

Anticipated acquisition by Refresco Group N.V. of the traditional non-alcoholic beverage business of Cott Corporation Inc.ⁱ

Decision on relevant merger situation and substantial lessening of competition

ME/6705/17

The CMA's decision on reference under section 33 (1) of the Enterprise Act 2002 given on 3 January 2018. Full text of the decision published on 8 February 2018.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

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SUMMARY

1. Refresco Group N.V. (**Refresco**) has agreed to acquire the traditional non-alcoholic beverage business of Cott Corporation Inc. (**Cott**) (the **Merger**). Refresco and Cott are together referred to as the **Parties**.

2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that the Parties will cease to be distinct as a result of the Merger, that the turnover test is met and that accordingly arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. The Parties overlap in the supply of manufacturing and packaging services for non-alcoholic beverages (**NABs**). They are primarily active in supplying private label (**PL**) products to retailers and in supplying contract manufacturing services (**co-pack**) to brand owners. They also overlap in the supply of branded products, but have relatively limited activity in this area.
4. With regard to the product frame of reference, the CMA believes that:
 - (a) supply to PL and co-pack brand owner customers should be considered as part of the same frame of reference;
 - (b) supply of carbonated soft drinks (**CSDs**) should be considered separately to non-carbonated soft drinks (**NCSDs**);
 - (c) within NCSDs, juice and juice drinks should be considered separately from other NCSDs;
 - (d) within the juice and juice drink segment, there should be a further segmentation based on whether the product is made from concentrate (**FC**) or not from concentrate (**NFC**);
 - (e) the supply of products in different types of packaging (i.e. polyethylene terephthalate (**PET**) plastic packaging, carton, glass bottle, can etc.) should be considered separately; and
 - (f) aseptically filled PET (**APET**)¹ products should be considered separately to products made using other production processes.
5. The CMA therefore assessed the impact of the Merger with regard to the supply of manufacturing and packaging services for each of:
 - juices/juice drinks in APET;
 - CSDs in PET;
 - CSDs in cans;

¹ Aseptic filling is the process by which a sterile (aseptic) product is packaged in a sterile container in a way that maintains sterility.

- energy and sports drinks (**ESDs**) in cans; and
 - the supply of branded NABs.
6. The CMA's investigation primarily focussed on assessing whether there will be sufficient alternative suppliers, able to bid credibly for future opportunities, within each frame of reference post-Merger.
 7. In the supply of manufacturing and packaging for FC juice and juice drinks in APET, the CMA found that:
 - (a) the Parties have competed with each other for significant opportunities in recent years;
 - (b) there is only one other UK-based supplier active in FC juice and juice drinks in APET;
 - (c) while a small number of suppliers from continental Europe might also be able to service UK customers, suppliers based outside the UK appear to be a more remote competitive constraint on the Parties because of transportation and other logistics costs (with the extent of supply from outside the UK being limited at present);
 - (d) the ability of some customers to self-supply may not be a material constraint on the Parties within this segment post-merger;
 - (e) alternative bottling techniques (such as 'hot fill' bottling) may not be a material constraint on the Parties within this segment post-merger; and
 - (f) there is also limited evidence to suggest that buyer power or the prospect of entry or expansion would provide a material constraint on the Parties within this segment post-merger.
 8. The CMA therefore believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) in the supply of manufacturing and packaging for FC juice and juice drinks in APET as a result of horizontal unilateral effects.
 9. In the other frames of reference listed at paragraph 5 above, the CMA does not believe that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects, in particular because there are sufficient remaining competitors in each area of overlap to constrain the Parties.
 10. The Parties have until 10 January to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

11. Refresco is headquartered in the Netherlands and is active in the production and bottling of NABs. Refresco owns a small number of own brand juices and juice drinks, but is primarily active in the supply of beverages to third parties including retailers and brand owners. The turnover of Refresco in 2016 was approximately £[X] worldwide and £[X] in the UK.
12. Cott is headquartered in Canada and is active in the production and bottling of NABs. Cott is primarily active in the manufacture and supply of beverages to third parties, including retailers and brand owners. Cott also owns a number of branded soft drinks including CSDs, ESDs, flavoured sparkling waters, and fruit drinks. The turnover of Cott in 2016 was £[X] worldwide and £[X] in the UK.

Transaction

13. The transaction is the acquisition by Refresco of Cott's traditional beverage manufacturing business, including Cott's UK business.
14. The Parties informed the CMA that the Merger is also the subject of review by competition authorities in the USA and Canada.

Procedure

15. The Merger was considered at a Case Review Meeting.²

Jurisdiction

16. As a result of the Merger, the enterprises of Refresco and Cott will cease to be distinct.
17. The UK turnover of Cott exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
18. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

² *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, from paragraph 7.34.

19. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 30 October 2017. The statutory 40 working day deadline for a decision is 3 January 2018 following an extension to the 40 working day period under section 34ZA(1) of the Act.

Counterfactual

20. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger.
21. In this case, there is no evidence supporting a different counterfactual and Refresco and third parties have not put forward arguments in this respect. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

22. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.³
23. The Parties are both active in the manufacturing and packaging of NABs including CSDs, ESDs and juice beverages. The Parties are primarily active in the supply of manufacturing and packaging to retailers requiring PL and co-pack services to brand owners. The Parties are also active in the manufacture, packaging and supply of branded products.
24. The Parties overlap in the supply of branded drinks and the manufacturing and packaging for CSDs in PET, CSDs in cans, ESDs in cans, and juice and juice drinks supplied in APET.

³ [Merger Assessment Guidelines](#), paragraph 5.2.2.

Product scope

25. Refresco submitted that, consistent with past decisions of the CMA, its predecessors and the European Commission (**EC**),⁴ the product frames of reference for the purpose of analysing the overlaps in the Parties' activities should be delineated on the following basis:
- (a) PL and co-pack NABs should be considered as a single market;
 - (b) CSDs and NCSDs should be considered as separate markets;
 - (c) NCSDs should be further segmented between juice and juice drinks; water; and ESDs;⁵
 - (d) each type of CSD and NCSD should be further segmented by the different types of packaging or packaging process, including each of PET, cans, glass bottles and cartons; and
 - (e) preservative-free bottling (including, in particular, APET packing) should not be treated as a single market, but rather should be analysed along with non-preservative free bottling.
26. Evidence gathered by the CMA largely supports this approach as a starting point (with each possible segmentation being considered in turn below). The CMA also considered whether it was appropriate to:
- (a) delineate by manufacturing and packaging using the APET production process as distinct from other production processes; and
 - (b) segment, for juice and juice drinks, between manufacturing and packaging for FC and NFC drinks.

