

Anticipated acquisition by Cott Developments Limited of Cooke Bros Holding Limited

ME/6044/13

The OFT's decision on reference under section 33(1) given on 12 June 2013. Full text of decision published 25 June 2013.

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

## **PARTIES**

1. **Cott Developments Limited** ('Cott Developments') is a wholly owned subsidiary of Cott Beverages Limited ('Cott') and Cott is a wholly owned indirect subsidiary of Cott Corporation headquartered in the United States of America (Florida) and Canada (Ontario) and is a global beverages company focussing on own-label non-alcoholic beverages ('NABs') and contract manufacturing in North America, Mexico and Europe (including the United Kingdom (UK)). Cott Developments is the acquiring company.
2. In the UK, Cott manufactures carbonated soft drinks ('CSDs') and still (non-carbonated) soft drinks, including juice, cordials, energy and sports drinks, and ready-to-drink teas as well as bottled water (still, sparkling and flavoured). Cott's business is largely focussed on producing own-label NABs for retailers and on contract packing branded NABs for third parties. Cott produces a very limited number of branded NABs.
3. **Cooke Bros Holdings Limited** ('Cooke Bros') is an independent soft drinks and freeze pops/ice lollies manufacturer operating in the UK. Cooke Bros produces CSDs, fruit juices, still drinks, bottled water, freeze pops/ice lollies and ice cubes. Cooke Bros markets its products under three main brands; Calypso, Jubbly and Mr Freeze. Cooke Bros focuses on branded

NABs to the food service industry and schools sector. Its UK turnover for year ending September 2011 was £34.1 million.

## **TRANSACTION**

4. Cott Developments proposes to acquire the entire issued share capital of Cooke Bros for a cash consideration of £23.5 million. The parties announced the proposed acquisition on 30 April 2013 and notified the Office of Fair Trading ('OFT') on the same day by way of a merger notice. The statutory deadline, which was extended by the OFT pursuant to section 97(2) of the Enterprise Act 2002 ('the Act') on 15 May 2013, is 13 June 2013.

## **JURISDICTION**

5. As a result of this transaction Cott Developments and Cooke Bros will cease to be distinct. In the UK, the parties overlap in the supply of branded NABs, namely: (i) non-cola flavoured CSDs; (ii) still drinks (fruit drinks and flavoured water); and (iii) bottled water. They also overlap in the supply of own-label NABs, specifically in relation to still flavoured water.
6. The OFT considers that the share of supply test in section 23(3) of the Act is met since the merging parties' combined share of supply in branded and own-label non-cola flavoured carbonated soft drinks in the UK in 2012 was [35-45] per cent by volume (with an increment from Cooke Bros of [0-10] per cent) and therefore exceeds 25 per cent.<sup>1</sup>
7. The OFT 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.

## **FRAME OF REFERENCE**

8. The OFT considers that product market definition provides a framework for assessing the competitive effects of the merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the OFT's assessment in any mechanistic way as it is recognised that there

<sup>1</sup> In addition, the parties' share of supply in branded orange and/or peach flavoured still water is [30-40] per cent by volume with the increment from Cott being [0-10] per cent.

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.<sup>2</sup>

### **Product scope**

9. The parties overlap in the manufacture and supply of NABs. More specifically, the parties overlap in the supply of branded non-cola flavoured CSDs, branded non-CSDs (in particular flavoured, water and fruit drinks) and bottled water. While own-label NABs is the main focus for Cott, Cooke Bros has only a minor own-label production and only in relation to fruit drinks and fruit juices. In considering the relevant frame of reference, the OFT's starting point is the overlapping products of the merging parties in the narrowest plausible candidate market.
10. The decisional practice of the European Commission (EC) in some cases has distinguished between CSDs and non-CSDs.<sup>3</sup> Within CSDs, further distinctions may be drawn between different types of CSDs for example cola and non-cola. Non-CSDs have been considered to include, but not limited to, water,<sup>4</sup> fruit juice, fruit drinks and dilutes. Each of these different product categories are therefore considered below.

