

# Provisional decisions on eight Enterprise Act 2002 merger remedies

31 August 2016

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## Introduction

1. In its [2015/16 Annual Plan](#), the Competition and Markets Authority (CMA) committed to commence a programme of work to systematically review our existing remedies to seek to remove measures that are no longer necessary. As part of this, in April 2015, the CMA launched reviews of 71 structural merger remedies that had been put in place before 2005. These reviews resulted in 51 remedies subsequently being removed.
2. In its [2016/17 Annual Plan](#), the CMA noted that it will build on this work in the coming year, launching further reviews of existing mergers or market remedies. This would include a further tranche of 30 to 40 old merger remedies that are more than ten years old. Following this commitment, on 14 June 2016, the CMA launched reviews of 12 merger remedies put in place before 1 January 2006. This notice concerns eight of those 12 merger remedies, which are assessed under the Enterprise Act 2002. The CMA's

provisional advice on merger remedies assessed under the Fair Trading Act 1973 are considered in a separate document.<sup>1</sup>

3. This notice concerns eight merger remedies under the Enterprise Act 2002.

## **Jurisdiction**

4. The CMA has a statutory duty in Schedule 24 of the Enterprise Act 2002 to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of a change in circumstances:
  - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
  - (b) an order is no longer appropriate and needs to be varied or revoked.
5. Responsibility for deciding on variation or termination of Orders lies with the CMA.

## **Undertakings that have lapsed**

6. This review has found that one of the eight merger remedies has lapsed, specifically, undertakings given by Hoverspeed UK Ltd, on 24 August 1981, concerning its proposed merger with Hoverlloyd Ltd. The CMA will therefore remove this case from its register of undertakings and orders.

## **Provisional decisions**

7. The CMA's provisional decisions in relation to each of the remaining seven merger remedies is set out in the annexes described in Table 1 below. In all seven cases, our provisional decision is that the undertakings should be released.

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<sup>1</sup> These two documents cover 11 of the 12 merger remedy reviews launched on 14 June 2016. The one remaining case is still being considered by the CMA and a provisional decision will follow later in 2016.

**Table 1: Undertakings on which the CMA has reached provisional decisions**

<i>Purchaser</i>	<i>Target business</i>	<i>Provisional decision</i>	<i>Annex</i>
Allied-Lyons plc	Carlsberg A/S	Release	1
Arriva plc	Lutonian Buses Ltd	Release	2
National Express Group plc	Midland Mainline Ltd	Release	3
National Express Group plc	Prism Rail plc	Release	4
Nutricia Holdings Ltd	Valio Internataional UK Ltd	Release	5
Scottish & Newcastle plc	Courage Ltd (Fosters Brewing Group Ltd)	Release	6
Thomas Cook Group Ltd	Interpayment Services Ltd	Release	7

## **Consultation on the CMA's provisional decisions**

8. The CMA is consulting on its provisional decisions in each of the seven cases described above and in the relevant annexes below.

9. This consultation will close on **30 September 2016**. If you wish to respond to this consultation, please contact the CMA as follows:

Peter Hill  
7th Floor North  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD

Email: [remedies.reviews@cma.gsi.gov.uk](mailto:remedies.reviews@cma.gsi.gov.uk)

10. Following this consultation, the CMA will consider the responses received and the evidence and views presented and will assess the impact of these responses on its provisional decisions before reaching its final decision in each case.

## **Annex 1: Allied-Lyons plc/Carlsberg A/S**

### **Undertakings given by**

1. Allied-Lyons plc and Carlsberg A/S.

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/3095).

### **Details of the transaction**

3. Allied Breweries Ltd and Carlsberg Brewery Ltd entered into a joint venture in which their brewing and wholesaling activities were merged. Allied would continue to own its pub estate under the name Ind Coope (Oxford & West) Ltd (known as Allied Retail).
4. Under the arrangement, Carlsberg Brewery Ltd would be renamed Carlsberg-Tetley Ltd (and subsequently Carlsberg-Tetley plc). Allied Breweries Ltd's brewing assets, which had been transferred to its subsidiary William Jones & Sons (Maltsters) Ltd, would become a wholly-owned subsidiary of Carlsberg-Tetley Ltd and would be renamed Carlsberg-Tetley Brewing Ltd.
5. On completion of the merger, Allied-Lyons plc and Carlsberg A/S would withdraw from the UK market for brewing, wholesale and distribution of beer. Allied Retail would enter into a seven-year supply agreement to buy all of its beer requirements from Carlsberg-Tetley Brewing Ltd.

### **Monopolies and Mergers Commission (MMC) report published**

6. *Allied-Lyons and Carlsberg A/S* (MMC report Cm 2029) was published on 28 July 1992.

### **The market concerned**

7. The supply of beer.

### **Theory of harm**

8. The MMC found that 'the removal of Carlsberg as an independent supplier would be detrimental to competition and adversely affect regional and local

brewers and independent wholesalers, especially in respect of lager supply to the free on-trade.<sup>2</sup>

### **Description of the undertakings**

9. The undertakings, given on 27 November 1992 by Allied required it:
- (a) 'Not to carry out the agreements with Carlsberg A/S relating to the merger of the parties' United Kingdom brewing and wholesaling interests (the Arrangements) unless they provide that, for a period of three years from the date of such merger, Carlsberg-Tetley Ltd (CTL) will not worsen the terms of supply to any regional or local brewer or independent wholesaler who obtained at least 500 barrels of Carlsberg products from Carlsberg Brewery Ltd in the twelve months preceding 30 September 1992.
  - (b) To ensure that if the Arrangements are carried out, no agreement is made which restricts any member of the Allied-Lyons (Allied Domecq) group for more than five years from acquiring beer from persons other than CTL.
  - (c) For so long as members of the Allied-Lyons (Allied Domecq) group hold shares or an interest in shares conferring 15% or more of the voting rights in CTL, then to ensure that:
    - (i) within two years of the merger, 100 pubs are freed from tie in addition to those required to be freed under the Supply of Beer (Tied Estate) Order 1989;
    - (ii) within four years of the merger a further 300 such premises are freed from tie.'
10. The undertakings, given on 26 November 1992 by Carlsberg A/S reflected the wording of (a) and (b) above and omitted (c). Together, the undertakings given by both parties are referred to here as the Undertakings.

