

## **Anticipated acquisition by SDE Group of Innserve Limited**

### **Decision on relevant merger situation and substantial lessening of competition**

**ME/6908/20**

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 3 March 2021. Full text of the decision published on 13 April 2021.

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

#### **SUMMARY**

1. Serviced Dispense Equipment (Holdings) Limited (the **SDE Group**) is jointly controlled by Heineken UK Ltd (**Heineken**) and Carlsberg UK Ltd (**Carlsberg**). The SDE Group outsources the procurement of technical services equipment (**TSE**) and the provision of technical services (**TS**) for the dispensing of draught beer, cider and other beverages to Innserve Limited (**Innserve**) under a contractual agreement (the **SSSC Agreement**). Pursuant to the terms of the SSSC Agreement, a wholly-owned subsidiary of the SDE Group exercised a contractual option to acquire 100% of the shares in Innserve (the **Merger**). The combination of the SDE Group and Innserve is referred to as the **Merged Entity**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of SDE Group and Innserve is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the share of supply test is met. 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 CMA considered the impact of the Merger in the following frames of reference:

- (a) The supply of TS (including the procurement of TSE) for draught beer and cider to the on-trade in Great Britain; and
  - (b) The supply of draught beer and cider to the on-trade in Great Britain.
- 4. However, the CMA did not find it necessary to conclude on the precise product or geographic frame of reference as competition concerns were not identified on any plausible alternative basis.
- 5. In light of the vertical relationship between Innservice's upstream activities in the supply of TS and the downstream activities of Heineken and Carlsberg in the supply of draught beer and cider, the CMA considered whether the Merger could give rise to input or customer foreclosure concerns.

### **Input foreclosure**

- 6. The CMA considered whether there is a realistic prospect that the Merged Entity would foreclose brewers competing with Carlsberg and Heineken by, for example, refusing to supply them with TS or increasing the price and/or worsening the quality of the TS supplied to them.
- 7. In assessing the Merged Entity's ability to pursue an input foreclosure strategy, the CMA found that:
  - (a) In contrast to the submissions of the Parties, the quality of TS supply is an important element in the supply of draught beer and cider to on-trade outlets, which is capable of having a significant impact on customer retention, and therefore could, in principle, provide a means for SDE Group to harm the competitiveness of its rivals; and
  - (b) Innservice does not, however, hold a sufficiently important position in the upstream market for the supply of TS for draught beer and cider for a foreclosure strategy of this type to be effective. The available evidence shows that customers for these services are able to switch to a range of alternative sources of supply (including switching to other TS suppliers and/or bringing the provision of TS in-house). This is consistent with the available evidence in relation to Innservice's existing market position, which shows that it has a comparable share of supply to other suppliers for contestable customers (ie customers other than Heineken and Carlsberg, which account for the vast majority of Innservice's business at present).
- 8. On this basis, the CMA considers that the Merged Entity would not have the ability to foreclose rival brewers from access to TS for draught beer and cider.

9. As the CMA has concluded that the Parties do not have the ability to foreclose TS to rival brewers, the CMA did not consider the incentive to foreclose or effects of any foreclosure strategy.

## **Customer foreclosure**

10. The CMA also considered whether there is a realistic prospect that the Merger would lead to the foreclosure of rival TS suppliers as a result of Carlsberg and Heineken in-sourcing greater volumes of TS, thereby restricting rival TS suppliers' access to key customers and a significant portion of the contestable market.
11. In assessing the Merged Entity's ability to pursue a customer foreclosure strategy, the CMA found that:
  - (a) Scale is important in the supply of TS for the sale of draught beer and cider to the on-trade, with the geographical density of customers leading to economies of scale for TS providers which can, in turn, impact on their competitiveness; and
  - (b) Innserve and Marston's are important customers of TS and account for a substantial portion of purchases, representing [40-50]% of the contestable market for purchases of TS in 2019.
12. Therefore, the CMA believes that Carlsberg and Heineken could (focussing primarily on their size as customers and the importance of scale upstream) have the ability to foreclose rival TS suppliers to the Merged Entity, either through a total or partial foreclosure strategy.
13. In assessing the Merged Entity's incentive to pursue a customer foreclosure strategy, the CMA found that:
  - (a) The supply of TS includes both installation work (which can be more readily planned) and maintenance work (which is typically *ad hoc* in nature). The available evidence shows that it is more efficient for Innserve to sub-contract much of its installation work, and that the Merged Entity's share of purchases in the contestable market is significantly lower when Innserve's purchases of TS for installation work are excluded; and
  - (b) Any reduction in the use of sub-contractors for maintenance work post-Transaction would materially raise the costs of the Merged Entity. In particular, employing more technicians in areas of lower and more uncertain demand for maintenance work would be an expensive and inefficient alternative to continuing to contract with third parties for the provision of these services.

14. On this basis, the CMA considers that the Parties would not have the incentive to foreclose rival TS suppliers from access to its downstream business in a way that would have a significant impact on rivals' volumes.
15. As the CMA has concluded that the Parties do not have the incentive to foreclose rival TS suppliers, the CMA did not consider the effects of any such foreclosure strategy.
16. For the reasons set out above, the CMA believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of vertical effects.
17. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

## ASSESSMENT

### Parties

18. Innserve is a wholly owned subsidiary of Hallriver Limited (**Hallriver**), which is ultimately owned by Nicholas Bryan. Innserve provides TSE and TS for dispensing equipment for draught beverages (mainly beer and cider) to and on behalf of the SDE Group in Great Britain. Innserve also supplies TSE and TS to its sister company Innserve Technical Services Limited (**ITS**). ITS provides TSE and TS to third party brewers. The 2019 turnover of Innserve in the UK was EUR [X] (approximately [X]).<sup>i</sup>
19. The SDE Group is jointly controlled by Heineken UK Limited and Carlsberg UK Limited. The purpose of the SDE Group is to own TSE, whereas responsibility to procure and manage TSE and provide TS on behalf of Heineken and Carlsberg's on-trade customers is fully outsourced by contract to Innserve.<sup>ii</sup>
20. Innserve and ITS are parties to a contract with SDE whereby Innserve provides personnel, facilities and resources (eg IT systems) to ITS with the support of SDE, and SDE receives a [X].
21. Heineken is the UK operation of Heineken N.V., which is a public company listed on Euronext Amsterdam. Heineken's turnover for 2019 was EUR [X] (approximately [X]).<sup>iii</sup>
22. In the UK, Heineken is active in the brewing and supply of beer and cider to the on-trade and off-trade, the wholesale and distribution of third party beverages, and also owns, through Star, a leased and tenanted pubs business (consisting of approximately 2,900 pubs and restaurants).<sup>iv</sup>

23. Carlsberg is the UK operation of Carlsberg A/S, which is a public company listed on the NASDAQ Copenhagen. Its UK turnover for 2019 was DKK [X] (approximately GBP [X]).
24. In the UK, Carlsberg is active in the brewing and supply of beer and cider and the wholesaling of beverages to both off-trade and on-trade retail outlets.
25. On 30 October 2020, Carlsberg completed a joint venture with Marston's PLC, into which both parties placed their existing UK brewing and distribution businesses. The new entity is known as Carlsberg Marston's Brewing Company Limited (**CMBC**), which is jointly controlled by Carlsberg and Marston's PLC. Marston's PLC retained full ownership and control of its pub estate (consisting of 1,365 pubs and restaurants).<sup>v</sup> Marston's has its own TS operation which focuses on installing and maintaining TSE in its own pub estate in order to support its beer supply arrangements, but does not provide TSE and TS to third parties.<sup>vi</sup> In addition to its own in-house technicians, Marston's also utilises third party TSE / TS contractors.
26. Heineken, Carlsberg and Innserve are collectively referred to as the **Parties**.