Possible segmentation between manufacturing and packaging for customers requiring PL and customers requiring co-pack products

27. In the UK, the Parties are both active in the supply of manufacturing and packaging for NABs to customers requiring either PL or co-pack products.
28. Refresco stated that the supply of manufacturing and packaging to all third parties (regardless of whether they are PL or co-pack) should be treated as

⁴ Including ME/1954/05 *Macaw Holdings Ltd / Cott Beverages Ltd* (2006), M.7057 *Suntory/ Glaxosmithkline* (2013), M.6924 *Refresco Group/ Pride Foods* (2013), ME/5801/12 *AG BARR plc /Britvic plc* (2013). M.2504 *Cadbury/Schweppes/ Pernod Ricard* (2001).

⁵ Refresco told the CMA that they do not overlap with Cott in ready to drink tea or water. Therefore, the CMA has not considered these products further in this decision.

part of the same product frame of reference. This is because there is significant scope for supply-side substitution between the two customer groups, since the manufacture and supply in both cases involve almost identical production processes.

29. In *Cott Beverages Ltd/Macaw (Holdings) Ltd*,⁶ the Competition Commission found that the supply of packaging to customers requiring PL and co-pack products was identical but that certain demand-side characteristics of co-pack branded products and PL products could differ (eg PL customers might also require R&D or marketing services in addition to manufacturing and packaging).
30. In the present case, some market participants indicated that they viewed the supply of manufacturing and packaging to customers requiring PL and co-pack products as substitutable, in particular because the production processes are identical.
31. The Parties overlap within the supply of both PL and co-pack products and the competitor set for both types of product appears to be similar. The CMA therefore believes that the competitive conditions do not vary materially depending on whether co-packing and PL products are considered together or separately.
32. The CMA has therefore considered co-packing and PL products to be part of the same product frame of reference (ie the supply of relevant products to all third parties).

Possible segmentation between NCDs and CSDs, and within NCSDs

33. Refresco submitted that CSDs and NCSDs are separate markets as demand and supply-side substitution between the two is very limited. Refresco also submitted that NCSDs can be segmented into juice and juice drinks, mineral water, ESDs.
34. In *Cadbury/Schweppes/ Pernod Ricard (2001)*,⁷ fruit juices were identified as a distinct product market because fruit juices (in particular refrigerated juices) have a different handling and delivery system, as well as a different healthier image when compared with other CSDs. In *Refresco/Pride (2013)*,⁸ the EC

⁶ ME/1954/05 Macaw Holdings Ltd / Cott Beverages Ltd (2006).

⁷ M.2504 Cadbury/Schweppes/ Pernod Ricard (2001).

⁸ M.6924 Refresco Group/ Pride Foods (2013).

indicated that NCSDs could be segmented into juice and juice drinks, mineral water, ready-to-drink teas, and ESDs.

35. The CMA has therefore assessed NCSDs and CSDs separately and, within NCSDs, has considered ESDs, and juice and juice drinks, separately.⁹

Possible segmentation by different types of packaging or packaging process

- *By packaging types*

36. Refresco submitted that different types of packaging may constitute separate product markets since, on the demand-side, some customers may prefer a particular type of packaging and, on the supply-side, the production processes for each packaging type can be quite different.
37. Some customers told the CMA that they prefer particular types of packaging; for instance, PET offers end-consumers a more convenient product which is more durable and not as heavy as glass bottles.
38. A number of suppliers of NABs told the CMA that production processes and equipment required for each packaging type can be quite different.
39. The CMA has therefore assessed the supply of manufacturing and packaging of different packaging types such as PET, cans, glass bottles and cartons separately.

- *Aseptic production processes (e.g. APET) versus other production processes*

40. Refresco submitted that some customers need preservative-free bottling, which includes a variety of production techniques. One of these techniques is the APET production process. Refresco submitted that the delineation of a separate segment for the supply of APET products would be an 'artificially narrow sub-segment' because non-aseptic methods of production are alternatives for aseptic products, customers rarely specify the technology used and very few customers specifically request APET, and customers switch between aseptic and non-aseptic products.
41. In particular, Refresco submitted that the hot fill production process¹⁰ is substitutable for APET when customers require preservative-free production,

⁹ The CMA notes that the Parties do not overlap in manufacturing and packaging of ready to drink tea or water.

¹⁰ Hot fill manufacturing is the process by which a hot liquid is injected into a container and inverted, which allows the heat to sterilize the container and the cap. It requires the use of thicker PET bottles which do not change form at high temperatures.

and provided some examples of customers switching between hot fill and APET production processes.

42. The EC has previously treated aseptic production processes as separate relevant markets. In particular, in *Refresco/Pride*,¹¹ the EC considered aseptic and non-aseptic production processes to be separate product markets, noting its findings, in the earlier decision of *Tetra Laval/Sidel*,¹² that aseptic and non-aseptic machines use very different technology, and machines used in the aseptic production process are significantly more expensive to buy and more complicated to operate. The EC also noted that the shelf-life and taste of a product can be affected by the production process chosen, which limits demand-side substitutability.
43. Tender data submitted by Refresco indicates that demand-side substitutability between APET and other bottling techniques is limited.¹³ While Refresco submitted data for all customers for which it had proposed to provide APET in the last two years, approximately one-third of those customers (accounting for the vast majority of all tenders within the set submitted by Refresco by value) specifically requested APET.
44. The Parties' internal documents also suggest that some customers value the APET production process and specifically look to use this process for their products.
45. [REDACTED]:
 - (a) [REDACTED]
 - (b) [REDACTED]
 - (c) [REDACTED]
46. Many customers also identified a distinct demand-side preference for APET. For example, a number of the Parties' customers told the CMA that they require APET filling because this production process extends the shelf life of products and reduces wastage. Some customers told the CMA that the hot fill production process may extend the shelf life of products in the same way as APET, but that hot fill affects the taste and aroma of a product and they would

¹¹ [M.6924 Refresco Group/ Pride Foods \(2013\)](#).

¹² [M.2416 Tetra Laval Sidel \(2005\)](#).

¹³ Refresco submitted tender data which included information on any contact by customer or prospective customer of Refresco requesting an informal quote or formal bid or updated price for the supply of products using the APET production process in the last two years.

not switch to hot fill for this reason. Suppliers also confirmed to the CMA that they were not aware of material customer switching from APET to hot fill.

47. On the other hand, another juice and juice drink supplier, which is active in hot fill production (but not APET) told the CMA that customers do not have a preference for APET or hot fill and that from a customer's perspective hot fill is substitutable for APET. Similarly, a small number of customers suggested that while APET is important for their products, it is not essential.
48. From a supply-side perspective, the available evidence indicates that it is very difficult, in practice, to switch from producing a non-APET product to an APET product without incurring significant cost. A number of third parties told the CMA (consistent with the previous findings of the EC) that APET filling and non-APET filling are technically very different to each other. They also noted that APET filling is much more expensive and requires additional expertise.
49. In response to the Issues Letter, Refresco submitted that:
 - (a) the majority of customers supplied with APET have no need or are not aware of the APET production process (which the Parties claimed was supported by the tender data that they had submitted); and
 - (b) customers using APET production can readily switch to chilled production.
50. The CMA considers, however, that the available evidence indicates that:
 - (a) customers are generally aware of the APET production process and typically value this process over other production processes; and
 - (b) customers typically would not switch from APET to chilled production. During the CMA's merger investigation customers told the CMA that because chilled production requires the product to remain chilled throughout the whole supply chain, this can be relatively expensive to put in place. In addition, competitors told the CMA that they did not, in practice, encounter switches away from APET production to other production methods, including chilled production.
51. Accordingly, in light of the evidence described above, in particular in relation to the substantial subset of customers who do not consider there to be good alternatives to APET at prevailing prices, the CMA has assessed the supply of manufacture and packaging for NABs (at least for the supply of manufacturing and packaging for juice and juice drinks) using the APET production processes separately from the supply of manufacturing and packaging using non-APET production processes. The CMA has, however, taken into account

the constraint imposed by suppliers of other production processes in its competitive assessment to the extent relevant.

