cider offering – to the detriment of smaller cider producers.

79. The OFT therefore considered whether the merger may give rise to conglomerate effects.[32] The OFT has examined whether the merged entity will have the ability and incentive to foreclose its rivals, and if so, whether this would have an adverse effect on competition. Specifically, in this case, the OFT considered whether C&C would have the ability and incentive to foreclose its' independent rivals from access to on-trade customers (publicans) through either tying or bundling.

On-trade

80. In relation to conglomerate effects in the on-trade the parties argued that they do not possess the requisite market power for these to arise as Gaymers' brands are not 'must have' as indicated by their individually low market share, and that Strongbow is the only must have brand in cider. The parties also argued Magners was not a 'must stock' brand and that the addition of it to the Gaymers portfolio, would be unlikely to incentivise publicans to take the Gaymers portfolio of products as part of a bundle in order to secure supplies of it. Moreover, the parties face competition from at least one significant brand in all of the potential categories identified.

81. In addition, neither C&C nor Gaymers has a direct route to market for the on-trade in England and Wales. C&C currently sells draught Magners directly and through its distributor Molsen Coors and C&C and Gaymers sell packaged products in the on-trade through wholesalers. Evidence supplied

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[32] Conglomerate effects may arise in mergers of firms in different markets that are not vertically related. These firms may produce complementary products or completely unrelated products. In some cases, conglomerate effects may lead to anti-competitive foreclosure that is, through tying and bundling or 'portfolio effects'. See Chapter 6 of the OFT's Substantive Assessment Guidelines (OFT516). Where customers value a variety of products a conglomerate merger may give the merged entity a product range advantage which could lead to an increase in market share.

by the parties also showed that in respect of the on-trade, their two largest customers are wholesalers namely Heineken (through WTBS) and Matthew Clark Wholesalers (owned by Constellation). The parties submitted that these wholesalers prefer to carry as wide a portfolio of products as possible to meet customer demand.

82. In summary, the OFT considers that C&C's ability to engage in a successful foreclosure strategy through tying and bundling its widest post-merger product offering was limited due to the fact that:

    (f) the merged entity post-merger would not generally have a direct route for the supply of their products to the on-trade (that is, they sell in the main, through wholesalers)
    (g) the lack of a direct route to customers further prevented them from influencing the purchasing strategy of on-trade customers (that is, publicans).

83. It has not therefore been necessary for the OFT to consider, in detail, whether C&C has the incentive to do so, or whether any such strategy would have an adverse effect on competition.

Scotland

84. In Scotland, the parties submit that any concerns are unfounded. C&C has non-exclusive rights to the ABInBev beer brands mentioned and is therefore not the only source of supply of these. The effect of the transaction is essentially to add the Gaymers portfolio to the existing C&C portfolio. Cider is of far lesser importance that beer to customers in Scotland and the parties believe this would therefore have no effect in terms of the concern raised with the OFT. Although, C&C does operate a loan book in Scotland, offering tied-loans in the on-trade to retailers in the independent free trade, this is a fraction of the size compared to that of Heineken[33], who the parties say will naturally tie publicans to purchasing their cider brands, and of Greene King who have an arrangement with Heineken for the supply of its cider to their loan-tied estate. The parties submitted, and the OFT agrees, that even if C&C was in a position to add the Gaymers brands to the tied list of products available to its tied-estate (which is unlikely given

[33] The value of C&C's loan book is £[ ] million. The value of Heineken's loan book is £[ ] million. The value of Greene Kings loan book is £[ ] million.

the strength of the Strongbow brand), this will not give rise to any conglomerate effects given the much larger loan-tied estates of Heineken and Greene King.

Conclusion

85. Given that third parties were not concerned (aside from one) and the factors considered above, the OFT does not believe that the merger creates or strengthened the ability or incentive for C&C to foreclose others by tying or bundling.

BARRIERS TO ENTRY

86. Where relevant, entry has been discussed above, in the context of the theories of harm raised.

87. Given that the OFT had no concerns that a substantial lessening of competition would arise as a result of the merger on any basis, it has not been necessary to consider barriers to entry in any further detail.

BUYER POWER

88. Where relevant the potential strength of the parties customers has been discussed above, in the context of the theories of harm raised.