### **History of the companies since the undertakings were given**

11. Allied-Lyons plc was renamed Allied Domecq plc on 19 September 1994 following a merger with Pedro Domecq. In 1999 the Allied Domecq pub estate was bought by, and split between, the brewer Bass and the pub company Punch Taverns. Allied Domecq was renamed Allied Domecq (Holdings) plc on 2 August 1999. The Bass pubs became Mitchells & Butler in 2003. Allied Domecq (Holdings) plc was bought by Pernod Ricard in 2005 and was

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<sup>2</sup> MMC Report: *Allied-Lyons and Carlsberg A/S*, (MMC Cm 2029), §1.6.

renamed Allied Domecq (Holdings) Limited on 15 September 2005. It is still active.

12. The Undertakings specifically refer to a company called Carlsberg-Tetley Ltd. This company was incorporated on 29 June 1992, renamed Carlsberg-Tetley UK Ltd on 13 July 1993 and dissolved on 28 February 1995.
13. In relation to the other companies referred to by the MMC in its report, and in the text of the Undertakings:
  - (a) William Jones and Son (Maltsters) Ltd was renamed Carlsberg-Tetley Brewing Ltd on 15 January 1993.
  - (b) On the same date Carlsberg Brewery Ltd was renamed Carlsberg-Tetley UK plc. Carlsberg-Tetley UK plc was subsequently renamed Carlsberg-Tetley plc on 13 July 1993. In 2004 it was renamed Carlsberg UK plc, then Carlsberg plc, then Carlsberg UK Holdings plc. It was renamed Carlsberg UK Holdings Ltd in 2010.
  - (c) Carlsberg-Tetley Brewing Ltd was renamed Carlsberg UK Ltd on 9 March 2004. Carlsberg UK Ltd is owned by Carlsberg UK Holdings Ltd, which is ultimately owned by Carlsbergfondet.
14. The CMA also notes that section 43 of the Small Business, Enterprise and Employment Act 2015 came into force on 26 May 2015. This requires pub operators to offer their tied pub tenants a 'market rent only' option in specified circumstances.

### **Change of circumstances**

15. For ease of reference we have considered each clause of the Undertakings set out in paragraph 9 separately as follows:

#### *Clause (a) – terms of supply*

16. Clause (a) applied for 'a period of three years' from the merger. The CMA considers this element of the undertakings to be time-expired.

#### *Clause (b) – exclusive supply agreements with members of the Allied-Lyons group*

17. Clause (b) limits supply exclusivity agreements to a maximum of five years. While the undertakings are unclear whether this applied only to pre-existing members of the Allied-Lyons group, the CMA notes that even in the event that the clause could be read to apply to agreements commenced after the date of the merger, Allied Domecq sold its pub estate in 1999.

18. The Undertakings refer specifically to, members of the Allied-Lyons (Allied Domecq) group and do not make provision for future new ownership of those pubs. The latest expiry of any such exclusive supply agreement is therefore likely to have been in 2004. The CMA considers this element of the undertakings to be time-expired.

*Clause (c) – release from tie*

19. Clause (c) contains specified time periods within which the required actions would be carried out. These are, within two years and, within four years of the merger. The CMA considers this element of the undertakings to be time-expired.
20. In addition, the clause applies only ‘for so long as members of the Allied-Lyons (Allied Domecq) group hold shares or an interest in shares conferring 15% or more of the voting rights in CTL’.
21. The company specified as ‘CTL’ (Carlsberg-Tetley Ltd) was dissolved in 1995 and the information available to the CMA indicates that no members of either Allied Domecq Holdings Ltd or Pernod Ricard currently hold shares in any relevant Carlsberg company and therefore, clause (c) no longer has effect.

*Conclusion*

22. The CMA considers that the factors set out above represent changes of circumstance relevant to the undertakings, such that they no longer have any effect.

**Provisional decision**

23. Based on the information available, the CMA’s provisional decision is that the undertakings on Allied Lyons plc should be released.

## **Annex 2: Arriva plc/Lutonian Buses Limited**

### **Undertakings given by**

1. Arriva plc (Arriva).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2004/2181).

### **Details of the transaction**

3. Arriva acquired Lutonian Buses Limited (Lutonian).

### **Monopolies and Mergers Commission (MMC) report published**

4. *ARRIVA Plc and Lutonian Buses Ltd: A report on the merger situation* (MMC Report Cm 4074) was published on 18 November 1998.

### **The market concerned**

5. The supply of local bus services in Bedfordshire and Hertfordshire (the Reference Area). Within this area, Arriva operated through its subsidiary, 'Arriva the Shires'.
6. Before the merger, Arriva supplied 41% of the bus services in the Reference Area at peak vehicle requirement, or 52% as measured by bus miles. On both measures, the acquisition of Lutonian added two percentage points to Arriva's share of supply.<sup>3</sup> In Luton itself, the merger increased Arriva's share of supply, measured by bus miles from 82% to 95%.<sup>4</sup> At the time of the merger, Lutonian operated 12 routes operating in Luton and its suburbs, with a focus on new routes serving housing estates and linking different areas of Luton. All its routes were commercial rather than tendered, and it had 20 mini-buses that were used on its routes.
7. Arriva the Shires operated 511 buses in the Reference Area at the time of the merger. In Luton, it provided the main urban network of buses together with a number of inter-urban services linking Luton and other towns.
8. In October 1997, Arriva the Shires began operating Challenger-branded buses in Luton including along the six most profitable Lutonian routes.