- *Possible segmentation within juice and juice drinks between manufacturing and packaging for NFC and FC*
52. As noted above, juice and juice drinks can be produced FC or NFC. FC juices are produced by removing the excess water from a juice, which yields a product which is five times more concentrated than the initial juice. This is usually then compressed and frozen before being transported to a production site, where water is then added again before it is sold. Conversely, NFC juices must be processed without any water removal and reconstitution.
 53. The Parties are both active in the supply of packaging for FC juice and juice drinks, whereas only Refresco is active in the supply of packaging for NFC juice and juice drinks.
 54. Refresco has submitted that there is a difference between chilled and ambient products due to their different storage and distribution costs. Refresco also noted that the majority of NFC juice and juice drinks are chilled, as NFC is a premium product, but that Cott does not currently supply any chilled juices.
 55. In *Refresco/Pride*,¹⁴ the EC noted that NFC and FC juice and juice drinks can be considered potential alternatives by end-consumers, but that “*the majority of retailers indicated that they would be unlikely to switch from NFC to FC following a price increase of 5-10% since retailers want to offer the whole assortment to their customers*”.¹⁵
 56. In the present case, a number of customers noted significant demand-side differences between NFC and FC juice and juice drinks. In particular, these customers told the CMA that they are required to stock both NFC and FC juice and juice drinks in order to be able to offer both to end consumers (and so the products are complementary rather than substitutable from their perspective).
 57. From a supply-side perspective, evidence from customers and competitors suggest that conditions of competition differ between NFC and FC in particular because:

¹⁴[M.6924 Refresco Group/ Pride Foods \(2013\)](#).

¹⁵ In [M.6585Hain/Orchard \(2016\)](#) the CMA segmented between fresh juice and NFC juice, but there was no comment made on the distinction between FC and NFC because the Parties were not active in FC juices.

- (a) FC juices are usually filled close to the end-customer. As FC juices are highly concentrated, it is cheaper to ship them in their concentrated form, and then add water and bottle them at a facility from which there will be a relatively short journey to the customer to save on logistics costs; and
- (b) NFC juices are usually filled at source. For example, special tankers with cooling are required to ship juices in their raw form. As such drinks are rarely manufactured in the UK (because the raw ingredients for such drinks are rarely grown in the UK), there is no material cost advantage in being able to bottle these drinks close to the UK customer base.
58. Some NAB suppliers told the CMA that it was technically possible to switch from supplying manufacturing and packaging for NFC juice and juice drinks to FC juice and juice drinks. However, the evidence available to the CMA does not establish that suppliers would have the incentive to switch production in this way. For example, one supplier of juice and juice drinks which is focused on NFC production stated that it would not be interested in moving to FC production because it does not have the expertise to do so. Moreover, in practice, continental European suppliers with access to raw materials tend to focus entirely or mostly on freshly squeezed and NFC juices. While evidence in relation to the relative margins for NFC and FC production was mixed (with suppliers suggesting that the margin for either type of production varies depending on the particular product), there is no basis to conclude that NFC producers would have a financial incentive to move into FC production.
59. In response to the CMA's Issues Letter, Refresco submitted that the production process for FC and NFC is virtually the same – both can be filled aseptically and only separate storage tanks for each type of product are required. Refresco also submitted that continental European suppliers still supply FC-packaged products into the UK, and that such suppliers are able to compete effectively for UK business with UK-based suppliers in relation to both NFC (despite the higher distribution costs) and FC products if the supplier is based in proximity to one of the main European ports.
60. The CMA found, however, that suppliers tend to specialise in either FC or NFC production and do not, in practice, switch between those production techniques. One major supplier told the CMA that switching from NFC production to FC production is possible but that switching from FC to NFC is not possible because of the different technical requirements of an NFC filling line. Moreover, the CMA believes that European suppliers of FC operate at a competitive disadvantage for UK business, as compared to UK suppliers, for the reasons outlined in paragraph 57.

61. The CMA has therefore assessed the supply of manufacturing and packaging for FC drinks separately from the supply of manufacturing packaging for NFC drinks, within the juice and juice drink segment.

Conclusion on product scope

62. For the reasons set out above, the CMA has considered the impact of the Merger within the supply of:
- manufacturing and packaging for FC juices/juice drinks in APET;
 - manufacturing and packaging for CSDs in PET;
 - manufacturing and packaging for CSDs in cans;
 - manufacturing and packaging for ESDs in cans; and
 - branded NABs.

Geographic scope

63. Refresco submitted that the relevant geographic market for the supply of NAB manufacturing and packaging should be defined as EEA-wide or, at least, should cover a region comprising a number of EU Member States.
64. In previous cases, both the CMA and the EC have considered the geographic scope for the packaging of NABs to be national for a number of reasons including: transport costs from continental Europe to import into the UK are substantially higher; tenders usually covered national territories; and consumer preferences differed significantly across countries.
65. A number of customers and competitors have told the CMA that it is particularly important for FC juices and juice drinks to be packaged close to the end-consumer, for reasons set out at paragraph 57.
66. This position is consistent with the Parties' internal documents. [X]
67. In response to the CMA's Issues Letter, Refresco submitted that the Parties also face material competition from continental Europe-based suppliers. Refresco provided examples of such suppliers currently supplying APET products into the UK.
68. The CMA investigated whether continental European suppliers are viable alternatives to the Parties by gathering evidence from customers and competitors. The available evidence indicates that suppliers in continental Europe are currently finding it difficult to win or retain contracts to supply to

the UK because of additional transport costs that customers would face and recent exchange rate fluctuations.¹⁶ The CMA has been told that this applies to a range of different packaging types, including APET.

Conclusion on geographic scope

69. The CMA therefore believes that the potential impact of the Merger on the supply of manufacturing and packaging to third parties for FC juices and juice drinks using the APET production process should be considered within a UK-wide frame of reference. As explained below, the CMA has also taken the constraint posed by competitors outside the UK into account, to the extent relevant, within its competitive assessment.
70. It was not necessary for the CMA to reach a conclusion on the appropriate geographic frame of reference for production processes other than APET because, as set out below, no competition concerns arise within these frames of reference on any plausible basis.