## Transaction and Rationale

27. On 8 June 2020, the SDE Group exercised a contractual option (the **Option**) set out in the SSSC Agreement to acquire 100% of the shares in Innserve.<sup>1</sup>
28. The available evidence shows that Carlsberg and Heineken exercised the Option to acquire Innserve because of Mr Bryan's desire to step away from and to cease owning and operating Innserve in order to focus on interests outside the TS sector.<sup>2</sup> The SSSC Agreement is due to expire in March 2021 and Carlsberg and Heineken have received notice from Mr Bryan that he does not wish to extend.<sup>3</sup>
29. The Parties submitted that ITS does not form part of the Target for the Merger, and that the future of ITS is uncertain given Mr Bryan's desire to step away from Innserve entirely. The Parties submitted that there were a number of potential outcomes for ITS, such as a sale to a third party, partnerships with other TS providers, or exit.<sup>4</sup>

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<sup>1</sup> Hallriver currently holds a [X] shareholding in the SDE Group, this is transferring back to Heineken/CMBC as part of the Merger. The Option price shall be determined in accordance with the terms of the SSSC Agreement but shall not exceed GBP [X].

<sup>2</sup> Draft Form CO, paragraph 18. Mr Bryan informed Carlsberg and Heineken of his intention by email on 26 July 2019.

<sup>3</sup> Parties' response to CMA RFI 3, question 5 (in particular Annex 5.7)

<sup>4</sup> Draft Form CO, paragraph 147 and 148.

30. The Parties subsequently submitted that, following the Merger, ITS, which owns no assets on its own, such as TSE or technicians, will have the option to utilise Innserve's services to continue to support its existing contracts with third party customers for an agreed period of 12 months from the completion of the Option.<sup>5</sup> All of Innserve's current customers have been contacted by HUK and CUK to explain this position.<sup>6</sup> Accordingly, while ITS does not form part of the package of assets being acquired by the SDE Group, the CMA considers that ITS is unlikely to be an independent competitor in the supply of TS post-Merger and that the current competitive capabilities of ITS should be attributed to the Merged Entity for the purposes of the competition analysis of the Merger.

## Jurisdiction

31. Each of the SDE Group and Innserve is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
32. The Parties submitted that they have a minimal overlap in the supply of TS, with a combined share of supply of [20-30]% (with an increment of [5-10]%). The CMA therefore believes that the share of supply test in section 23 of the Act is met.
33. 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.
34. The Merger meets the thresholds under Council Regulation (EC) 139/2004 (the **EC Merger Regulation**) for review by the European Commission. The Parties submitted a reasoned submission to the European Commission on 16 November 2020 requesting referral to the CMA under Article 4(4) of the EC Merger Regulation. On 7 December 2020, the CMA informed the European Commission that it agreed with the referral request and considered the Merger capable of being reviewed in the United Kingdom under the Act. On 21 December 2020, the European Commission announced its decision to refer the Merger to the CMA for review.
35. The preliminary assessment period for consideration of the Merger under section 34A(2) of the Act started on 22 December 2020 and the statutory 45

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<sup>5</sup> The Parties' response to the CMA first RFI on 28 October 2020, question 9 and 10.

<sup>6</sup> The Parties' response to the CMA first RFI on 28 October 2020, question 10. This period was initially 6 months but was subsequently extended to 12 months.

European Commission working day deadline for a decision is therefore 3 March 2021.

## Counterfactual

36. 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. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.<sup>7</sup>
37. The Parties submitted that in the event the Option had not been exercised, [REDACTED], ie the pre-existing competitive situation would have prevailed in the short term. However, in the longer-term, the continuation of supply by InnsERVE under Mr Bryan's ownership would not have been a viable option.<sup>8</sup> The Parties therefore submitted that the only realistic possibilities are:
- (a) Early termination of the SDE JV, with both Heineken and CMBC bringing their respective TS functions in-house; or
  - (b) A continued outsourcing arrangement with InnsERVE under new ownership.
38. The Parties' internal documents indicate that they considered several possible alternative scenarios to the Merger:<sup>9</sup>
- (a) Heineken's internal documents indicated a preference for [REDACTED].<sup>10</sup>
  - (b) Carlsberg's internal documents indicate the initial preference to [REDACTED].<sup>11</sup>
  - (c) Carlsberg's internal documents suggest that once it became clear that [REDACTED] was not an option, there was a preference for [REDACTED].<sup>12</sup> [REDACTED].<sup>13</sup>

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<sup>7</sup> *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

<sup>8</sup> Parties' response to the Issues Letter.

<sup>9</sup> Annex 5.15A [REDACTED].

<sup>10</sup> Annex 5.14B [REDACTED]; Annex 5.16 [REDACTED]; Annex 5.15A [REDACTED].

<sup>11</sup> [REDACTED]. Annex 5.15B [REDACTED].

<sup>12</sup> Carlsberg Annex 009 to Form CO; Carlsberg Annex 008 to Form CO.

<sup>13</sup> Annex 5.14B [REDACTED]; Parties' response to CMA RFI 3 (paragraphs 50-52).

39. In light of the above evidence, the CMA considers that there is no realistic prospect of Mr Bryan continuing to operate Innserve.
40. The CMA also considers that the counterfactual scenario in which the SDE Group would be dissolved and TS and TSE would be insourced would involve extensive negotiations between the Parties (given the various legal, organisational and financial implications of these arrangements) in circumstances in which the available evidence indicates that they hold materially different positions in relation to the preferred outcome of these negotiations.<sup>14</sup> For these reasons, the CMA does not consider this to be a realistic counterfactual scenario.
41. On the basis of the available evidence, the CMA considers that there is a realistic prospect of a counterfactual in which Innserve's independence from Carlsberg and Heineken is preserved, through a sale to an independent third party.
42. In conclusion, the CMA considers that given the contractual complexities involved and the varying commercial preferences, neither, the dissolution of the SDE Group nor Mr Bryan continuing Innserve in the long term meet the realistic prospect threshold. In any case, given the nature of the theories of harm set out below,<sup>15</sup> and in line with its Guidance,<sup>16</sup> the counterfactual scenario in which Innserve's independence from Carlsberg and Heineken is preserved by a sale to a third party is the most competitive realistic counterfactual scenario.

## Background

### TSE

43. TSE allows for draught beer and cider to be stored, cooled and dispensed to consumers in an on-trade outlet, eg a bar or a pub. The Parties submitted that this means that demand for the supply of TSE is predominately driven by the sale of beer and cider brands through on-trade outlets.<sup>17</sup>

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<sup>14</sup> For instance, Heineken internal documents noted [REDACTED]. Heineken would also have to [REDACTED]. See, for example, Annex 5.14B [REDACTED]; Annex 5.15A [REDACTED]. See also Annex 5.16 [REDACTED]. The Parties would also need to maintain the status quo for approximately 18 months (as mentioned in paragraph 37 above) until they found an alternative option.