### **Distinction between CSDs and non-CSDs**

11. The parties submitted that decisions concerning NABs have distinguished CSDs from non-CSDs. The OFT received no evidence to suggest that this is not the case and, in line with previous OFT decisions (including Barr/Britvic), the OFT supports distinguishing between CSDs and non-CSDs. Accordingly, the OFT will consider CSDs and non-CSDs separately for the purposes of the competitive assessment.

<sup>2</sup> This approach is in line with the CC's and OFT's joint *Mergers Assessment Guidelines*, September 2010, paragraph 5.2.2.

<sup>3</sup> See for example, Case No COMP/M.2504 - Cadbury Schweppes/Pernod Ricard, 2001; Case No. IV/M.833 - The Coca-Cola Company/Carlsberg A/S, 1997; and Case No. COMP/M.5632- PepsiCo/Pepsi Americas, 2009.

<sup>4</sup> Case No ME/5801/12 A.G. Barr/Britvic, and Case No COMP/M.1065 - Nestle/San Pellegrino, 1998. The Commission considered there to be a separate market for bottled water, but left open the question whether the market should be further subdivided according to whether the water was still or sparkling. In an earlier case, it suggested that sparkling and flavoured source water may indeed form part of the overall bottled source water market (Case COMP. M.190 - Nestle/Perrier, 1992).

## CSDs

12. Within CSDs, the European Commission (**EC**) has previously concluded that there is a separate product market for cola-flavoured CSDs (which is the largest segment by overall CSD sales). In more recent cases it has considered its assessments in the context of an overall CSD market, sometimes leaving the precise market definition open,<sup>5</sup> and sometimes concluding that the market is for CSDs overall.<sup>6</sup>
13. The parties submitted that it would not be relevant to further distinguish between different tastes and colours of CSDs, for example cola and non-cola flavours. The OFT did not find it necessary to conclude on this issue as there are no competition concerns on any basis in this case.

## Non-CSDs

14. In *Coca-Cola Company/Fresh Trading Limited*,<sup>7</sup> the OFT did not reach a firm conclusion on possible categories within non-CSDs but, in relation to the drinks at issue, the OFT suggested segmenting the market as follows: (i) 100 per cent juice beverages, (ii) nectars (fruit content between 25 and 99 per cent), (iii) smoothies, and (iv) juice beverages from concentrate.
15. In *A.G. Barr/Britvic*,<sup>8</sup> the OFT found limited evidence to support widening the narrow candidate markets of water, fruit juice, fruit drinks,<sup>9</sup> and dilutes, and so, on a cautious basis, considered these separately.<sup>10</sup>
16. In the present case, the parties pointed to the above OFT Decisions but did not put forward a specific view on the extent to which non-CSDs should be

<sup>5</sup> *Case No. COMP/M.5632 - Pepsico/Pepsi Americas, 2009; and Case No. COMP/M.5633 - Pepsico/The Pepsico Bottling Group, 2009.*

<sup>6</sup> *COMP. 39/116/B-2 - Coca-Cola Undertakings, 2005.* Although the Undertakings did distinguish between types of *Coke*, for example, *Coke Light, Cherry Coke, Vanilla Coke* etc.

<sup>7</sup> *Anticipated acquisition by the Coca-Cola Company of a minority interest in Fresh Trading Limited*, OFT, May 2009. This approach was followed in the subsequent and recent Coca-Cola-Fresh Trading Limited merger (ME/5978/13) in May 2013.

<sup>8</sup> Case No ME/5801/12 *A.G. Barr/Britvic* – February 2013.

<sup>9</sup> Please see footnote 5 which notes a possible categorisation of fruit juice and fruit drinks.

<sup>10</sup> The OFT decision ME/5801/12 *A.G. Barr/Britvic* was referred to the CC on 13 February 2013. Because the CC is due to announce its decision in July 2013 the OFT does not specifically rely on this decision for the purposes of its assessment in this case.

segmented. They also pointed to an EC case which concluded<sup>11</sup> that within the non-CSD market there was a separate market for bottled water.

17. The OFT has not found it necessary to conclude on this issue and left the precise definition in relation to non-CSDs open as no competition issues arise on any basis. Possible distinctions, where applicable are reflected in the direct assessment of the effects of the acquisition, taking into account the closeness of competition between brands.