Horizontal unilateral effects

71. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality without needing to coordinate with its rivals.¹⁷ Horizontal unilateral effects are more likely when the merging parties are close competitors.
72. In this section, the CMA first, by way of background, summarises its findings in relation to the market context for the services at issue and explains the approach taken to competitive assessment within each frame of reference. The CMA then provides its competitive analysis for each relevant frame of reference (ie the supply of manufacturing and packaging for FC juices/juice drinks in APET, manufacturing and packaging for CSDs in PET, manufacturing and packaging for CSDs in cans, manufacturing and packaging for ESDs in cans, and branded NABs).

Market context

73. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects, the CMA considered the available evidence within each frame of reference. Consistent with its established practice, the CMA has considered

¹⁶ Contracts are usually in GBP and therefore current exchange rate conditions reduces the profitability to export to the UK.

¹⁷ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

the Parties' existing market presence, assessed how they have compete with each other, and considered what other constraints (in particular from alternative suppliers) the Parties will face post-merger.

74. The CMA notes that the markets for the manufacturing and packaging of NABs are characterised by relatively small numbers of contracts, which are typically negotiated through (formal or informal) tenders. For that reason, the CMA considers that market shares are generally likely to be of limited relevance in assessing the competitive strength of the Parties and their competitors.¹⁸ The CMA's investigation has therefore primarily focussed on assessing whether there will be sufficient alternative suppliers, able to bid credibly for future opportunities, within each frame of reference post-merger.
75. The CMA has assessed whether there will be a sufficient competitive fringe of firms to constrain the Parties post-merger within each frame of reference by:
- (a) considering the current activities of the Parties and their competitors including; in particular, the extent to which they have bid for recent opportunities within each segment;
 - (b) assessing how the Parties perceive each other, and their competitors, as a competitive constraint; and
 - (c) investigating how third parties (ie customers and competitors) perceive the Parties, and their competitors, as competitive constraints.
76. Where relevant (ie where the available evidence indicates that there will not be a sufficient competitive fringe of firms to constrain the Parties post-merger), the CMA has also considered whether potential constraints from self-supply, other bottling techniques, countervailing buyer power, or entry and expansion would constrain the Parties post-merger.

The supply of manufacturing and packaging for FC juices and juice drinks in APET in the UK

Shares of supply

77. Refresco suggested that the Parties hold a combined share of [20-30]% by volume in the supply of manufacturing and packaging for juices and juice drinks in APET (with [10-20]% for Refresco and [10-20]% for Cott).¹⁹ Refresco

¹⁸ The CMA also notes that the share data provided by the Parties suffers from certain limitations, explained further below, which also reduce the weight that could be placed on this data.

¹⁹ Refresco's revenue in FC juice and juice drinks in APET was £[~~3~~] for 2017 (Jan-Oct) and Cott's revenue for the same period was £[~~3~~].

was, however, unable to provide separate shares of supply for the FC and NFC segments and was not able to estimate the shares of any competing suppliers. The Parties are primarily active in FC juices (Cott is not currently active in NFC production and Refresco's NFC activities account for less than [0-5]% of its sales volumes in juice and juice drinks in APET). The CMA therefore considers that the share data submitted for a combined NFC/FC segment materially underestimates the Parties' market position in the FC segment.²⁰

78. Refresco has acknowledged that estimating reliable shares of supply is particularly difficult in relation to APET production because the third-party market data used to compile estimates does not distinguish between APET and non-APET products (and therefore there is considerable uncertainty about the total market size for APET products). In response to the CMA's Issues Letter, Refresco argued that it is also difficult to identify third party products which have been produced using the APET production process, rather than other preservative-free production processes (such as hot fill).
79. The CMA considers that the share of supply data submitted by Refresco has very limited relevance for the assessment of competition in relation to the FC juice and juice drink APET segment.
 - (a) First, as explained in paragraph 74 above, market shares are generally likely to be of limited relevance in assessing current competitive strength within this frame of reference. Consistent with the approach described above, the CMA has therefore focussed, in particular, on assessing whether there will be sufficient alternative suppliers, able to bid credibly for future opportunities, within each frame of reference post-merger.
 - (b) Second, the available evidence, taken in the round, suggests that the estimates provided by Refresco are likely to substantially understate the Parties' competitive significance in relation to APET production, in particular because the CMA has been able to identify few alternative suppliers of FC juice and juice drink in APET for UK customers. The CMA has identified only one alternative UK-based supplier other than the Parties, with the available evidence also suggesting that the extent of supply to UK customers from suppliers based in continental Europe is limited. This is wholly inconsistent with the position encapsulated in the share of supply data provided by Refresco that other suppliers currently account for around three-quarters of supply within the UK APET segment.

²⁰ Refresco's sales volumes in this regard are based on the period from Jan-Oct 2017.

(c) Third, existing shares of supply (even if accurate) would not fully reflect the competitive significance of Refresco, [REDACTED].²¹

80. [REDACTED] This expected rate of success suggests that Refresco may face relatively limited competition in practice for APET opportunities. The projected rate of success is, in particular, notably higher than those observed in other areas of overlap in which the available evidence establishes that a larger number of suppliers are active in supply to UK customers.²²
81. In response to the CMA's issues letter Refresco submitted that "[REDACTED] In this regard, Refresco indicated that [REDACTED]
82. The CMA notes that its investigation is intended to assess the change in market power likely to result from a merger. In this regard, [REDACTED]. The CMA therefore considers that this should be taken into account in the assessment any of change in market power brought about by the Merger.
83. Accordingly, for the reasons set out above, the CMA considers that the Parties' competitive significance is likely to be considerably understated in the share data for the juice and juice drink APET segment submitted by Refresco. By contrast, the CMA considers that the available evidence indicates that the Parties (in particular Refresco) currently hold a very strong market position within the relevant frame of reference.

Closeness of competition

84. The CMA has examined the closeness of competition between the Parties, in particular by reference to tender data submitted by the Parties, the Parties' internal documents, and the views of third parties.

Tender data

85. Refresco submitted that the Parties could not be considered to be close competitors, in particular because they have competed over a limited number of tenders in recent years. Refresco also suggested that the tender data shows that the Parties consistently face competition from suppliers using other bottling techniques.
86. Both Refresco and Cott submitted tender data for the previous two years, comprising responses to formal tenders, requests for quotations, and

²¹ [REDACTED]

²² [REDACTED]

renegotiations of existing contracts. Refresco submitted a list of [REDACTED] ‘tenders’, with Cott submitting a list of [REDACTED] ‘tenders and enquiries.’