Carlsberg identified organizational implications such as [REDACTED]. See, [REDACTED].

<sup>15</sup> The two vertical theories of harm set out below rely on the Parties being vertically integrated and the more competitive counterfactual would be to compare this situation against a scenario in which that vertical integration would not have taken place.

<sup>16</sup> [Merger Assessment Guidelines](#), paragraphs 4.3.1 to 4.3.7

<sup>17</sup> Form RS, paragraph 96.



44. TSE can be (i) **branded TSE**, whereby it is specific to the particular supplier (normally the font taps on top of a bar); (ii) **shared generic TSE**, whereby all suppliers utilise it to move beer and cider keg products to glass (eg remote cellar cooling equipment); or (iii) **non-shared generic TSE**, whereby the equipment is used to dispense a single beer or cider only (typically a pump or line set connected to a keg).<sup>18</sup>
45. Most often, brewers supply TSE to on-trade outlets in a bundle with draught beer and cider. By deciding on the beer and cider supplier(s), an on-trade outlet indirectly chooses the TSE it wants and can trade-off its preferences for TSE with its beer and cider purchases. The brewer with the most cooled keg lines on the bar is the Lead Brewer (and hence the owner and provider of the shared generic TSE);<sup>19</sup> the other brewers that supply to the outlet provide the relevant branded and non-shared generic TSE.
46. A small proportion of on-trade outlets procure TSE directly, either from TSE manufacturers, third party TSE suppliers or from the current owners of the TSE installed in an outlet.

## **TS**

47. TS is the on-site technical maintenance (excluding weekly cleaning), repair, installation and replacement of TSE at on-trade outlets. TS is typically provided to on-trade outlets by each brewer for their own branded and non-shared generic TSE and by the Lead Brewer for the shared generic TSE at an outlet.
48. As with TSE, brewers typically supply TS to on-trade outlets in a bundle with draught beer and cider. This means that an on-trade outlet indirectly chooses the TS supplier it wants and can trade-off its preferences for TS with its beer and cider purchases. Exceptionally, on-trade outlets choose to unbundle TS from the supply of draught beer and cider and procure TS directly from independent TS suppliers (ie those that are not already integrated with a brewer).

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<sup>18</sup> There are some small differences in the TSE used in the dispense of cask beer (which is mainly ale) as it does not need to be cooled and is typically served at 'cellar temperature' through a hand-pull pump at the bar. This means that, unlike keg products (such as the majority of draught beer and cider brands), ale brands do not typically need their casks to be connected to the shared generic TSE in an on-trade outlet.

<sup>19</sup> The 'Lead Brewer' will typically take ownership of shared generic TSE in an on-trade outlet and will be responsible for providing TS for this TSE. Lead Brewers will allow other brewers in an on-trade outlet access to its shared generic TSE, usually in return for a one-off or monthly connection charge. A majority of brewers also adhere to the 'Must Buy Must Sell' concept, which was introduced by the five largest UK brewers in the 1990s. When the Lead Brewer changes, the incoming Lead Brewer must pay the outgoing Lead Brewer a fair value for the transfer of ownership of that outlet's existing shared generic TSE (Annex 8.1 - Lead Brewer Concept.docx, paragraph 4). This means that shared generic TSE does not have to be replaced whenever the Lead Brewer changes and prevents the associated disruption to the operations of an on-trade outlet.

49. The choice of TS supply by brewers is determined by their needs and preferences. The evidence available to the CMA indicates that brewers provide TS to on-trade outlets in different ways:
- (a) Providing TS using their own technicians (ie providing TS in-house), which is typically supplemented by sub-contracting arrangements with independent suppliers. This model for TS provision is used by [redacted] and [redacted].
  - (b) Out-sourcing or sub-contracting TS to a number of different suppliers (ie 'multi-sourcing' TS), with separate contracts by region and/or by the type of TS activity (ie maintenance or installation work). This model for TS provision is used by [redacted].
  - (c) Fully out-sourcing TS to an independent supplier which is responsible for providing TS for the brewer's installed based of TSE. This model for TS provision is used by [redacted], Carlsberg and Heineken.
50. Some brewers, such as Marston's, make use of a hybrid model with some in-house technicians and outsourced TS in specific regions to one or more contractors.<sup>vii</sup>
51. When outsourcing and/or sub-contracting TS to independent suppliers, some brewers prefer to have one TS supplier to serve their entire requirements across Great Britain (as that helps in ensuring consistency in standard of service and ease of doing business), while others may choose to multi-source based on the particular strengths of independent suppliers, ie having a good reputation for high levels of service in certain regions or being focused on a particular type of TS work.
52. As with brewers, independent TS suppliers may also supplement the work carried out by their own technicians by making use of sub-contracting for specific geographic areas or type of work, eg Innserve sub-contracts a significant proportion of its installation work.
53. The CMA notes therefore that contracts for TS may be national or regional. It is quite common for smaller TS suppliers to service regional contracts, whether these contracts are with brewers or with other independent TS suppliers.

### ***Supply of draught beer and cider to the on-trade***

54. TSE and TS are typically procured by on-trade outlets as part of a bundle with draught beer or cider from brewers.

55. The two largest suppliers of draught beer and cider to the on-trade (Heineken and Molson Coors) accounted for [40-50]% of sales by volume in 2019, with the next eight largest suppliers (Carlsberg, Budweiser, Diageo, Asahi, C&C Group, Marston's, Greene King and Thatchers) accounting for [30-40]% of sales by volume. The CMA notes that these shares of supply may indicate that the market is concentrated, particularly given the position of the two largest brewers.
56. However, the CMA has found that smaller brewers also play an important role in competitive dynamics in the supply of draught beer and cider to the on-trade. The Parties' internal documents indicate that there has been a wider proliferation of brands in recent years than was the case 15-20 years ago, with this change predominantly driven by on-trade outlets procuring brands from smaller brewers to offer a greater choice and range of brands to consumers.<sup>20</sup> This is consistent with the views of third parties, which told the CMA that offering a wide range of beer and cider brands to consumers is important to on-trade outlets and is a factor in their choice of draught beer or cider suppliers.
57. The CMA considers that on-trade outlets are likely to continue to procure draught beer and cider brands from a wider selection of brewers to strengthen their competitive offering to consumers.

## **Frame of reference**

58. 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 it is recognised that 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.<sup>21</sup>

## **Product scope**

59. The Parties submitted that the relevant markets should be (i) the distribution and supply of draught beer (including all ale, lager and cider) and (ii) the

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<sup>20</sup> Annex 12.7B [§].