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<sup>3</sup> Source: paragraph 2.9 of the [MMC report](#).

<sup>4</sup> Source: paragraph 2.25 of the [MMC report](#).



Following the acquisition of Lutonian by Arriva, the Challenger-branded buses were withdrawn in March 1998.

9. Other bus companies in the reference area included Stagecoach, with some inter-urban services into Luton, Blazefield/ Sovereign which operated in Hertfordshire and Luton, University Bus, which operated routes centred on the University of Hertfordshire in Hatfield, and over 40 other bus operators that operated mainly a small number of tendered or rural services in the reference area.

### **Theory of harm**

10. The MMC found there was insufficient prospect of competition from new entry to provide a sufficient constraint to discourage Arriva from taking advantage of its enhanced market power in Luton following the merger. The main barrier to entry was, in its view, the prospect of retaliation by the incumbent which, by controlling Lutonian, occupied all the main niches in the Luton bus market. In this case, the merger following closely upon the operation and subsequent closure of Challenger, was likely to have reinforced the reputation of Arriva the Shires for responding aggressively to competition, so reinforcing such a barrier to entry.
11. The MMC concluded that the loss of competition and potential competition on commercial services in Luton may be expected to result in higher fares and/or lower choice and/or less innovation on routes and services and poorer levels of service.

### **Description of the undertakings in lieu of reference**

12. The undertakings (given on 7 February 2000) can be summarised as requiring Arriva:
  - (a) to sell Lutonian to a single purchaser by 7 May 2000;
  - (b) not to acquire any interest in Lutonian or any company having control of Lutonian by ways of shares, directorships or any other form of interest;
  - (c) not to co-operate or attempt to co-operate with Lutonian on any matter;
  - (d) not to register any new commercial bus service in competition with Lutonian for two years following its sale; and
  - (e) where Arriva registers or runs a bus service close in time and route to one of Lutonian's bus services, leading to the cessation of Lutonian's bus

service, the fares and frequency of the relevant Arriva bus services are to be as set out in the undertakings.

### **History of the companies since the undertakings were given<sup>5</sup>**

13. Arriva (company number 00347103) is still active.
14. Lutonian (company number 02169880) was sold in 2000 to Julian Peddle in partnership with Chris Day of Red Rose Travel. The company was then sold to Centrebus, following which Mr Peddle took a stake in that company.<sup>6</sup> Mr. Peddle now owns 100% of Centrebus.<sup>7</sup>

### **Change of circumstances**

15. Arriva sold Lutonian, in accordance with clause (a) and complied with the restrictions on its conduct set out in clauses (b) to (d) of the undertakings within the two year time frame. Accordingly we are of the view that the undertakings relating to the sale of Lutonian and subsequent conduct by Arriva have been fulfilled. The remainder of this section focuses clause (e) of the undertakings.
16. Lutonian was ultimately sold to Centrebus, which now operates 16 routes in and around the Luton area, with an additional 27 routes in other areas of Bedfordshire and Hertfordshire.<sup>8</sup> Consequently, the Lutonian business is now part of a larger bus operator in the Reference Area.
17. Although Centrebus operates only five routes that are the same as those of Lutonian's at the time of the merger, Centrebus does not operate mini-buses in Luton as Lutonian had done previously.<sup>9</sup>
18. In October 2009, the most recent date for which comprehensive information was available, the shares of supply of the three leading bus operators in Luton<sup>10</sup> were as follows:

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<sup>5</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>6</sup> Sourced from Wikipedia [website](#).

<sup>7</sup> According to a Fame report Centrebus is 100% owned by Julian Henry Peddle

<sup>8</sup> See [Centrebus website](#) for details.

<sup>9</sup> Based on a comparison of the surrendered routes and those operated by Centrebus at the [Traffic Commissioner's website](#).

<sup>10</sup> Source: Appendix 4.3 of the CC's market investigation report into the supply of local bus services. Note that An operator's share of supply in an area is measured throughout this section as the total number of weekly services (that is the number of scheduled journeys) run by that operator on local bus routes which cover a distance of at least 500 metres in an area, divided by the total number of weekly services on local bus routes run by all operators which cover a distance of at least 500 metres in the area – see note to Table 4.1 in the CC's report.

Table 1 – shares of supply of bus operators in Luton (2009)

Arriva	53.4%
Centrebus	27.2%
Airparks Services	9.2%
Other eight operators	10.2%

19. Table 1 shows that Arriva's share of supply in Luton has fallen significantly since the time of the merger.<sup>11</sup>
20. In 2016, Arriva operates three routes within Luton, and a further three inter-urban routes that serve Luton and other areas.<sup>12</sup> Other operators in the area include Centrebus which operates over 10 routes in and around Luton. Other operators include Stagecoach, which operates two routes that travel into Luton, a new entrant, Grant Palmer,<sup>13</sup> which operates four routes into Luton,<sup>14</sup> and Uno Bus which operates one route that serves Luton. The CMA considers therefore that Arriva's share of the supply in Luton remains significantly lower than at the time of the original transaction, both on the basis of the number of routes operated in 2016 and the shares of supply calculated in 2009. However, the CMA does acknowledge that, where bus markets are considered on the basis of individual routes (as described in footnote 10), there may still be areas of Luton in which Arriva may have a strong position.
21. The CMA has considered whether the above represent changes of circumstances relevant to the undertakings, such that they may need to be varied, superseded or released. We have found that:
- (a) successful new entry has taken place in the reference area in the form of Grant Palmer, with the new entrant having four routes in Luton and is continuing to expand<sup>15</sup> and accordingly conditions of competition on the market have changed significantly since the MMC decision;
  - (b) the sale of Lutonian's business, ultimately to Centrebus, has placed it as part of a larger bus business in Hertfordshire, Bedfordshire and other areas,<sup>16</sup> which are likely to make it less susceptible to aggressive challenge from Arriva of the nature which was a concern to the MMC at the time of the merger; and

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<sup>11</sup> However, the CMA notes that for the purposes of assessing mergers between bus operators, the OFT and CC have previously defined markets as individual routes and assessed market shares on this basis, rather than calculating shares as set out in the CC's market investigation as described in footnote 9.