87. The Parties submitted that both these lists showed very limited head-to-head competition between the Parties. In particular, Refresco suggested that its tender data showed that, over the last two years, [REDACTED] has switched between the Parties and that the Parties had competed against each other [REDACTED] times.
88. The CMA considers, however, that the lists of tenders submitted by the Parties do not fully reflect competitive dynamics (and, in particular, the degree of competitive interaction between the Parties) within the FC juice and juice drink APET segment.
- (a) [REDACTED].²³ Accordingly, consistent with the relevant frame of reference, the CMA has focussed its analysis on a narrower number of tenders (approximately [REDACTED]) in which customers requested APET packaging for a juice or juice drink product.
- (b) Second, an analysis of these tenders shows that the Parties typically competed with each other on the highest volume and value contracts. The CMA notes, in this regard, that Cott and Refresco competed with each other on contracts accounting for approximately 90% (by value) of all ‘high-acid’ APET-specific opportunities that Refresco bid for during this period.
- (c) Third, the available evidence suggests a significant degree of competitive interaction between the Parties within these tenders. For example, the Parties’ internal documents in relation [REDACTED]. The Parties’ internal documents do not evidence the same level of competitive interaction with any other supplier.
- (d) Fourth, [REDACTED]
- (e) Fifth, [REDACTED] As described below in each relevant frame of reference, the tender data for all other areas of overlap identifies several alternative suppliers with a track record of bidding (often successfully) for opportunities within each segment. By contrast, [REDACTED]
89. In the round, the CMA therefore considers that the tender data does not support Refresco’s position that the Parties are not close competitors. By contrast, the data shows that the Parties have competed for significant opportunities within the FC juice and juice drink APET segment in recent

²³ Cott is not currently active in ‘low-acid’ filling and therefore low-acid filling has not been considered in this competitive assessment.

years. [REDACTED], the evidence shows that significant customers have nevertheless consistently sought to engage Cott in order to constrain Refresco.

Internal documents

90. Refresco submitted that the Parties' internal documents do not evidence any particular closeness of competition between the Parties.
91. The CMA notes that the Parties' internal documents, in general, contain few references to competitors (and therefore do not frequently refer to any other competitors within the FC juice and juice drink APET segment).
92. In one document, [REDACTED]
93. [REDACTED]. The CMA also notes (as explained in paragraph 80 above) that this document is consistent with Refresco facing few constraints in the supply of FC juice and juice drink APET within the UK.
94. Accordingly, while the internal documents provided by the Parties generally provide little insight into competitive dynamics in relation to the FC juice and juice drink APET segment, the CMA does not consider them to support a lack of closeness of competition between the Parties (as suggested by Refresco).

Third party views

95. The evidence received during the CMA's merger investigation suggests that customers consider Cott and Refresco to be close competitors.
96. Customers requiring co-pack products consistently told the CMA that the Parties are close competitors in the supply of juices and juice drinks in APET. Some customers and suppliers identified the Parties as the only two suppliers of juices and juice drinks in APET in the UK and had difficulty in identifying any other UK-based suppliers of APET.²⁴
97. Some customers raised a concern that currently only Cott and Refresco are viable UK-based suppliers of APET production. For example, one customer stated that post-merger there "*will be no competition in the UK based market place for a format which is seeing significant growth given the recent movement in consumer trends towards healthier products.*"

²⁴ Of the 11 customers that responded to the CMA's questionnaire, the majority identified both Parties as credible suppliers of FC juice and juice drink APET (eight identifying Refresco as a credible supplier and six identifying Cott). Four customers were unable to identify any other alternative to the Parties. To the extent that other customers were able to suggest alternatives to the Parties, the CMA's investigation found that these suppliers are not currently active in supply of FC APET to UK-based customers. [REDACTED]

Competitive constraints

98. Unilateral effects are more likely where customers have little choice of alternative supplier. The CMA has considered whether there are alternative suppliers which would provide a competitive constraint to the combined entity.
99. Refresco submitted that customers can easily switch suppliers as there are several alternatives available, including Purity Soft Drinks Ltd, P Mulrines and Sons and Multiple Marketing Ltd. The Parties also suggest that Stute Foods Ltd, riha WeserGold Getränke GmbH & Co. KG, J. Garcia Carrion and Molkerei Gropper GmbH & Co. KG would also be suitable alternative suppliers for UK customers.
100. The CMA considers that suppliers based in the UK are likely to be a more significant competitive constraint on the Parties than those based outside the UK. In particular, the evidence available to the CMA indicates that suppliers in continental Europe are currently finding it difficult to win or retain contracts to supply UK-based customers because of transport and other logistics. For that reason, UK-based and non-UK based suppliers are considered separately below.

Constraint from UK-based suppliers

101. The CMA has identified only one other supplier in the UK that currently supplies manufacturing and packaging services to third parties for FC juices or juice drinks using the APET production process.
102. The CMA notes that [REDACTED]
103. This competitor told the CMA that it competes with Refresco and Cott ([REDACTED]). Accordingly, notwithstanding [REDACTED] the CMA believes that it will be a material competitive constraint on the Parties post-Merger.
104. The CMA notes that there is one other UK-based supplier of juices and juice drinks in APET to third Parties, but that this supplier produces freshly squeezed and NFC drinks and does not currently produce FC juices and juice drinks.²⁵ This supplier was not identified as a provider of FC juice and juice drinks by any customer and (given the uncertainty, as described in paragraph 58 above, that NFC suppliers would have the ability and incentive to provide

²⁵ This customer has told the CMA that it is not interested in pursuing business in the FC APET filling. In its view, it is specialised in supplying premium freshly-squeezed juices and has no economic incentive to move into the supply of FC APET.

FC products), the CMA believes that this supplier is unlikely to be a material competitive constraint on the Parties post-Merger.

105. As a result, the CMA believes that the Parties are two of only three suppliers with FC APET capability in the UK.

Constraint from non-UK based suppliers

106. Some customers told the CMA that they currently use non-UK-based suppliers, such as J. Garcia Carrion and Munoz. The CMA notes, however, that all of these contracts relate to NFC juice and juice drinks only (and these suppliers may, for the reasons described in paragraph 58 above, have limited ability and incentive to compete within the FC segment).²⁶
107. The CMA was told by some customers that Stute Foods Ltd and WeserGold Getränke GmbH & Co. KG, which are both based in Germany, are able to supply some FC juice and juice drinks to the UK. The CMA has not, however, been able to obtain any evidence to substantiate the full extent of existing supply from these providers (with the available evidence indicating that only very small volumes are supplied into the UK market from non-UK-based suppliers).
108. More generally, the available evidence suggests that suppliers based outside the UK are unlikely to be close competitors to the Parties.
- (a) First, shipping costs mean that non-UK based suppliers are significantly more expensive than UK suppliers for FC products. As noted in paragraph 65 above, some customers and NAB suppliers have told the CMA that it is most efficient for FC juices and juice drinks to be produced at a location close to the end-consumer. This is because it is cheaper to ship the concentrated form and then add water and bottle the product close to the end-consumer to reduce transportation and other logistics costs.
- (b) Second, the CMA has been told by customers that they have concerns about the competitiveness of European suppliers. Some NAB customers have noted that exchange rate fluctuations significantly weaken the position of non-UK-based suppliers; other customers told the CMA that they have switched from continental European suppliers to UK suppliers to mitigate exchange rate fluctuations. Similarly, some NAB suppliers based in continental Europe have confirmed that they are currently

²⁶ Both suppliers are in close proximity to orange producers, and one supplier owns its own orchards.

struggling to compete for UK customers due to recent exchange rate changes and uncertainty about possible further changes.