<sup>21</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

supply of TS for draught beer, cider and draught beverages (consisting of wine, premixed cocktails and soft drinks).<sup>22</sup>

60. However, the Parties recognised that the CMA and its predecessors had previously analysed the brewing and distribution of draught beer, TSE and TS markets on the basis of the following product markets: the distribution and supply of draught beer to the on-trade; the procurement of TSE for draught beer; and the supply of TS for draught beer.<sup>23</sup>

#### *The supply of TSE and TS*

61. The Competition Commission (**CC**) previously considered that the supply of TSE and TS for draught beer (where beer was defined to include ale, lager and cider) are separate but interdependent markets.<sup>24</sup>
62. The CMA considers that some TS suppliers procure some types of TSE on behalf of their customers in addition to supplying TS, whereas others offer only TS services. This suggests that there may not be supply-side substitutability for all market participants.
63. However, bearing in mind the interdependence of TS and TSE, the CMA considers that, for the purposes of its competitive assessment in this case, it is more appropriate to consider the two segments together. Therefore, the CMA refers to the supply of TS, for the purposes of this decision, as including both the supply of TS and the procurement of TSE for the purposes of installing and replacing this in on-trade outlets, except stated otherwise.
64. The CMA has considered whether it is appropriate to widen the product frame of reference to include:
- (a) the supply of TS for other draught beverages; and
  - (b) the supply of TS for draught beer and cider provided by brewers' in-house teams.

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<sup>22</sup> Draft Form CO, paragraph 129.

<sup>23</sup> Draft Form CO, paragraph 129. Note: These frames of reference are based on the Competition Commission's assessment of the acquisition by SDE of the Technical Services Function of Coors, 2005 (**Coors Decision**), discussed also in footnote 24.

<sup>24</sup> The CC noted that competition in both TSE and TS was currently limited by several features of the market: the bundling of prices of TSE and TS with beer; the interdependency of TSE and TS coupled with brewer ownership and control of TSE. See paragraphs 10 and 4.21 of the decision.

*Possible widening of the frame of reference to include the supply of TS for other draught beverages*

65. The Parties submitted that an appropriate frame of reference would consider both TS for draught beer and cider as well as soft drinks and other draught beverages (ie wine and cocktails).<sup>25</sup> This is because, while not interchangeable from a demand-side perspective, most suppliers provide TS for both draught beer and cider as well as for soft drinks and other draught beverages and can switch easily between the two.
66. The CMA understands that the technical expertise required for servicing soft drinks equipment is somewhat different than for beer and cider equipment such that it would be costly for a TS supplier for soft drinks to switch to draught beer and cider. Third parties said that, while the skills required were not dissimilar and could be transferable, the technical expertise required to install and maintain the two types of TSE are different as the functionality of the TSE is different (due to soft drinks being mixed at the point of dispense whereas beer, cider and other draught beverages are pre-mixed products). It is therefore likely that a supplier of TS for soft drinks would incur some additional costs when entering the market for the supply of TS for draught beer and cider (such as providing specialist training to its technicians).
67. In any event, the CMA considers that it is not necessary to conclude on widening the frame of reference to include TS for draught beverages as no competition concerns arise on either basis.

*Possible widening of the frame of reference to include the supply of TS for draught beer by brewers' own in-house teams*

68. The Parties consider that brewers and other TS customers can and do switch between in-house and outsourced or subcontracted TS suppliers with minimal disruption or expense in a timescale of 6-8 months.<sup>26</sup> The Parties noted the recent decision of Budweiser to move its TS provision in-house (ie self-supply TS) as an example of this.<sup>27</sup>
69. The CMA considers that not all brewers could choose to self-supply TS at short notice without incurring substantial sunk costs. Third parties cast doubt on the ease with which they could switch to in-house TS provision in a timely manner without substantial cost or an initial reduction in quality of TS. Further, the CMA considers that the Parties' example of Budweiser is not

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<sup>25</sup> Draft Form CO, paragraphs 113-115 and 122-126.

<sup>26</sup> Draft Form CO, paragraph 113.

<sup>27</sup> Draft Form CO, paragraph 206.

representative of the options available to all brewers as Budweiser acquired the TS operations of Mitie (its former outsourced supplier of TS) rather than building its own in-house TS operations. This evidence indicates that it is unlikely that a brewer could feasibly switch entirely to an in-house solution at short notice without incurring substantial sunk costs.

70. While the evidence does not support widening the frame of reference to include the supply of TS for draught beer and cider by brewers' own in-house teams, the CMA will consider ability of brewers to bring TS provision in-house in more detail in the competitive assessment as a potential out-of-market constraint.

#### *The supply of draught beer and cider to the on-trade*

71. Previously the CMA (and its predecessors) found separate markets for the brewing of each of beer and cider. In relation to beer, product segmentations for: (i) lager (within lager: (a) standard lager, and (b) premium lager), and (ii) ale (within ale: (a) standard ale, and (b) premium ale). The CMA has left open whether alternative segments are appropriate (eg craft beer, world beer, etc). The supply of each of these to the on-trade and off-trade has been considered separately.<sup>28</sup>
72. In this case, the CMA considers that it is not necessary to segment the market further but will consider the impact of the Merger on narrower segments as appropriate in the competitive assessment.

#### **Geographic scope**

73. In relation to the supply of TS (excluding TSE), the Parties submitted that in line with previous precedents,<sup>29</sup> the geographic scope of the relevant market is the supply of TS in Great Britain (as they are not active in Northern Ireland). In particular, the Parties note that most major TS suppliers operate nationally or can provide national coverage by using regional sub-contractors to service on-trade outlets where they do not have a local presence.
74. The evidence the CMA has gathered from brewers to date indicates that there are some regional aspects to competition in TS. For example, TS suppliers need to be relatively close to the on-trade outlets to meet service level agreements (ie minimum call-out times) and have sufficient resources (either in-house or by using a network of suppliers) in these areas to meet the

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<sup>28</sup> See for example Carlsberg A/S/Marston's PLC (2020), Heineken/Diageo (2016), Heineken/Punch (2017), AB InBev/Modelo (2012).

<sup>29</sup> The Parties referred to the Coors Decision; Draft Form CO, paragraphs 127-128.

demand for TS from on-trade outlets. However, the CMA has found that brewers do not vary the provision of TS to their on-trade customers based on the geographic location of their outlets. In addition, two brewers told the CMA that ensuring a uniform level of service across on-trade outlets in different regions is an important factor in their choice of TS model and choice of TS suppliers.

75. In previous cases, the CMA (and its predecessors) found that the appropriate geographic frame of reference for the brewing of beer and cider (and all relevant sub-segments, in both the on-trade and off-trade) was the UK or, at its narrowest, GB and Northern Ireland separately.<sup>30</sup>
76. In this case, the CMA has received no evidence to point to a different geographic frame of reference for the brewing and distribution of beer and cider.

### ***Conclusion on frame of reference***

77. For the reasons set out above, and noting that the differences between Great Britain and Northern Ireland, the CMA has considered in more detail the impact of the Merger in the following frames of reference:
  - (a) The supply of TS for draught beer and cider to the on-trade in Great Britain; and
  - (b) The supply of draught beer and cider to the on-trade in Great Britain.
78. However, the CMA does not find it necessary to conclude on the precise product or geographic frame of reference as it has identified no competition concerns on any plausible basis (for the reasons set out in detail below).

## **Competitive assessment**

### ***Vertical effects***

79. Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between an upstream supplier and a downstream customer or a downstream competitor of the supplier's customers.

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<sup>30</sup> Carlsberg A/S/Marston's (2020); Heineken/Diageo (2016); Greene King/Spirit (2014); C&C Group/Constellation (2010).