<sup>12</sup> See [Arriva website](#) for details.

<sup>13</sup> Entered the market in 1999 (after the undertakings were signed) – see [Grant Palmer website](#).

<sup>14</sup> According to its website, it has now grown to a fleet of 26 buses and has claimed recent growth with passenger numbers up in 2015 by 5% on the year before.

<sup>15</sup> According to information provided on its [website](#).

<sup>16</sup> Centrebus also operates in Northamptonshire, Leicestershire, Lincolnshire, Rutland, and Nottinghamshire – and it has twice the market share that Lutonian had in Luton.

(c) the Centrebus business is now quite different to that of Lutonian, as it now operates only five of the routes that were previously operated by Lutonian, and no longer makes use of mini-buses as used by Lutonian to access new areas and estates in Luton.

22. The CMA considers that these changes mean that the circumstances that led to the undertakings being agreed are no longer appropriate to the current structure of the market and consequently, that the behavioural undertakings agreed 16 years ago are no longer be appropriate.

**Provisional decision**

23. Based on the information available, the CMA's provisional decision is that the undertakings on Arriva should be released.

## **Annex 3: National Express Group plc/Midland Mainline Limited**

### **Undertakings given by**

1. National Express Group plc (NEG).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/355).

### **Details of the transaction**

3. National Express Group PLC (NEG) acquired Midland Main Line Limited (MML) in April 1996. The acquisition followed NEG's successful bid for a passenger rail franchise for the services operated by MML. NEG subsidiary National Express Line (NEL) operated five coach services which overlapped with MML's rail services between central London and, respectively, Sheffield, Chesterfield, Derby, Nottingham and Leicester.

### **Monopolies and Mergers Commission (MMC) report published**

4. *National Express Group PLC and Midland Main Line Limited. A report on the merger situation* (MMC Report Cm 3495) was published on 20 December 1996.

### **The market concerned**

5. Coach and rail travel between central London and South Yorkshire and the East Midlands.

### **Theory of harm**

6. Potential loss of competition. The merger was expected to lead, over time, to higher coach fares or higher fares on both coach and rail, and/or a lower quality of coach services or a lower quality of both coach and rail services, than would have been the case had the merger not occurred.

### **Description of the undertakings**

7. The undertakings (given on 16 December 1997) require NEG not to increase fares above the increase in the Retail Price Index; not to reduce the levels of service, in respect of coach services between central London and Sheffield, Chesterfield, Derby, Nottingham and Leicester; to provide a quality of service at least equal to the standards on other parts of the National Express Ltd network; and to provide the Director General of Fair Trading (now the CMA)

with such information as might be required to ascertain that the undertakings are being followed.

### **History of the companies since the undertakings were given<sup>17</sup>**

8. NEG (company number 02590560) is still active.
9. Midland Mainline Limited (company number 03007934) is still active but no longer part of NEG.

### **Change of circumstances**

10. Some of the UK's rail franchises changed with effect from November 2007, and as part of those changes, the Midland Mainline franchise was combined with other services to form a new East Midlands franchise.
11. In June 2007, following a competitive tender process for the new franchise, the Department for Transport awarded the East Midlands franchise to Stagecoach. The services operated by Midland Mainline transferred into this new franchise and to East Midlands Trains from 11 November 2007<sup>18</sup> meaning that NEG no longer controls the Midland Mainline franchise.
12. The CMA considers the change in franchisee to represent a change of circumstances relevant to these undertakings, and consequently that the undertakings are no longer appropriate.

### **Provisional decision**

13. Based on the information available, the CMA's provisional decision is that the undertakings on NEG should be released.

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<sup>17</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>18</sup> Details can be found of the franchise [here](#).

## **Annex 4: National Express Group plc/Prism Rail plc**

### **Undertakings given by**

1. National Express Group plc (NEG).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/354).

### **Details of the transaction**

3. NEG acquired Prism Rail for £166 million in 2000.

### **Competition Commission (CC) report published**

4. Undertakings in lieu of a reference to the CC were given on 17 January 2001.

### **The market concerned**

5. The supply of rail and coach services between central London and Stansted Airport.

### **Theory of harm**

6. Potential loss of competition. The OFT was concerned that the merger would eliminate competition between bus and rail services on the route between Liverpool Street, London and Stansted Airport.

### **Description of the undertakings in lieu of reference**

7. The undertakings were given on 17 January 2001 and were varied on 3 August 2006.
8. The original undertakings sought to restore the competitive dynamic between coach and rail on the Stansted route by ensuring that the competitive constraints that NEG faced on its Heathrow coach service were replicated on its Stansted coach service, so that NEG would behave as if it were facing competition post-merger on the Stansted route. The undertakings implemented this aim by requiring that NEG's Stansted coach prices be capped at a level no higher than equivalent fares on its London-Heathrow coach service.
9. The undertakings also implemented requirements on the frequency and capacity of coach services between London and Stansted. This included setting a minimum number of daily coach departures from central London and

Stansted airport, as well as stipulating times for the first and last departure of coach services on the routes.