109. The weaker position of non-UK based suppliers is also evidenced in [✂]
110. In response to the CMA's Issues Letter, Refresco argued that continental European suppliers are competing and winning business in the UK. They provided an example of one continental European supplier named in price negotiations as offering a lower price across the product range. Refresco also stated that there is ongoing supply by continental European suppliers of juice and juice drinks in APET to the UK. Further, Refresco provided an analysis of FC distribution costs and submitted that while there is a cost advantage to diluting close to the customer, this is not material. Refresco provided data showing a small variance in relative transport costs per bottle to supply the UK from the UK compared with continental Europe.
111. The Parties' views are not, however, consistent with those of the majority of UK-based customers and non-UK-based suppliers. The CMA has received only limited evidence to suggest that continental European suppliers are systematically viewed as a competitive constraint by UK-based suppliers. Some continental European suppliers told the CMA that they are not actively competing for business in the UK (and were unlikely to do so in future). Moreover, as noted above, to the extent that some customers have suggested non-UK-based suppliers may supply FC juice and juice drinks to the UK at present, the CMA has not been able to obtain any evidence to substantiate the full extent of any existing supply from these providers (with only very small volumes of supply being supported by the available evidence).
112. For the reasons explained above, the CMA is therefore only able to place limited weight on the constraint that is likely to be provided by non-UK-based FC suppliers, such as Stute Foods Ltd and WeserGold Getränke GmbH & Co. KG, post-Merger. The CMA considers that non-UK-based suppliers of NFC products, such as J. Garcia Carrion and Munoz, are unlikely to be a material constraint on the Merged Entity post-Merger.

Constraint from self-supply

113. Refresco submitted that self-supply is a constraint, both from the demand and the supply-side. Specifically, on the supply-side Refresco submitted that brand owners can decide between outsourcing (ie co-packing) and in-house production.

114. This is, however, not consistent with the views of other suppliers and customers which suggest that self-supply would not constrain the Parties' activities. In particular:
- (a) One supplier of NABs told the CMA that it is not aware of any brand owners moving back to in-house bottling after co-packing; another supplier of NABs stated that moving production in-house is only worthwhile once you have generated sufficient volume for high capacity utilisation of a filling line to make the investment worthwhile; another supplier of NABs told the CMA that it requires co-packing when it is near full capacity or it is trialling a new product and has small production volumes.
 - (b) Responses from customers consistently commented that, across all NAB types, sufficient volume is required to consider moving production in-house. One customer commented that it would cost a substantial amount to move its NAB production in-house and take a significant period to do so. A number of co-packing customers which do not have in-house production facilities told us that they wanted to focus on their brands and were not interested in becoming manufacturers.
115. The CMA therefore believes that for most customers, self-supply would not be a material constraint on the Merged Entity, in relation to FC APET manufacturing and packaging, post-Merger.

Constraint from other bottling techniques

116. Refresco submitted that some customers may have a preference for a preservative-free product, but that there are a wide range of alternative suppliers and methods which can serve them including hot fill, chilled and foil seal.
117. This is, however, not consistent with the views of other suppliers and customers which suggest that other bottling techniques would not constrain the Parties activities.
118. As described in paragraph 45(b), there are certain customers who value the APET production process because it extends shelf life without affecting the flavour or aroma of a product in the way that hot fill production does. The CMA also heard from a number of customers that chilled production is not a substitute for APET because this requires an entirely chilled supply chain and is much more expensive. Further, customers told the CMA that foil seal production does not extend shelf life for as long as APET and therefore APET was preferable to prevent wastage.

119. The CMA therefore believes that for a substantial subset of customers, other production techniques would not be a material constraint on the Merged Entity in relation to FC APET manufacturing and packaging, post-Merger.

Countervailing buyer power

120. Refresco submitted that countervailing buyer power exists in the market, which would limit parties' ability to increase price.²⁷ It submitted an econometric analysis for APET showing [REDACTED] Refresco noted that the econometric analysis suggests, however, that [REDACTED]. Refresco therefore considers that all customers, and not just the largest customers, have bargaining power.
121. The CMA places no weight on this argument for two reasons. First, it is based on the position that large firms have bargaining power (even though the CMA has not been provided with evidence on this point). For example, even firms that have APET capabilities in-house may not be able to utilise them due to capacity constraints and therefore are not able to leverage a supposed in-house option in price negotiations (and the CMA has seen no evidence of this possibility being used as leverage in negotiations involving either of the Parties). Second, even if the argument were correct, it may be that the ability of smaller customers to exercise buyer power arises from the presence of alternative suppliers such as Cott, which would be removed by the Merger.
122. Refresco also submitted that the bargaining power of customers would increase post-merger [REDACTED]. Refresco considers that this would mean that customers would be in a stronger bargaining position post-Merger where they have additional non-APET contracts with the respective other party.
123. However, when assessing the tender data and related documents submitted by the Parties, which included extensive correspondence with customers, the CMA has not seen any evidence that [REDACTED]. The CMA therefore places limited weight on this argument.
124. Overall, the CMA does not believe that the evidence submitted suggests that buyer power may prevent or mitigate unilateral effects. Even if the CMA were to accept the arguments made by the Parties, the strength of any countervailing buyer power, and how it would change post-merger, is unclear. The CMA therefore believes that the available evidence does not indicate that

²⁷ Refresco submitted a buyer power analysis overall and across all markets. We focus here only on APET analysis because we did not identify competition concerns in other markets.

countervailing buyer power will not prevent or mitigate any SLC arising in the supply of manufacturing and packaging of juice and juice drinks in APET.

Barriers to entry and expansion

125. Entry, or expansion, of existing firms, can mitigate the initial effect of the acquisition on competition, and in some cases, may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.²⁸ In terms of timeliness, the CMA's guidelines indicate that the CMA will look for entry to occur within two years.²⁹
126. Evidence submitted by customers and NAB suppliers suggests that suppliers of juices and juice drinks in APET tend to focus mainly on either NFC or FC (but not both). Moreover, many NFC competitors have told the CMA that they are specialising in NFC production and therefore would not have the incentive to compete for FC production at or around prevailing prices.³⁰
127. The CMA spoke to competitors about the costs of entering or expanding their production. They indicated that this would be difficult and estimated the costs of such expansion to be between £5 to £15 million.
128. The CMA has identified one competitor who is investing in APET capability. This competitor is an existing supplier of APET production and therefore has existing expertise in APET production. Other suppliers have told the CMA that APET filling requires expertise and knowledge that need to be build up before being able to effectively compete in the market.
129. Refresco submitted that customers can sponsor entry or expansion. [X]. However, potential suppliers the CMA has contacted have not indicated a willingness to be sponsored to enter; and even if some large customers could use a perceived willingness to sponsor entry as a negotiating threat, such a threat is not likely to be credible for smaller customers. The Parties would therefore not be constrained, in competing for the majority of customers, unless sponsored entry actually occurs and has spare capacity.
130. The CMA therefore believes that entry or expansion will not be timely, likely or sufficient to prevent or mitigate any SLC arising in the supply of manufacturing and packaging of juice and juice drinks in APET.