80. Vertical mergers can weaken rivalry in certain circumstances, for example when they result in foreclosure of the merged firm's competitors. The CMA only regards such foreclosure to be anticompetitive where it results in an SLC in the foreclosed market(s), not merely where it disadvantages one or more competitors.<sup>31</sup>
81. The CMA has considered two vertical theories of harm in relation to the proposed Merger:<sup>32</sup>
- (a) Input foreclosure, ie if the Merged Entity would foreclose brewers competing with Carlsberg and Heineken by refusing to supply them with TS or increasing the price and/or worsening the quality of the TS supplied to them; and
  - (b) Customer foreclosure, ie the foreclosure of rival TS suppliers as a result of Carlsberg and Heineken in-sourcing greater volumes of TS, thereby restricting rival TS suppliers' access to key customers and a significant portion of the contestable market.

#### ***Input foreclosure of rival brewers***

82. The CMA has considered whether the proposed Merger may lead to the foreclosure of brewers which compete with Carlsberg and Heineken as a result of the Merged Entity refusing to supply them with TS, or increasing the price and/or worsening the quality of the TS supplied to them. This would raise rival brewers' costs and harm their ability to provide a competitive constraint on Carlsberg and Heineken in the supply of beer and cider to the on-trade.

#### ***Ability to foreclose brewers***

83. The CMA has considered whether the Merged Entity would, for example, have the ability to implement one of the following foreclosure strategies:
- (a) Total foreclosure, such as refusing or restricting the supply of TS to rival brewers post-Merger; and/or

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<sup>31</sup> In relation to these theories of harm, 'foreclosure' means either foreclosure of a rival or to substantially competitively weaken a rival.

<sup>32</sup> A number of third parties told the CMA that, as a result of the Merger, Carlsberg and Heineken could restrict the routes to market available to rival brewers through their control of shared generic TSE in on-trade outlets in which they are Lead Brewer, either by providing incompatible equipment or charging high fees for accessing their TSE. However, the CMA notes that both Carlsberg and Heineken individually could have already pursued this strategy before the Merger and therefore the CMA does not consider this to be a competition concern which is specific to this Merger.



(b) Partial foreclosure, such as increasing prices, reducing quality or otherwise lowering levels of service (eg call-out times) of TS to rival brewers post-Merger.

84. Several brewers told the CMA that, in addition to the Merged Entity being able to preference TS call-outs for on-trade outlets which sell Carlsberg and Heineken's brands, Innserve's technicians could be incentivised to promote Carlsberg and Heineken's brands to on-trade customers when attending call-outs to resolve issues with rival brewers' TSE.<sup>33</sup>
85. Several brewers told the CMA that the Merged Entity would have access to commercially sensitive data (such as on the volume of their sales and the location of high value on-trade customers), which could provide Carlsberg and Heineken with an advantage when competing with these brewers to supply draught beer and cider to on-trade outlets. The CMA has discussed this below at paragraphs 92 - 96 in further detail.
86. When assessing whether the Merged Entity would have the ability to foreclose rival brewers, the CMA considered: the importance of TS for the sale of draught beer and cider to the on-trade; the Parties' access to commercially sensitive information; and the market power of Innserve. These are discussed in turn below.

*Importance of TS for the sale of draught beer and cider*

87. The Parties submitted that on-trade customers do not consider TS provision to be an important factor. On-trade outlets select the brands that they wish to purchase and then choose the supplier of the brand, irrespective of the TS supplier involved and do not switch brands in response to poor TS supply.<sup>34</sup> According to the Parties, TS supply is not a differentiator for brewers when competing to supply retail customers, but merely a hygiene factor. Retail customers need TS supply to be provided to a minimum competent standard,

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<sup>33</sup> As the CMA found that the Merged Entity lacks the ability to foreclose rival brewers (see below paragraph 107), the CMA did not find it necessary to conclude on this point.

<sup>34</sup> Paragraph 21, Parties' response to the Issues Letter. In this regard, the Parties submitted that in 2019 and 2020, Heineken had approximately [§] customers using standard dispense systems equivalent to those supplied to ITS brewer customers. Of these customers, only [§] raised complaints in this duration and only [§] stopped dealing with Heineken for reasons other than outlet closing. Carlsberg received [§] complaints in relation to TS in 2019, with only [§] ceasing to trade with Carlsberg (paragraph 32, Parties' response to the Issues Letter). The Parties stated that this is in the context of [§] total maintenance and installation visits in 2019.

The CMA has attached limited weight to this submission, as it was not clear how the data was collected and very limited detail was provided on the nature and severity of the complaints. The CMA also notes that a small number of complaints is consistent with Innserve providing a good quality of service pre-Merger and does not indicate what the impact of a reduction in service quality post-Merger might be.

ie the beer taps should be functional and retail customers are not particularly concerned with who the TS supplier is.<sup>35</sup>

88. The CMA considers that the evidence from third parties does not support the Parties' submissions. For instance:
- (a) The majority of on-trade outlets responding to the CMA's merger investigation said that the quality of overall services is, together with price and quality of beer and cider, an important or very important factor in their choice of draught beer supplier; and
  - (b) The vast majority of brewers that responded to the CMA's investigation said that, together with the price of beer, quality of beer and of overall services, the quality of TS is an important or very important factor in their competitive offering to on-trade customers. The majority of brewers told the CMA that on-trade customers will switch to another brewer if the quality of TS it provides leads to a line being off for a long period of time or if it is impacting the quality of the pulled pint for consumers.
89. By contrast, only a small number of brewers and on-trade outlets that responded to the CMA's investigation said that the price of TS is an important or very important factor in their competitive offering or choice of supplier. The CMA considers that this is because TS is typically procured as part of a bundle with draught beer or cider from brewers and only accounts for a small proportion of the price paid by on-trade outlets for draught beer or cider (typically less than 10%).<sup>36</sup>
90. The Parties' internal documents indicate that they routinely monitor the TS element of their competitive offering in surveys of their on-trade customers and benchmark their TS performance against other brewers.<sup>37</sup> Some documents indicate that [REDACTED].<sup>38</sup>
91. On the basis of the evidence summarised above, the CMA considers that the quality of TS supply is an important element of the supply of draught beer and cider to on-trade outlets, in particular because it can have an impact on customer retention.

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<sup>35</sup> Paragraph 26, Parties' response to the Issues Letter.

<sup>36</sup> [REDACTED].

<sup>37</sup> Annex 24.1 [REDACTED].

<sup>38</sup> [REDACTED] Annex 24.1 [REDACTED] Annex 5.16 [REDACTED].