10. In 2006, following a request from NEG to review the undertakings, the OFT considered that by reason of a change of circumstances the undertakings were no longer appropriate and needed to be varied in part.
11. The OFT concluded that due to material changes in the market, the price control provisions of the undertakings had unforeseen consequences. As no alternative price control mechanisms appeared appropriate, the OFT released NEG from the price control provisions.

### **History of the companies since the undertakings were given<sup>19</sup>**

12. NEG (company number 02590560) is still active.
13. Prism Rail plc (company number 03081303) was renamed NX Bahrain Bus Company plc on 24 June 2014. It is still active.

### **Change of circumstances**

14. In October 2011 the Department for Transport announced Abellio had been awarded the franchise for the rail service between London Liverpool Street and Stansted airport.<sup>20</sup> The franchise was originally to run from 5 February 2012 until July 2014 however in March 2013 it was announced the franchise would be extended until 15 October 2016.<sup>21</sup>
15. The Undertakings state at paragraph 16b that NEG shall comply with the terms of the undertakings for as long as it or any of its subsidiaries is the Franchisee for the provision of passenger rail services between Liverpool Street Station, London and Stansted airport.
16. The CMA considers that change in the company operating the franchise, from October 2011, constitutes a change of circumstances relevant to these undertakings, and that the undertakings are no longer appropriate.

### **Provisional decision**

17. Based on the information available, the CMA's provisional decision is that the undertakings on NEG should be released.

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<sup>19</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>20</sup> Details of the [Government announcement](#).

<sup>21</sup> Furtehr details of the [Government announcement](#).



## **Annex 5: Nutricia Holdings Limited/Valio International UK Limited**

### **Undertakings given by**

1. Nutricia Holdings Limited (NH).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2004/2181).

### **Details of the transaction**

3. NH acquired Valio International UK Limited (VI) from Valio Oy, on 3 February 1995.

### **Monopolies and Mergers Commission (MMC) report published**

4. *Nutricia Holdings Ltd and Valio International UK Ltd, report of the merger situation* (MMC – Cm 3064) was published on 21 December 1995.

### **The market concerned**

5. The supply in the UK of enteral clinical products (ECN) and of specialist gluten-free and low-protein products. The MMC did not believe the merger would have effects adverse to the public interest in the market for ECN products.
6. Gluten-free products are of considerable importance to sufferers of gluten-sensitive conditions, namely coeliacs and sufferers of dermatitis herpetiformis.
7. Low-protein products are equally important to sufferers of phenylketonuria (PKU). Many low-protein products were supplied on NHS prescription, so consumer choice was limited by this process. Prices were subject to approval by the ACBS.<sup>22</sup>

### **Theory of harm**

8. As a result of the merger, the company had over 80% of the supply of gluten-free and low-protein products in the UK. The MMC concluded that the increase in market share as a result of the merger would strengthen the

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<sup>22</sup> The ACBS, which is primarily a body of medical experts, has, since December 1992, been required to ensure that such substances are provided as economically as possible under the NHS. It has to date adopted price maxima based largely on the highest prices previously prevailing in the relevant product category, which are not necessarily related to cost. These price limits tend to be above the prices currently charged by most of the supplying companies.

company's ability to increase prices within the constraint of the present ACBS price cap. It would remove a source of comparative price information between major competing companies. Also, in the event of disputes and possible delisting of products, it would reduce the effectiveness of the ACBS in ensuring adequate alternative product suppliers. This would reduce the effectiveness of the ACBS in controlling prices. The MMC concluded that the merger may be expected to result in higher prices for a number of gluten-free and low-protein products, namely bread, rolls and flour mixes.

### **Description of the undertakings**

9. The undertakings (given on 7 April 1997) essentially required NH not to increase the price of certain gluten free and low protein bread and rolls and flour mixes in any one year by more than the general index of retail prices less two percentage points.

### **History of the companies since the undertakings were given<sup>23</sup>**

10. NH (company number 01917542) was renamed Nutricia (Cow and Gate, Milupa) Holdings Limited on 24 July 2007. It is still active.
11. VI (company number 02502240) was renamed SHS Holdings Limited on 28 March 1995 and Scientific Hospital Supplies Holdings Limited on 6 October 1997. It is still active.

### **Views of the parties**

12. NH replied to our ITC with a short written submission.
13. NH claims that since the undertakings came into force, the structure of competition in the two product markets has changed fundamentally rendering the undertakings redundant and that they have been redundant for many years.

### **Change of circumstances**

14. NH told us in its submission that in the time since the undertakings were given the structure of the supply of gluten-free and low-protein products markets has changed significantly. In December 2006 NH divested two of its gluten free brands to Dr Schar, leaving it with only its Juvela brand.<sup>24</sup>

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<sup>23</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>24</sup> The sale was cleared by the OFT in March 2007.<sup>24</sup> Following this sale, NH's share of the supply of gluten-free products was less than 40%.

15. NH was acquired by Danone SA in July 2007. The Juvela business was not part of that acquisition and is now owned by Hero AG, a Swiss company. As a result of this transaction, NH no longer has a presence in the supply of gluten-free products.
16. In relation to low-protein products, NH supplies three products under its Loprofin brand in two market segments, generating combined revenues of £129,000 in 2015 and shares of 17% and 14% respectively.
17. In these two segments of the low-protein market, NH now faces competition from four competitors: Mevalia, Fate Special Foods, First Play Dietary Foods and Juvela.
18. The CMA considers that NH's withdrawal from the gluten-free market and the increase in competition on the low-protein products market indicate that the adverse effects identified as a result of the original transaction no longer prevail, and consequently that the undertakings are no longer appropriate.

#### **Provisional decision**

19. Based on the information available, the CMA's provisional decision is that the undertakings on NH should be released.