²⁸ [Merger Assessment Guidelines](#), paragraph 5.8.3.

²⁹ [Merger Assessment Guidelines](#), paragraph 5.8.11.

³⁰ For example, one competitor mentioned that they are specialised in premium NFC juices, which they consider their niche. They have no incentive to offer FC products because they do not have any expertise in those products.

Conclusion on competitive constraints

131. In the round, the available evidence indicates that the post-Merger competitive constraints on the Merged Entity within the FC juice and juice drinks in APET segment would be limited. In particular, there would only be one other UK-based supplier active within this segment. While a small number of continental Europe-based suppliers might also be able to service some UK customers, the extent of supply from outside the UK at present appears to be limited and non-UK-based suppliers face material challenges (in terms of cost and logistics) in competing for UK business. There is also limited evidence to suggest that buyer power or the prospect of entry or expansion would constrain the Parties post-merger.

Conclusion on horizontal unilateral effects

132. For the reasons set out above, the CMA believes that the Parties compete in the manufacturing and packaging of FC juice and juice drinks in APET and that the constraints faced by the Parties post-Merger would be limited.
133. Accordingly, the CMA found that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of manufacturing and packaging for FC juices/juice drinks in APET in the UK.

The supply of manufacturing and packaging for CSDs in PET

Shares of supply

134. Refresco estimated that the Parties had a combined share of [30-40]% by volume in 2017 in the supply of manufacturing and packaging for CSDs in PET (with [20-30]% for Cott and [5-10]% for Refresco).
135. As explained in paragraph 74 above, the CMA considers that market shares are generally likely to be of limited relevance in assessing the competitive strength of the Parties and their competitors. The CMA also notes that there is some uncertainty in the consumer data about which drinks are categorised CSD or PET (which also reduces the weight that could be placed on the data).

Closeness of competition

136. In CSDs, Refresco only has [REDACTED], which it won from Cott. [REDACTED]
137. Refresco has approximately [REDACTED]
138. [REDACTED] The CMA notes that there are some examples of Refresco bidding for contracts which have [REDACTED] in the last two years and this may suggest that [REDACTED]

139. The tender data suggests that Cott and Refresco have competed for business in the past, albeit in a limited number of cases. The data show that Cott and Refresco competed in [X] tenders between 2015 – 2017.³¹ In [X], Refresco won business from Cott.³² The remaining [X] tenders were won by Cott, who was also the incumbent in those instances. All the [X] bids are in relation to [X]. The tender data for these contracts suggest that, in addition to the one contract it has, Refresco has unsuccessfully bid on [X] occasions in 2016-17.
140. The tender data supplied by the Parties also suggest that other suppliers are also competing in this segment including Princes and Radnor. In particular, the data shows that Princes competes with Cott as often as Refresco does.³³ In general, the Parties do not compete against each other frequently and [X]
141. In this regard, in contrast to the position in the FC juice and juice drink APET segment (as summarised in paragraph 89 above), the CMA notes that the tender data provided by the Parties within this segment is broadly consistent with the other evidence in relation to competitive dynamics (and, in particular, the degree of competitive interaction between the Parties) for CSDs in PET. The CMA therefore considers that some weight can be placed on the limited competitive interaction between the Parties within this data set.
142. Accordingly, the CMA believes that the tender data shows a degree of competitive interaction between the Parties pre-Merger, but that they were not each other's closest competitors.

Competitive constraints

143. Refresco submitted that there are a number of competitors in this segment, including:
- (a) Princes, [X];
 - (b) Caw Ingredients [X]
 - (c) Konings [X];
 - (d) Roxane [X];
 - (e) Radnor; and

³¹ The parties participated in [X] bids in total, of these Cott participated in [X] and Refresco in [X] tenders.

³² Of the tender both parties competed in [X] was [X]

³³ Since the Parties generally have limited information on competitors, this evidence is likely to understate the interactions with Princes; whereas given a full list of Refresco's tenders, Refresco is not understated.

(f) Smaller competitors include Leissingler and Norbev.

144. For the most part, customers told the CMA that they did not have any concerns about the Merger because there are sufficient alternative suppliers in this market which they can switch to. Some customers did, however, raise concerns about the reduction in the number of suppliers in the market should the merger go ahead.
145. The majority of customers were able to identify Princes, Norbev and Caw Ingredients as alternative suppliers to the Parties.

Conclusion on horizontal unilateral effects

146. For the reasons set out above, the CMA believes that the Parties are not particularly close competitors and there are a sufficient number of alternative suppliers remaining in this segment post-Merger. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to CSDs in PET.

The supply of manufacturing and packaging for CSDs in cans

Shares of supply

147. Refresco estimated that the Parties had a combined share of [30-40]% by volume in 2017 in the supply of manufacturing and packaging for CSDs in cans (with [30-40]% for Cott and [5-10]% for Refresco).
148. As explained in paragraph 74 above, the CMA considers that market shares are generally likely to be of limited relevance in assessing the competitive strength of the Parties and their competitors. The CMA also notes that there is some uncertainty in the consumer data about which drinks are categorised CSD or produced in cans (which also reduces the weight that could be placed on the data).

Closeness of competition

149. The tender data suggests that there are few instances where Cott and Refresco have competed against each other. Cott and Refresco competed in [X] of [X] tenders between 2015 – 2017.³⁴ [X]

³⁴ The parties participated in [X] bids in total, of these Cott participated in [X] and Refresco in [X] tenders.

150. The tender data shows that there are a number of alternative suppliers against whom the Parties compete in this segment, including Bavaria, Font Salem, HCC, Princes and RUK.
151. In this regard, in contrast to the position in the FC juice and juice drink APET segment (as summarised in paragraph 89 above), the CMA notes that the tender data provided by the Parties within this segment is broadly consistent with the other evidence in relation to competitive dynamics (and, in particular, the degree of competitive interaction between the Parties) for CSDs in cans. The CMA therefore considers that some weight can be placed on the limited competitive interaction between the Parties within this data set.
152. Refresco supplies cans from its production facility in the Netherlands and currently is unable to supply cans from its plant in the UK. Refresco told the CMA that this means it is less competitive in the UK because of recent exchange rate movements, [REDACTED].
153. Customers of CSDs in cans generally told the CMA that they had concerns about the competitiveness of continental European suppliers, specifically citing the impact of exchange rate movements. Some customers told us that this is a key factor in their decision-making when considering European based suppliers, including Refresco.
154. During the CMA's merger investigation, customers identified both Parties as possible suppliers, but also consistently noted that Refresco is less competitive due to exchange rate fluctuations.
155. The evidence suggests that the Parties are active in competing against each other, however this occurs infrequently. Moreover, the CMA believes that because of the exchange rate fluctuations Refresco is a more remote competitive constraint on UK-based [REDACTED]. The CMA therefore believes that the Parties are not close competitors in this segment.