89. Given that the OFT had no concerns that a substantial lessening of competition was created on any basis, it has not been necessary to consider buyer power in any further detail here.

THIRD PARTY VIEWS

90. Third party views have already been discussed in other parts of the decision where appropriate.

91. It should also be noted that several third party customers believed that C&C would create a larger and welcome competitor to Heineken.

ASSESSMENT

92. The parties overlap in the supply of cider both in the on-trade and the off-trade in the UK, and the OFT has assessed the merger on both of these markets separately. The OFT also considered possible market segmentation by categories typically used by the industry, that is by fruit type (apple or pear), type of cider (economy, mainstream or premium), branded and private label or by packaging format. However, given the OFT has no competition concerns in any of the possible segmentation, it has not been necessary for the OFT to conclude on whether there are separate markets. The nature of the potential adverse effects does rely, however, on a segmentation of the cider market between the on-trade and off-trade. The OFT has, therefore, considered the potential effects of the merger on the market for cider in the on-trade and the off-trade in the UK both separately and when taken together.

93. The OFT took as the basis of its geographic market definition supply in the UK, although again the OFT's decision did not turn on this point.

94. Several concerns were raised by third parties; that the merger creates a duopoly between Heineken and the merged entity; that coordination is more likely as a result of the merger; that the merger may result in conglomerate effects and that the possible withdrawal of Gaymers from the production of private label ciders will lead to unilateral effects resulting in a substantial lessening of competition.

Loss of competition between the parties

95. Several third parties were concerned that the merger created a duopoly in the supply of cider as it is the merger of the second and third largest producers of cider in the UK. However, the combined market shares of the parties in the on and off-trade are below 25 per cent, and there is limited evidence of direct competitive interaction between the brands held by each of the parties. On this basis, the OFT does not believe that the merger will give rise to a substantial lessening of competition at the horizontal level.

Withdrawal of Gaymers from production of private label

96. A third party expressed a concern that C&C might withdraw from private label cider production and that, as a consequence, there might not be

sufficient capacity to satisfy demand in private label leading to a price increase. A further concern was raised by the parties' own internal documents that such a withdrawal [ ].

97. C&C contended that [ ] was simply one of a number of options that was open to it in the early stages of formulating its bid for Gaymers. Following due diligence, it argued that it found the assumptions underlying this proposal were misconceived and that, in fact, there were significant reputational benefits [ ]. While accepting that this was a plausible explanation, the OFT did consider whether harm to the market could result from Gaymers withdrawal from private label. The evidence showed that a) there were sufficient other players in the production of private label and (b) excess capacity to produce private label cider. As a consequence, the OFT did not believe that withdrawal (even were it to happen) would give rise to any competition concerns.

Loss of a Maverick

98. A third party complained to the OFT that Gaymers was a low price innovator whose role as an independent competitor is proportionally greater than its market share would suggest. The parties showed, to the satisfaction of the OFT, that far from being an innovator, Gaymers had largely copied any significant cider innovations and that its brands were viewed as weak by the majority of its customers.

Coordinated effects

99. The OFT investigated a third party complaint that the merger made coordination over pricing in particular, more likely between the enlarged C&C and Heineken. The parties submitted that there is insufficient transparency in the UK cider market to enable coordination. Contracts are individually negotiated and cider is not a homogenous product, there being many variants. Furthermore, the parties lack of a direct route to market particularly in the off-trade, led the OFT to conclude that there was no strong ability for the parties to align their behaviour. There is little incentive for the parties to sustain any coordination given C&C relative size and there is demonstrable continuing competition between Magners and Bulmers in particular. The presence of other players in the market such as Kopparberg and the buyer power exhibited suggests that coordination is not likely to be

sustainable. The OFT did not therefore consider that any competition concerns were raised as a result.

Conglomerate effects

100. A third party raised concerns that the merger added mainstream and economy brands to C&C's offering (Magners) and that as a result the enlarged C&C would be able to leverage this power in the on-trade to disincentivise publicans from multi-sourcing.

101. The OFT does not believe that the merger creates or strengthened the ability or incentive for C&C to foreclose others by tying or bundling given the merging parties did not have the requisite power in the market, through, for example, having any brands which were considered 'must haves', and in addition had no direct route to market.

102. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

103. This merger will therefore **not be referred** to the Competition Commission under section 22 of the Act.