### **Distinction between branded and own-label**

18. The Competition Commission (CC)<sup>12</sup> and OFT<sup>13</sup> have separately considered whether own-label products should be considered part of a wider beverage market in previous decisions. The OFT considers that the extent to which own-label provides an effective constraint to branded goods depends on the extent to which branded products can be substituted by the customer for own-label products, including, the bargaining power of retailers and their ability to divert sales from branded to own-label products.
19. The parties pointed to *A.G. Barr/Britvic* where the OFT concluded that it did not have sufficient evidence to warrant widening the product scope for branded CSDs and non CSDs to include own-label products.
20. In this case third parties were generally of the view that own-label supply does not constrain the price of branded products. Two customers noted that they had limited or no own-label supply. The only area where third parties (two competitors) noted that there may be some constraint between branded and own-label was in relation to fruit juices where the parties do not overlap.

<sup>11</sup> *Case No IV/M. 1065 Nestle/San Pellegrino*

<sup>12</sup> *Cott Beverage Limited/Macaw (Holdings) Competition Commission Merger Inquiry, 2005*, in which the Competition Commission concluded that there was a separate market for private label CSDs. However, it should be noted that this case related specifically to the private label segment and indeed the market at issue was identified as that for the supply of own-label PET-bottled CSDs.

<sup>13</sup> *ME/4091/09, Coca-Cola Company/Fresh Trading Limited, 2009*, in which the OFT considered whether own label non-CSDs were effective substitutes for branded non-CSDs but did not find it necessary to reach a firm conclusion on this point.

21. The OFT has not found it necessary to conclude on whether or not branded and own-label products are in the same product market in this case as no competition issues arise on any basis.

### **Distribution channels**

22. Previous CC decisions have found that the supply of soft drinks could be distinguished according to whether sales are made through the on-trade or off-trade distribution channel.<sup>14</sup> Sales are principally to large retailers (who then sell to final customers) and cash and carry outlets who can sell to both the **on-trade** (where drinks are consumed on the premises such as hotels, pubs and restaurants) and **off-trade** (where drinks are consumed off the premises, such as supermarkets and petrol stations).
23. The parties referred to the distinction made between on-trade and off-trade in the *A.G. Barr/Britvic* where the evidence pointed to there being little distinction between patterns of substitution at the wholesale level and patterns of substitution at the downstream retail level. Here the OFT noted that sales to each group are materially different due to the different scale, distribution requirements and pricing mechanisms in each channel.
24. The parties are both small suppliers in the on-trade channel and Cooke Bros supplies only to schools and to a lesser extent to the NHS. In this case the OFT has focused its investigation on off-trade and the supply to schools given Cott's focus is on off-trade and Cooke Bros is active in the schools channel.

### **Supply to schools**

25. The parties noted that many of the major NAB suppliers supply into the schools channel and that there are no material barriers to a company active in NABs to start supplying into schools. They submitted that the product must comply with 'School Food Regulations'<sup>15</sup> and that in relation to the

<sup>14</sup> *Cott Beverages Limited/Macaw (Holdings) Limited*, merger enquiry, CC Report, 28 April 2006; *Case No COMP/M.2504 - Cadbury Schweppes/Pernod Ricard*, 2001.

<sup>15</sup> The School Food Regulations impose nutritional standards for school food, prescribing the types of food and drink that should, and should not, be offered during the school day. The School Food Regulations stipulate the wide variety of drinks that are permitted, split into two categories: Plain drinks and Combination drinks. In relation to those NAB product categories supplied by Cooke Bros, Plain Drinks include fruit juice. Combination Drinks include combinations

product categories supplied by Cooke Bros, this largely involves ensuring that the drinks meet certain requirements as to fruit juice content and ensuring there are no added sugars. The parties also noted that suppliers can choose whether or not to comply with the Government's Voluntary Code of Practice for Drinks in Schools<sup>16</sup> and that schools purchase NABs in a range of different packaging formats so no changes to this would be needed.