### *Access to Commercially Sensitive Information*

92. As noted in paragraph 84, brewers have raised concerns that the Merged Entity would have access to commercially sensitive data that could provide Carlsberg and Heineken with an advantage when competing with these brewers to supply draught beer and cider to on-trade outlets. This could, in particular, help the Parties to better target a foreclosure strategy by raising the costs of specific rivals.
93. The Parties submitted, in this regard, that:
- (a) Carlsberg and Heineken already hold significant information on the third party brands that have taps at outlets using Carlsberg or Heineken's TSE and that this information is ringfenced from the commercial teams;<sup>39</sup>
  - (b) The SDE Shareholders Agreement contains provisions ensuring that Carlsberg and Heineken do not have access to each others' confidential information and Carlsberg and Heineken directors are not allowed to be present in any SDE board meeting where the development plans for the brands of any other brewer are discussed;<sup>40</sup> and
  - (c) Customer service agreements between the SDE Group and each of Carlsberg and Heineken provide for the confidential treatment of customer data. The same protocol will be applied by the Merged Entity in relation to ITS brewer customers.<sup>41</sup>
94. The Parties submitted that post-Merger they will continue to follow similar safeguards and use measures such as limiting information flow between SDE Group and the Parties; ensuring that any relevant materials are appropriately anonymised/aggregated; and requiring relevant employees to sign confidentiality agreements.<sup>42</sup> The Parties also submitted that using commercially sensitive information or coordinating to implement a foreclosure strategy would go beyond the scope of the joint venture and could amount to a breach of Chapter I of the Competition Act 1998 (**CA98**).<sup>43</sup>
95. While the prohibitions in Chapters I and II of CA98 would limit some forms of information-sharing and coordination post-Merger, the CMA's guidelines indicate that this does not preclude that a foreclosure strategy could be based on such conduct.<sup>44</sup> In any case, the CMA notes that there may be partial or

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<sup>39</sup> Paragraph 11, Parties' response to the Issues Letter.

<sup>40</sup> Paragraph 13, Parties' response to the Issues Letter.

<sup>41</sup> Paragraph 14, Parties' response to the Issues Letter.

<sup>42</sup> Paragraph 15, Parties' response to the Issues Letter.

<sup>43</sup> Paragraph 16, Parties' response to the Issues Letter.

<sup>44</sup> *Merger Assessment Guidelines*, paragraph 5.6.14.

total foreclosure strategies available to the Merged Entity that are unlikely to violate these prohibitions.

96. The Parties have not submitted any supporting evidence to demonstrate how the measures listed in paragraph 93 are implemented in practice and how they will be implemented post-Merger. In any case, the CMA considers that contractual arrangements are unlikely to completely remove the ability of a firm to foreclose its rivals. Contracts can be renegotiated or terminated and breaches waived. The relative bargaining power, and broader commercial considerations, of each party to an agreement will affect their incentive to agree to changes and decisions on contractual enforcement.

*Market power of Innserve*

97. In assessing the market power of Innserve, the CMA considered: (i) independent TS suppliers' shares of supply for draught beer and cider to the on-trade; and (ii) the alternatives that are available to brewers, including whether they could switch from Innserve to other TS suppliers or could bring TS provision in-house (ie self-supply TS).
98. The Parties submitted that (even if Innserve ceased to supply TS to rival brewers or if third parties no longer wish to contract with Innserve post-Merger) the Merged Entity would not have the ability to foreclose rival brewers from the supply of TS.<sup>45</sup> This is because:
- (a) There are a number of credible and capable alternative TS suppliers active in the market which are available to rival brewers (either on a fully outsourced basis or through the use of sub-contractors to supplement their own in-house provision).<sup>46</sup>
  - (b) Brewers which currently rely on Innserve could bring more of their TS provision in-house rather than switch to an alternative TS supplier post-Merger.

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<sup>45</sup> Draft Form CO, paragraph 149.

<sup>46</sup> Draft Form CO, paragraphs 153 – 157.

- *Shares of supply*

99. The CMA has found that other independent TS suppliers are much smaller than Innserve by revenue (when including its revenue from SDE Group and ITS customers). This is shown in Table 1 below.<sup>47</sup>

**Table 1: Revenue from TS for draught beer and cider (2019)**

Independent TS suppliers	Revenue (£m)	% share
<b>Innserve</b>	[REDACTED]	<b>[40-50]</b>
Three Nations*	[REDACTED]	[20-30]
T&J Installations	[REDACTED]	[5-10]
City Dispense	[REDACTED]	[5-10]
Atlantic	[REDACTED]	[5-10]
Morepour	[REDACTED]	[0-5]
All Chilled**	[REDACTED]	[0-5]
Premier Installation	[REDACTED]	[0-5]
IDS Services	[REDACTED]	[0-5]
A-Tek	[REDACTED]	[0-5]
Woodall TS	[REDACTED]	[0-5]

Source: See responses to CMA TSE/TS supplier questionnaire; 'Appendix 5 - Confidential.xlsx' (as submitted by Innserve).

Note: The revenue figures shown in this table exclude independent TS suppliers' spend on sub-contracted services.

\* [REDACTED]

\*\* [REDACTED]

100. However, the CMA has found that [80-90]% of Innserve's revenue in 2019 came from its non-contestable and long-term out-sourcing arrangement with the SDE Group. When assessing independent TS suppliers' shares of contestable supply (ie where suppliers compete for TS customers), some independent TS suppliers are larger than Innserve (as shown in Table 2 below). This indicates that other suppliers are as effective as Innserve, or more successful, in winning third party contracts, despite Innserve's overall greater size and scale.

<sup>47</sup> The CMA notes that, as the revenue estimates are from 2019 and therefore include purchases of TS by Marston's which may be supplied by the Merged Entity post-Merger (see paragraphs 121 – 123 below), other independent TS suppliers are likely to account for an even smaller share of revenue than shown in Table 1 and Table 2.

**Table 2: Revenue from TS for draught beer and cider to contestable customers (2019)**

Independent TS suppliers	Revenue (£m)	% share
Three Nations*	[REDACTED]	[30-40]
T&J Installations	[REDACTED]	[10-15]
City Dispense	[REDACTED]	[10-15]
Atlantic	[REDACTED]	[10-15]
<b>Innserve</b>	[REDACTED]	<b>[10-15]</b>
Morepour	[REDACTED]	[5-10]
All Chilled**	[REDACTED]	[0-5]
Premier Installation	[REDACTED]	[0-5]
IDS Services	[REDACTED]	[0-5]
A-Tek	[REDACTED]	[0-5]
Woodall TS	[REDACTED]	[0-5]

Source: See responses to CMA TSE/TS supplier questionnaire; 'Appendix 5 - Confidential.xlsx' (as submitted by Innserve).

Note: The revenue figures shown in this table exclude independent TS suppliers' spend on sub-contracted services.

\* [REDACTED]  
 \*\* [REDACTED]

- *Alternatives to Innserve*

101. A number of brewers which currently rely upon Innserve/ITS cast doubt on their ability to switch to a credible and capable alternative TS supplier. In particular, those brewers told the CMA that the alternative independent suppliers currently available to them do not have the same resources, IT systems, level of service and/or geographic coverage as Innserve, in particular in regions with a lower density of on-trade outlets (eg the North of Scotland or the South West of England).
102. On the other hand, TS suppliers contacted by the CMA (including both brewers with their own in-house TS provision and independent TS suppliers) indicated that there are a number of close or very close competitors to Innserve which provide TS across Great Britain. These alternatives include T&J Installations (which has recently been acquired by the Celli Group, a manufacturer of TSE), Three Nations, City Dispense and Atlantic.<sup>48</sup> In addition to these larger independent TS suppliers, a small number of other local and regional suppliers were considered to be close or very close competitors to Innserve by the TS suppliers contacted by the CMA.
103. The CMA found that the larger independent suppliers each have a number of sizeable customers of TS for draught beer and cider (including Innserve, Marston's and other smaller brewers) and frequently compete with Innserve in tenders. In particular, the Parties submitted evidence that Innserve was unsuccessful in its bid to win [REDACTED].