## **Annex 6: Scottish & Newcastle plc, Courage Ltd (Fosters Brewing Group Ltd)**

### **Undertakings given by**

1. Scottish & Newcastle plc (S&N); Fosters Brewing Group Ltd (Fosters); Intreprenuer Beer Supply Company Ltd (IBSC) (formerly Courage Ltd (Courage)).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/3095).

### **Details of the transaction**

3. The transaction was the purchase of Courage brewing interests from Fosters by S&N in 1995.

### **Monopolies and Mergers Commission (MMC) report published**

4. Following the Director General of Fair Trading's merger inquiry, undertakings in lieu of a reference to the MMC were given on 14 August 1995.

### **The market concerned**

5. The supply of beer in the UK.

### **Theory of harm**

6. The loss of competition between brewers on wholesale prices of beer, to the disadvantage of consumers.

### **Description of the undertakings in lieu of reference**

7. The undertakings given by S&N required it i) to divest a specified proportion of its tied estate of pubs; and ii)

'To release 1,000 of Intreprenuer Pub Company Ltd's ('IPCL') tied pubs<sup>25</sup> from the beer supply agreement between Fosters (50% owners of IPCL) and Courage, due to end on 28 March 1998; 500 pubs to be released by 1 January 1996, and a further 500 by 1 January 1997, the supply of beer to

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<sup>25</sup> Under tied lease agreements tenants are required to purchase beer and other drinks solely through, and at a price set by, the pub company or brewery to whom the pub belongs in exchange for a discount from market rates on property rent, insurance, etc. (known as 'dry rent').

such pubs being put out to open competitive tender from which S&N would not be excluded.<sup>26</sup>

8. The undertakings given by Fosters and by IBSC required each to  
  
'release 1,000 of Inntrepreneur Pub Company Ltd's ('IPCL') tied pubs from the beer supply agreement between [IBSC] and S&N, due to end on 28 March 1998; 500 pubs to be released by 1 January 1996, and a further 500 by 1 January 1997, the supply of beer to such pubs being put out to open competitive tender from which S&N would not be excluded.'
9. The effect of all the undertakings was to release IPCL tied pubs (50% owned by Fosters) from two beer supply agreements: one between Fosters and Courage, and the other between IBSC and S&N. These beer supply agreements were in any event due to end in 1998.

### **History of the companies since the undertakings were given**

10. The Inntrepreneur Beer Supply Company Ltd, formerly Courage Ltd, was renamed Tibsco Ltd on 27 March 1998. It is still active and is owned by SABMiller plc.
11. Fosters Brewing Group Ltd was renamed Fosters Group Ltd on 15 April 2002. It was bought by SABMiller Beverage Investments in 2001 and is now dissolved.
12. Fosters was released from its undertakings by the Minister for Competition, Consumers and Markets in 2001 in accordance with advice from the Director General of Fair Trading in 1999 that the undertakings had been complied with.<sup>27</sup>
13. Scottish & Newcastle plc was renamed Scottish & Newcastle Ltd on 17 June 2008. It is still active and has been owned by Heineken since 2008.
14. After the purchase of Courage by S&N in 1995, Scottish & Newcastle Breweries Ltd was renamed Scottish Courage Ltd until 2007, when its Courage brewing and brands were sold to Wells & Young's Brewing Company, now trading as Charles Wells Ltd. Scottish Courage Ltd was

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<sup>26</sup> IPCL was a pub estate company, originally formed in 1991 from a joint venture between Fosters and Grand Metropolitan (Diageo) in which Fosters' Courage Pubs were sold to Grand Metropolitan, with Fosters retaining a 50% stake, and Grand Metropolitan breweries were sold to Fosters. The name of the Courage pubs business was changed to Inntrepreneur Estates and again in 1995 to The Inntrepreneur Pub Company.

<sup>27</sup> DTI press release, 27 November 2001.

renamed Scottish & Newcastle UK Ltd and subsequently in 2009 renamed Heineken UK Ltd.

15. Diageo sold IPCL to Terra Firma in 1999. IPCL was then sold to another Terra Firma company, Unique Pub Company. In 2002 Terra Firma sold Unique Pub Company to Enterprise Inns.

### **Change of circumstances**

16. The undertakings provided for the early release of 1,000 Inntrepreneur Pub Company Ltd's ('IPCL') tied pubs from the beer supply agreement between Inntrepreneur Beer Supply Company and S&N which was due to end on 28 March 1998. On the basis of information available to the CMA set out below, the CMA provisionally considers that the undertakings have been fulfilled and consequently are now spent. The CMA identifies this as a change of circumstances in the market that is relevant to the undertakings.

### **Provisional decision**

17. Based on the information available, the CMA's provisional decision is that the undertakings can be released in respect of the remaining signatory, Inntrepreneur Beer Supply Company Ltd (now Tibsco Ltd).

## **Annex 7: Thomas Cook Group Ltd/Interpayment Services Ltd**

### **Undertakings given by**

1. Thomas Cook Group Ltd (TCG).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2004/2181).

### **The transaction**

3. TCG announced its acquisition of Interpayment Services Ltd (ISL), the travellers cheque issuing business of Barclays Bank plc, on 11 August 1994. TCG issued MasterCard-branded travellers' cheques and ISL issued Visa-branded ones. The merger was referred to the Monopolies and Mergers Commission (MMC) on 9 November 1994 and the acquisition was completed on 24 November 1994.

### **The MMC report**

4. *Thomas Cook Group Ltd and Interpayment Services Ltd* (MMC – Cm 2789) was published on 23 March 1995.