26. The OFT notes that while Cott does not provide directly to schools, one of its brands, SUSO (which Cott purchased in January 2012) meets the School Food Regulations and that Cott is aware that some of its wholesale customers and contract caterers may be supplying SUSO into the schools channel. SUSO's marketing also appears to include a large focus on schools<sup>17</sup>.
27. Third party customers active in the schools channel noted that School Food Regulation reduced the number of suppliers active in this market. They noted that most schools purchase with guidelines that restrict sugary drinks and promote healthier beverages. They noted the entry has been limited due to the small market size and limited margins. However, one third party noted that regulations and guidelines had not resulted in a detrimental reduction in suppliers and products. Another explained that in pure juice there is a range of suppliers in the market but that in other areas such as non-carbonated juice water drinks there are fewer suppliers.

of fruit juice with plain water (still or sparkling), provided they contain at least 50 per cent fruit juice by volume and no added sugars or honey. Combination drinks are classified as non-alcoholic flavoured drinks under EU law and are allowed to contain certain additives and flavourings.

<sup>16</sup> The Voluntary Code of Practice for Drinks in Schools ('the Code') was introduced in 2008 to provide guidance to schools and manufacturers on producing and providing healthier drinks to children. It sets out technical specifications for drinks that address issues such as colours, sweeteners, dairy content, fruit juice content, additives and flavourings. The Code was intended to supplement the legal requirements already contained in the School Food Regulations. The Children's Food Trust undertook a review of the Code's provisions in 2010 and concluded that (i) many schools are unaware of the existence of the Code, or rarely enquire as to whether products meet the Code's requirements; (ii) only a small number of schools had signed up to the Code; (iii) manufacturers stated that compliance neither caused commercial detriment nor provided any commercial gain.

<sup>17</sup> See [www.suso.co.uk/greatness.html](http://www.suso.co.uk/greatness.html)

28. Some third party competitors noted that they did not supply to the schools channel but they believed that it would not be difficult to supply them and one competitor noted that using wholesalers meant it would incur no additional costs in doing so. However, it also explained that selling to schools in a major way requires specific products that meet school standards and guidelines and dedicated sales teams to promote the product to schools and local authorities.
29. The OFT considers that on the basis of evidence obtained, the schools channel may be a distinct customer segment due to its differing requirements and the reduced number of suppliers active in this segment. On a cautious basis, the OFT considers supply to schools as a distinct frame of reference.

### **Supply of freeze pops**

30. The parties do not overlap in the supply of freeze pops.<sup>18</sup> Cooke Bros has a large share in the supply of freeze pops but Cott is not active in this area. However in order to assess whether the merger may result in conglomerate effects in this respect, the OFT has considered whether the product scope for freeze pops should be extended to include ice lollies and ice cream.
31. The parties considered that freeze pops compete with other types of ice lollies and ice cream. They argued that previous OFT decisions have considered a wider market for ice cream.<sup>19</sup> This was confirmed by third parties with one stating that a five per cent rise in the price of freeze pops would lead them to moving to ice lollies.
32. The OFT considers that the most appropriate frame to assess conglomerate effects in this acquisition is wider than freeze pops, although it has not been necessary to conclude on this issue given that no competition concerns arise on any basis.

<sup>18</sup> Freeze pops are water based frozen fruit beverages that are typically consumed after freezing. It can be purchased individually in frozen form ready for consumption or purchased in packs from larger retailers in ambient form (ambient freeze drink).

<sup>19</sup> OFT decision issued in 2006 - ME/2451/06 – Anticipated acquisition by Ruby Acquisitions Limited (Oaktree Capital Management) of Richmond Foods plc.

### **Contract packing (co-packing)**

33. Cooke Bros is not active in co-packing.<sup>20</sup> However, in order to assess whether Cott could use its presence in co-packing to foreclose downstream NAB suppliers, the OFT has considered what the relevant product scope is in this area.
34. The parties submitted it is not meaningful to define contract packing as separate relevant market. They noted that contract packing of NABs to third party brand owners is generally undertaken by the same firms that produce own-label NABs, and that contract packed NABs represent only a small proportion of total NAB volumes. Furthermore, the parties submitted that contract packing uses the same production lines as own-label product. They noted that in *Cott/Macaw*, the CC considered that there was a degree of supply side substitutability between contract packing and own-label production.
35. One co-packing customer noted that it would be unlikely to change type of packaging in response to a five per cent price increase. However, it noted that contract packers could supply a range of pack formats and sizes.
36. The OFT leaves the precise product scope of co-packing open in its assessment of the foreclosure theory of harm.