<sup>48</sup> The CMA has found that the geographic coverage of these four suppliers differ: [REDACTED] and [REDACTED] only serve England and Wales, whereas [REDACTED] and [REDACTED] provide TS to customers in each region of Great Britain.

104. Further, as set out in paragraphs 49 – 51, brewers use a number of different models to provide TS to their on-trade customers based on their individual needs and preferences. The CMA has found that brewers can and do switch between these models or between TS suppliers. For example:

(a) [REDACTED].

(b) Budweiser recently brought its TS provision in-house when it acquired the TS operations of Mitie (its former outsourced supplier of TS) in 2020. [REDACTED].

(c) [REDACTED].

105. While a small number of brewers told the CMA that the self-supply of TS is not an alternative to Innserve because of the material costs and challenges associated with bringing TS provision in-house (particularly in areas where they have a low geographic density of on-trade customers), the CMA has found that other similar sized brewers provide TS to their customers using in-house technicians. These brewers typically supplement their own in-house provision with the use of independent TS suppliers (either on an outsourced or sub-contracted basis) in regions where they have fewer on-trade customers, such as the North of Scotland or the South West of England. The self-supply of TS by brewers could therefore be an alternative to Innserve for certain categories of brewers and in particular those with regions of a sufficient geographic density of on-trade customers.

106. The CMA considers that the evidence of actual and potential switching between TS models or TS suppliers by brewers indicates that the costs of doing so are not prohibitive, although these costs may be higher where there has been a long-term contractual relationship or where there is a high degree of integration between the IT systems of a brewer and a supplier.

- *Conclusion on the market power of Innserve*

107. Based on the evidence set out above, the CMA believes that Innserve does not hold a sufficiently important position in the upstream market for the supply of TS for draught beer and cider for a foreclosure strategy of this type to be effective. In particular, the CMA has found that:

(a) Innserve has a comparable share of supply to other suppliers for contestable customers (ie customers other than Heineken and Carlsberg, which account for the vast majority of Innserve's business at present); and

(b) There a number of alternative sources of supply of TS for draught beer and cider, including switching to other TS suppliers and/or bringing the provision of TS in-house.

### *Conclusion on ability to foreclose brewers*

108. On the basis of the above evidence, the CMA believes that the Merged Entity would not have the ability to foreclose rival brewers to sell their products to the on-trade market either through a total or partial foreclosure strategy.

### *Conclusion on input foreclosure of TS to rival brewers*

109. As the CMA has concluded that the Parties do not have the ability to foreclose TS to rival brewers, the CMA has not considered the incentive of the Parties to foreclose TS to rival brewers.
110. The Parties submitted that any foreclosure strategy would only have a limited effect on competition as only a few small and medium sized brewers would be affected, whereas Carlsberg and Heineken compete more closely with other larger brewers. While the CMA did not need to consider the effects of foreclosing TS to rival brewers, as it did not find the Parties had the ability to do so, the CMA notes (as set out in paragraph 56) that smaller brewers play an important role in the competitive dynamics of the supply of draught beer and cider to the on-trade, in particular by offering choice and range of brands valued by consumers.
111. For the reasons set out above, the CMA does not believe that the Merger gives rise to a realistic prospect of an SLC as a result of vertical effects in relation to the supply of TS for draught beer and cider to the on-trade.

### ***Customer foreclosure of rival TS suppliers***

112. The CMA considered whether the Merger may lead to the foreclosure of rival TS suppliers as a result of Carlsberg and Heineken in-sourcing greater volumes of TS, thereby restricting rival TS suppliers' access to key customers and a significant portion of the contestable market. This would result in these rival TS suppliers becoming less effective competitors and harm their ability to provide a competitive constraint on the Merged Entity in the supply of TS for draught beer and cider.
113. The Parties submitted that there is no expectation of any material change or reduction in Innserve's use of sub-contractors post-Merger.<sup>49</sup> This is because Innserve sub-contracts TS work to third party providers where it is more cost-effective and efficient to do so, such as for TSE installation work or for call-outs in areas where Carlsberg and Heineken have fewer customers.

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<sup>49</sup> Draft Form CO, paragraphs 16 and 161.



114. The Parties indicated that [REDACTED].<sup>50</sup> However, the Parties maintained that, under any scenario, third party providers will continue to be utilised to perform work and a larger proportion of work will be sub-contracted by Innserve in future [REDACTED].<sup>51</sup>
115. A number of different independent TS suppliers told the CMA that they are unlikely to recoup any lost revenues from Innserve and/or Marston's through sales to other customers and that the proposed Merger would affect their ability to compete with the Merged Entity.<sup>52</sup> One independent TS supplier told the CMA that the loss of Innserve and Marston's as customers could cause it to cease trading.<sup>53</sup> By contrast, another third party said that the revenues derived from Marston's were low and that it may be in a better position to win customers post-Merger as Innserve would no longer be independent.

#### *Ability to foreclose rival TS suppliers*

116. The CMA has considered whether Carlsberg and Heineken would have the ability to foreclose rival TS suppliers to Innserve by restricting the TS volumes which Marston's and Innserve out-source or sub-contract to rival TS suppliers.
117. When assessing whether the Merged Entity would have the ability to foreclose rival TS suppliers, the CMA has considered the importance of scale in the supply of TS for the sale of draught beer and cider to the on-trade as well as the importance of Innserve and Marston's as TS customers.

#### *Importance of scale in the supply of TS*

118. The CMA has found that greater geographical density of customers leads to economies of scale for TS providers and impacts on their competitiveness in the supply of TS for draught beer and cider.
119. A brewer with some in-house TS provision and a number of TS suppliers said that customer density is an important factor in the competitiveness of TS provision as having more on-trade outlets to cover in a particular region increases the efficiency of its business and allows it to spread its fixed costs over a larger number of call-outs.<sup>54</sup>
120. This is consistent with the Parties' internal documents, which describe any possible reduction in density (arising from Heineken and Carlsberg breaking

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<sup>50</sup> Parties' response to RFI 5, paragraph 11.

<sup>51</sup> Parties' response to RFI 5, paragraph 16.

<sup>52</sup> [REDACTED].

<sup>53</sup> [REDACTED].

<sup>54</sup> See responses to TSE/TS questionnaire.

up and dividing the assets of the SDE Group) as [REDACTED].<sup>55</sup> In addition, the need for Innserve to [REDACTED] is referenced in a number of other internal documents.<sup>56</sup>

#### *Importance of Innserve and Marston's as TS customers*

121. The CMA has found that Innserve and Marston's are important customers of TS for draught beer and cider to the on-trade:<sup>57</sup>
- (a) Innserve's purchases account for [20-30]% of total TS for draught beer and cider to the on-trade in 2019; and
  - (b) Purchases by Marston's account for [20-30]% of the total TS for draught beer and cider to the on-trade in 2019.
122. The Merged Entity will therefore represent [40-50]% of the contestable market for purchases of TS for draught beer and cider to the on-trade in 2019.
123. In addition, Marston's and Innserve accounted for [20-30]% of TS suppliers' revenues from TS and TSE for draught beer and cider in 2019.<sup>58</sup> A number of other [REDACTED] TS suppliers said that Marston's accounted for [REDACTED].<sup>59</sup> Most of the [REDACTED] TS suppliers of Marston's said that they would have to scale down their activities were Marston's to stop using their services, but that they would not exit the market.