### **The market**

5. The MMC acknowledged that consumers had access to a range of international payment methods. However, it noted that each method or device had its own distinctive features and in particular that some (cash and travellers cheques) had wide acceptance throughout the world whereas others had more limited usage. The MMC found that UK travellers considered other forms of payment to be complementary to travellers' cheques rather than substitutes. The MMC also observed low levels of consumer price elasticity for travellers' cheques, or cross-elasticity in relation to plastic cards.
6. The MMC noted that new plastic-based electronic travellers' cheques were in development. It commented that these had the potential to become significant effective competitors to traditional paper travellers' cheques, that Barclays was not precluded from launching such products post sale of ISL to TCG, and that new entrants with these products were not precluded from using the MasterCard brand. However, the MMC's view was that it would be some years before these new products would be in widespread use, in part because the international networks which enable cards to be used in ATMs overseas were only at that time becoming established.

7. The MMC therefore considered the supply of travellers' cheques to be a separate market from other forms of travel payment method. However, it highlighted that this would be likely to change in the future as a result of wider availability and greater use of electronic payment methods (which at the time were not widely used).

### **Theory of harm**

8. The MMC considered that a loss of competition would result from the merger, and that this may be expected to operate against the public interest.
9. Whereas the MMC concluded that the merger would not significantly reduce competition in the travellers' cheques market with respect to banks and building societies, it found that sales agents which competed with TGC's retail operation (that is travel agents and bureaux de change) would be affected by a reduction of inter-brand competition among travellers cheque suppliers.
10. The MMC's concerns were, first the potential for business information relating to travel agents and bureaux de change which use ISL to be transferred to their competitor, TCG, and second the potential for TCG to cease offering a white label MasterCard cheque (that is, not Thomas Cook branded) to competitors. The MMC highlighted that competing travel agents and bureaux de change which, were unwilling to use TCG as a supplier would effectively be forced to offer American Express travellers' cheques. This in turn would provide American Express with an opportunity to impose less favourable terms on customers with increased costs being borne by consumers.

### **Description of the undertakings**

11. The undertakings (the Undertakings), given on 29 March 1996, require TCG to take a number of actions effectively to distinguish the branding of ISL's Visa travellers cheques from Master Card cheques issued by TCG and to maintain ISL as sole issuer and endorser of ISL travellers cheques. In detail, it agreed to:
  - (a) 'maintain the Master Card trade mark for Master Card Travellers' Cheques and the Visa trade mark for Interpayment Travellers' Cheques
  - (b) maintain ISL or Barclays Bank Canada as appropriate as sole issuer of Interpayment Travellers' Cheques
  - (c) ensure that in the event that the Thomas Cook Group Ltd issues Travellers' Cheques bearing the Visa trade mark, such Travellers' Cheque shall not be issued to Sales Agents on terms more favourable than those on which Interpayment Travellers' Cheques are issued [and]



...

(d) ensure that there is endorsed on the face of each Interpayment Travellers' Cheque a notice to the effect that ISL or Barclays Bank Canada as appropriate is the issuer of such Travellers' Cheque, and that no endorsement associated with the Thomas Cook Group Ltd or Master Card appears thereon'.<sup>28</sup>

12. TCG also gave undertakings in relation to the currencies and denominations to be issued in Interpayment travellers' cheques. In addition, TCG agreed to:

(a) not enter into any agreement having effect after 31 December 1997 which specifies that any proportion of travellers' cheques issued by TCG should bear the MasterCard trade mark; and

(b) terminate with effect from 1 January 1998 any agreement made before the date of the Undertakings to the extent that any such agreement will have the effect described in paragraph 11 above.

### **History of the companies since the Undertakings were given<sup>29</sup>**

13. TCG (company number 00198600) changed its name to Travelex Global and Financial Services Limited on 27 September 2001. It is still active.

14. Interpayment Services Limited (company number 02199546) is still active.

### **Market developments since 1995**

#### *Characteristics of card payments and cash withdrawals*

15. Travellers cheques had a number of characteristics which, in 1995 were not replicated by other available payment types. These were:

(a) Travellers cheques had wide acceptance across many countries, either directly as a means of payment or as a means of obtaining local currency through conversion. At the time, debit cards were not widely used abroad, credit cards had more limited acceptance among retailers and could be expensive to use, while the availability of ATMs varied significantly across countries.

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<sup>28</sup> Full details of the undertakings can be found [here](#).

<sup>29</sup> Information in this section was sourced from Companies House.

- (b) Travellers' cheques allowed budget-control by making a pre-determined amount of funds available whereas credit and debit cards did so to a lesser degree.
- (c) Travellers' cheques differed by being more secure in terms of fraud, and easily replaceable in the event of loss. At the time, card payments were not always secure, in advance of the roll-out of 'chip & PIN' hardware both in the UK and abroad, which means the instances of fraud or counterfeiting were more significant for payment cards.<sup>30</sup>
16. The particular characteristics of travellers' cheques compared to other forms of payment, coupled with low levels of consumer switching from travellers' cheques to other methods, led the MMC to conclude that travellers' cheques constituted a separate relevant market. The MMC made the caveat that this was likely to change as other forms of payment became more widespread.
17. In the last 21 years, there have been a significant number of changes concerning the payment products available, and their characteristics. The main changes considered relevant are as follows:
- (a) **Wider acceptance of payment cards abroad:** It is now easier to obtain funds or pay for goods and services abroad using cards than it was in 1995. Credit and debit are more widely accepted as a means of payment abroad with more retailers accepting such payments.<sup>31</sup> In the EU, this wide acceptance may also be driven in the future by the recent EU regulation to cap the interchange fees of card providers.
- (b) **More mature networks of ATMs:** While in 1995 ATMs were available in some countries and with limited international compatibility, now they are more common, not only in western and EU countries but also in more rural and less developed countries.<sup>32</sup> Card companies also now provide smartphone apps which enable travellers to locate their nearest ATM anywhere in the world.
- (c) **Creation of pre-paid travel money cards:** Recent years have witnessed the development and growth in the use of pre-paid travel money cards, which most closely replicated the characteristics of travellers cheques. Pre-paid cards allow consumers to add a fixed sum of money to a

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<sup>30</sup> For example through signature forgery or counterfeiting using data copied from the magnetic strips of authentic cards.