Competitive constraints

156. Refresco submitted that there are a number of competitors in this segment including Bavaria, Font Salem, RUK, HCC and Princes.
157. Several customers confirmed to the CMA that [REDACTED] (who the Parties did not identify as a competitor in this segment), which are both based in the UK, are viable alternative suppliers, and also identified large scale suppliers based in continental Europe, such as [REDACTED].
158. [REDACTED]. Customers, such as [REDACTED] have mentioned [REDACTED] as possible alternatives.

159. The CMA notes that, continental European suppliers have indicated that the recent exchange rate movements are a concern with respect to their competitiveness.³⁵ One continental European supplier explained [REDACTED].³⁶
160. The CMA has also been told that there are smaller competitors in the UK including [REDACTED], which is able to [REDACTED] and will therefore constrain the Parties to some extent.
161. In addition, the CMA has received evidence of substantial expansion in this segment, [REDACTED].

Conclusion on horizontal unilateral effects

162. For the reasons set out above, the CMA believes that Refresco is not a particularly significant constraint on Cott and that there are a sufficient number of credible alternative suppliers remaining in this segment following the Merger. [REDACTED]. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to CSDs in cans.

The supply of manufacturing and packaging for ESDs in cans

Shares of supply

163. Refresco estimated that the Parties had a combined share of [60-70]% by volume in 2017 in the supply of manufacturing and packaging for ESDs in cans, with [30-40]% for Cott and [20-30]% for Refresco ([REDACTED]).
164. As explained in paragraph 74 above, the CMA considers that market shares are generally likely to be of limited relevance in assessing the competitive strength of the Parties and their competitors. The CMA also notes that there is some uncertainty in the consumer data about which drinks are categorised ESD or produced in cans (which also reduces the weight that could be placed on the data).

Closeness of competition

165. The tender data suggests that there are few instances where Cott and Refresco have competed against each other. Cott and Refresco competed in

³⁵ Responses from European suppliers suggested that they have ongoing contracts, but that those contracts are less profitable.

³⁶ [REDACTED]

[redacted] of [redacted] tenders between 2014–2017. Of the tenders both parties competed in, two were won by Cott ([redacted]).

166. The tender data supplied by the Parties also suggests that other suppliers were active in this segment including RUK and Bavaria. The CMA notes that while both Parties are active in tendering in this market, the tender data indicate that they do not frequently compete directly with each other (and that other suppliers consistently win tenders).
167. In this regard, in contrast to the position in the FC juice and juice drink APET segment (as summarised in paragraph 89 above), the CMA notes that the tender data provided by the Parties within this segment is broadly consistent with the other evidence in relation to competitive dynamics (and, in particular, the degree of competitive interaction between the Parties) for ESDs in cans. The CMA therefore considers that some weight can be placed on the limited competitive interaction between the Parties within this data set
168. Refresco supplies cans from its production facility in the Netherlands and currently is unable to supply cans from its plant in the UK. Refresco submitted that the same argument as outlined in paragraph **Error! Reference source not found.** also applied to ESDs in cans.
169. The CMA found that while customers identify both Parties, they also consistently indicate that Refresco is less competitive due to exchange rate fluctuations.
170. The CMA believes that while the evidence suggests that the Parties are active in competing against each other, this occurs infrequently. Moreover, the CMA believes that because of exchange rate movements Refresco is a more remote competitive constraint on UK-based suppliers because its supply base is in the Netherlands. The CMA therefore believes that the Parties are not each other's closest competitors in this segment.

Competitive constraints

171. Refresco submitted that there are a number of competitors in this segment including Bavaria, Konings, CEE and Princes.
172. Several customers confirmed to the CMA that [redacted], which are both based in the UK, are viable alternative suppliers, and also mentioned large-scale suppliers based in continental Europe, such as [redacted].
173. The CMA has discussed the evidence on these suppliers in relation to CSDs in cans in paragraphs 156 to 161 above. Those suppliers are also active in ESDs in cans and the same considerations as above apply, ie [redacted].

174. Moreover, competitors have told the CMA that it is possible to switch production from CSDs in cans to ESDs in cans and one major UK competitor confirmed to the CMA that it is active in CSDs and ESDs in cans. The CMA therefore believes that, from a supply-side perspective, suppliers active in producing CSD in cans exert some competitive constraint on ESDs in cans.³⁷

Conclusion on horizontal unilateral effects

175. For the reasons set out above, the CMA believes that there are a sufficient number of alternative suppliers remaining in this segment and that the Parties are not close competitors. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to ESDs in cans.

The supply of branded NABs

176. Refresco estimated that the Parties had a combined share of 15% by volume in the supply of branded NABs.
177. Refresco argued that there is limited competition between the parties because they are targeting different customer groups. Cott supplies the Calypso brand which is sold in schools only, whereas Refresco's Sunpride brand is a PL alternative for retailers and wholesalers who do not have their own PL juice drink. The products are also mainly sold in different pack sizes, for instance Sunpride is primarily sold in 1 litre cartons (or larger) and Calypso is sold in lunch-box sized cartons. Only [5-10]% of Sunpride products (by value) are sold in a pack size comparable to Calypso.
178. The CMA notes the product and customer differentiation between these products, and no customers identified the Parties as close competitors in this segment. The CMA therefore believes that the Parties are not close competitors in the supply of branded NABs.
179. Internal documents show that the Parties consider their brands to both be in the same market, but also provide evidence of limited switching of customers between the Parties. The documents identify strong and well-known brands competing in this market, including Capri Sun, Robinsons, Ribena and Cawston Press.
180. For the reasons set out above, the CMA believes that the Parties are not close competitors and each face significant competition from other brands in this market. Accordingly, the CMA found that the Merger does not give rise to

³⁷ The CMA recognises that the competitor set in both markets is similar.

a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of branded NABs.

Conclusion on substantial lessening of competition

181. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of manufacturing and packaging for FC Juices/juice drinks in APET in the UK.

Decision

182. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.

183. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised³⁸ whilst the CMA is considering whether to accept undertakings³⁹ instead of making such a reference. The Parties have until 10 January 2018⁴⁰ to offer an undertaking to the CMA.⁴¹ The CMA will refer the Merger for a phase 2 investigation⁴² if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides⁴³ by 17 January 2018 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

Rachel Merelie
Executive Director, Markets and Mergers
Competition and Markets Authority
3 January 2018

³⁸ Section 33(3)(b) of the Act.

³⁹ Section 73 of the Act.

⁴⁰ Section 73A(1) of the Act.

⁴¹ Section 73(2) of the Act.

⁴² Sections 33(1) and 34ZA(2) of the Act.

⁴³ Section 73A(2) of the Act.

ⁱ The Parties noted that the Target includes also a small immaterial alcoholic piece in Canada and the USA, therefore the reference to “non-alcoholic beverage business” is not entirely accurate