#### *Conclusion on ability to foreclose rival TS suppliers*

124. On the basis of the above evidence, the CMA believes that Carlsberg and Heineken could (focussing primarily on their size as customers and the importance of scale upstream) have the ability to foreclose rival TS suppliers to the Merged Entity, either through a total or partial foreclosure strategy.

#### *Incentive to foreclose rival TS suppliers*

125. As set out in paragraph 114, the Parties indicated that [REDACTED].<sup>60</sup> The CMA therefore considers that [REDACTED] evidence of an incentive to consolidate Marston's TS requirements within Innserve, [REDACTED].

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<sup>55</sup> Carlsberg Annex 19 to the Draft Form CO.

<sup>56</sup> [REDACTED]; Annex 20.1[REDACTED].

<sup>57</sup> The CMA estimated the size of the total outsourced and/or sub-contracted TS for draught beer market by requesting (i) the revenues of the TS suppliers referenced by Carlsberg and Heineken as alternatives to Innserve and (ii) the spend on outsourced and/or sub-contracted TS by the largest brewers by shares of supply of draught beer to the on-trade.

<sup>58</sup> [REDACTED].

<sup>59</sup> [REDACTED].

<sup>60</sup> Parties' response to RFI 5, paragraph 11.

126. However, the Parties also submitted that – irrespective of [✂] – third party providers will continue to be used as sub-contractors to perform TS. In particular, the Parties told the CMA that:
- (a) Innserve and Marston’s primarily rely on sub-contractors for installation work, for which demand is variable over time and across regions;
  - (b) The use of sub-contractors allows for a more flexible and efficient service provision given the *ad hoc* nature of maintenance work; and
  - (c) Using sub-contractors provides a cost-effective method of maintaining service levels in areas of low customer density where deploying permanent employees would not be efficient.
127. The CMA considers that the available evidence supports the position that the Merged Entity would not have the incentive to pursue a customer foreclosure strategy, in particular because of the costs of such a strategy.
128. First, the vast majority ([80-90]%) of Innserve’s purchases of TS in 2019 was for installation work, which the available evidence indicates is more cost-effective to sub-contract. Evidence provided by the Parties demonstrated that Innserve’s installation work varied substantially over time and this variation has primarily been accommodated through the use of sub-contractors for peaks of work. The Merged Entity would therefore need to employ more technicians to complete the necessary installations for Carlsberg, Heineken and Marston’s, which would be an expensive and inefficient alternative to the use of sub-contractors during the periods of peak demand. When the proportion of Innserve’s TS purchases which were for installation work is excluded, the Merged Entity’s purchasing share of the contestable market for TS services falls from [40-50]% to [20-30]%.<sup>61</sup>
129. Second, any reduction in the use of sub-contractors for the remaining maintenance work post-Merger would materially raise the costs of the Merged Entity. As set out in paragraphs 50 – 51, the CMA has found that it is common for brewers and independent TS suppliers to rely on sub-contractors to supplement the service provided by their in-house teams, particularly in areas where they have a lower geographic density of customers. The CMA considers that employing more technicians in areas of lower and more uncertain demand for maintenance work (which, by its nature, is more *ad hoc*

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<sup>61</sup> While the CMA has not been able to estimate the Merged Entity’s purchasing share of the contestable market for TS services when also excluding the proportion of Marston’s TS purchases which were for installation work, the CMA considers that the Merged Entity’s purchasing share would fall below [20-30]%.

and time-sensitive than installations) would be an expensive and inefficient alternative to the use of sub-contractors by the Merged Entity.

130. On the basis of the above, the CMA considers that Carlsberg and Heineken do not have the incentive to foreclose rival TS suppliers to the Merged Entity as the Merged Entity will still rely upon sub-contractors post-Merger for work formerly carried out by both Marston's and Innserve.

#### *Conclusion on customer foreclosure of rival TS suppliers*

131. As the CMA has concluded that the Parties do not have the incentive to foreclose rival TS suppliers, the CMA did not consider the effects of the Parties' implementing any such foreclosure strategy.
132. For the reasons set out above, the CMA believes that there is not a realistic prospect that the Merged Entity would have the incentive to engage in a strategy in relation to the foreclosure of TS suppliers competing with the Merged Entity. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects in relation to the supply of TS for draught beer and cider.

#### **Barriers to entry and expansion**

133. Entry, or expansion of existing firms, can mitigate the initial effect of a merger 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.<sup>62</sup>
134. However, the CMA has not had to conclude on barriers to entry or expansion as the proposed Merger does not give rise to competition concerns on any basis.

#### **Third party views**

135. As noted in paragraph 92 above, brewers raised concerns that the Merged Entity would have access to commercially sensitive data that could provide Carlsberg and Heineken with an advantage when competing with these brewers to supply draught beer and cider to on-trade outlets.
136. The CMA notes that the Parties have indicated that they intend to put in place safeguards to protect against the risk of unlawful conduct post-Merger

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<sup>62</sup> *Merger Assessment Guidelines*, from paragraph 5.8.1.

(although they have not submitted any supporting evidence to demonstrate how the measures listed in paragraph 93 are implemented in practice and how they will be implemented post-Merger). Customers of the Parties may therefore wish to fully understand and monitor the protections that are put in place in relation to confidential information.

137. In addition, given the importance that customers appear to attach to the appropriate treatment of confidential information, this would be expected to be a parameter of competition over which suppliers compete. Accordingly, in keeping with the conclusions reached above, a customer that is not satisfied with the confidentiality arrangements offered by the Merged Entity should ultimately be able to switch its business to one (or more) of several credible alternatives (that are not vertically-integrated and/or may offer confidentiality arrangements that the customer prefers).
138. All other third party comments have been taken into account where appropriate in the competitive assessment above.

## Decision

139. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the United Kingdom.
140. The Merger will therefore **not be referred** under section 33(1) of the Act.

**Colin Raftery**  
**Senior Director Mergers**  
**Competition and Markets Authority**  
**3 March 2021**

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<sup>i</sup> The Parties submitted that the 2019 turnover of Innserve in the UK was EUR [REDACTED] (approximately [REDACTED]).

<sup>ii</sup> The last sentence of paragraph 19 should read as follows: The purpose of the SDE Group is to own TSE, whereas responsibility to procure and manage TSE and provide TS on behalf of Heineken and Carlsberg to on-trade customers is fully outsourced by contract to Innserve.

<sup>iii</sup> The Parties submitted that Heineken's turnover for 2019 was EUR [REDACTED] (approximately [REDACTED]).

<sup>iv</sup> Heineken submitted that its leased and tenanted pub business Star consisted of approximately 2,500 pubs and restaurants.

<sup>v</sup> The Parties submitted that Marston's pub estate consisted of approximately 1,365 pubs and restaurants.

<sup>vi</sup> The penultimate sentence in paragraph 25 should read as follows: Marston's has its own TS operation which focuses on installing and maintaining TSE in its own pub estate and supporting its draught beer supply agreements, but does not otherwise provide TSE and TS to third parties.

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vii Paragraph 50 should read as follows: Some brewers, such as CMBC in respect of Marston's legacy arrangements, make use of a hybrid model with some in-house technicians and outsourced TS in specific regions to one or more contractors.