<sup>31</sup> For example, Barclaycard is now accepted in 36 million outlets worldwide (source: Barclaycard, quoted by BBC) and Visa is accepted at 38 million locations in over 200 countries (source: Visa).

<sup>32</sup> For example: Global Alliance enables customers of member banks to access 50,000 ATMs worldwide on the Mastercard/Cirrus network with no withdrawal fee (Global Alliance); the Visa/Plus network provides access to over 2 million ATMs in 200 countries (Visa).

payment card and use it at retailers which accept other payment cards.<sup>33</sup> Many providers of pre-paid cards now also offer smartphone apps which enable users to manage their cards, top them up and track spending, and providers offer the security of replacing lost or stolen cards. Some of these cards are designed specifically to allow for use abroad in other currencies.

- (d) **Greater security from card payments:** Card issuers now offer short-notice rapid replacement services, although a fee may be applied. In addition, measures have been introduced in the last 15 years to combat card fraud, in particular: the formation of the Dedicated Cheque and Plastic Crime Unit, a specialist police unit sponsored by the banking industry, in 2002<sup>34</sup>; the introduction of 'chip & PIN' technology in the UK in 2003, also widely used in Europe; and the Fraud Intelligence Sharing System in 2008. Pre-paid travel money cards are also not linked to a specific bank account, which adds an extra layer of security.<sup>35</sup>

#### *Changes in consumers' use of payment products*

18. The CMA research has found that significant changes have taken place in relation to the payment products that consumers use both in the UK and when abroad, particularly a substantial decline in the use of travellers' cheques. The UK Cards Association reported<sup>36</sup> that cards have largely replaced the need for cash or travellers' cheques when UK consumers travel abroad. In particular, UK consumers have increasingly used debit cards instead of cash or cheques since 2000 and debit cards have also become more popular than credit cards for making cash withdrawals abroad due to the lower transaction cost.
19. The use of travellers' cheques by people travelling abroad from the UK has declined from around 57% in 1992<sup>37</sup> to only 4% in 2015, whereas Mintel reports that 36% of consumers use a debit card, 37% use a credit card, and 11% use a prepaid travel or currency card.<sup>38</sup>
20. Mintel also reports that 50% of consumers use only cash or debit card abroad and the remainder mainly use a combination of cash and payment card. In

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<sup>33</sup> There are some restriction on using pre-paid cards, such as for reservations for products, or as security against a hire car for example.

<sup>34</sup> The DCPCU has a national UK remit but also works closely with many police forces across Europe and some outside of Europe.

<sup>35</sup> The CMA also notes that travellers' cheques as a format are not entirely immune from fraudulent use; counterfeiting has become widespread, and the ease with which legitimate cheques can be reported as stolen and replaced has provided an opportunity for a black market to develop.

<sup>36</sup> UK Cards Association, 'A Decade of Cards: 2000 – 2010... and beyond'

<sup>37</sup> *Tourists and their money*, Mintel Personal Finance Intelligence, Vol.2, 1993; quoted in MMC Report: Cm 2789.

<sup>38</sup> *Travel Money – UK*, Mintel, March 2016. (Base: 891 internet users aged 18+ who have been on holiday abroad in the last 12 months).

addition, 38% of people actually arrange their travel money at their destination.<sup>39</sup> This suggests that a different approach to arranging travel money is now the norm for consumers in the UK, and travellers' cheques form only a small proportion of the payments made by consumers when abroad.

21. The decline in usage of travellers' cheques is also illustrated by the fact that new entry by providers in the travel money sector since the time of the MMC's report has been in relation to other forms of payment such as pre-paid travel money cards. In addition some financial institutions have now ceased to issue or cash travellers' cheques.

### **Change of circumstances**

22. The CMA considers that there are two changes of circumstance relevant to the Undertakings in this case. First, the changes in the characteristics of card and other payment methods mean these are more likely now to replicate, and in some circumstances, exceed the protections afforded by travellers' cheques. Second, together with these changes in product characteristics, consumer preferences have changed, such that travellers' cheques are now used much less frequently by consumers, with more payments being made by debit and credit cards, including pre-paid travel money cards.
23. This review has not sought to assess in detail the exact boundaries of the product market that encompasses travellers' cheques in 2016 and indeed no such conclusions are reached. It has however highlighted the significant changes in payment technology and processes since 1995, all of which suggest that there are now a greater number of payment products available which can replicate and improve on the key characteristics of travellers' cheques. Consequently, the CMA considers that travellers' cheques face a greater competitive threat than was the case in 1995.
24. The CMA considers that the competition concerns highlighted in the MMC Report are no longer applicable, due to of the development of wider competitive constraints in this market since the undertakings were given. In particular: (i) the reduction in the proportion of travel agents' business accounted for by travellers' cheques would reduce the risk of TCG obtaining sufficient commercial information about its competitors to allow it to gain a significant advantage; and (ii) the increased constraints from alternative payment forms would be likely to result in a reduced incentive on the part of TCG to refuse to issue white-label travellers' cheques, and reduced ability on

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<sup>39</sup> *Travel Money – UK*, Mintel, March 2016. (Base: 891 internet users aged 18+ who have been on holiday abroad in the last 12 months).

the part of American Express to impose less favourable terms to customers with consequent increased costs to consumers.

**Provisional decision**

25. Based on the information available, the CMA's provisional decision is that the undertakings on TCG, now Travelex Global and Financial Services Limited, should be released.