### **Conclusion on product scope**

37. For the reasons outlined above, the OFT assesses the transaction on the basis of CSDs and, within non-CSDs, water and fruit drinks. Further segmentation within these including by branded and own-label has been left open, and any distinctions which could form the basis for narrower, plausible candidate markets, have been considered as part of the direct assessment of the competitive constraints on the parties' brands.
38. In relation to the distribution channels through which the parties supply their products, the OFT considers on a cautious basis the schools channel to be a distinct frame of reference. In other on-trade channels, the parties activities are very limited so the OFT has considered on-trade more

<sup>20</sup> Contract packing is the supply of NAB containers such as cans, bottles (glass or plastic), and other types of drink packaging formats to drinks suppliers.

generally but no further. The OFT has assessed the off-trade channel as a distinct frame of reference on a cautious basis.

39. With regard to the supply of freeze pops and co packing, whilst there is no horizontal overlap between the parties, the OFT considered the product market in respect to the issue of conglomerate effects and foreclosure effects respectively. However, the OFT does not find it necessary to conclude given the absence of competition concerns in either case.

### **Geographic scope**

40. The parties submitted that the appropriate geographic frame of reference with respect to NABs is at least Great Britain. The parties pointed to OFT and EC merger decisions that have followed a national geographic scope. They also argued that this was appropriate given that the parties are marginal suppliers into Northern Ireland.
41. Third-party comment generally pointed to a UK-wide geographic scope, typically noting that suppliers had national coverage and that supplier location is not important. There were, however, some exceptions. One third party noted that some brands have stronger sales regionally such as Irn Bru in Scotland and Vimto in North West England (neither of which form a part of this merger). Another third party also pointed to regional differences in consumer preferences (but provided no more detail). One competitor argued that the market was wider than national but another competitor noted that the price of products was too low for them to be imported with the possible exception of high value brands or fruit juices.

### **Conclusion on geographic scope**

42. The OFT considers a Great Britain geographic scope to be appropriate in this case given previous decisional practice and current third-party comment. The OFT does not consider it necessary to look at regional scopes such as Scotland because the OFT has received no evidence that the parties' brands are significantly stronger in certain regions.
43. The parties submitted that the appropriate geographic frame of reference for the supply of ice cream is at least UK-wide. This is in line with previous

OFT decisional practice.<sup>21</sup> It is not necessary for the OFT to conclude on geographic scope for the supply of ice-cream given the absence of competition concern but on a cautious basis and for the purposes of its competition assessment the OFT considers the geographic scope for ice-cream to be UK-wide.

44. The parties made no comment on the geographic scope of co-packing but one customer noted that contract packing is supplied to it on a national basis for all its UK requirements. The OFT therefore uses a UK geographic scope with respect to co-packing, although it has not been necessary to conclude on this.

## **HORIZONTAL ISSUES**

45. The merging parties overlap, as far as is material for the competitive assessment, in the supply of:
- i. branded non-cola flavoured CSDs
  - ii. branded still drinks (fruit drinks and flavoured water)
  - iii. branded bottled water (still and sparkling), and
  - iv. own-label still flavoured water.

### **Shares of supply**

46. Horizontal unilateral effects can arise where a firm merges with a competitor that previously provided a competitive constraint, and are more likely where the merging firms' products compete closely.<sup>22</sup> The OFT sets out evidence on shares of supply and the closeness of competition between the parties.
47. In all areas of overlap in branded NABs, the parties' combined share of supply is less than [10-20] per cent by volume and value<sup>23</sup> with very small increments of no more than [0-10] per cent. The OFT also considered the parties' combined share of supply across all overlapping products (including still flavoured water) for both branded and own-label and found these to be

<sup>21</sup> OFT decision issued in 2006 - ME/2451/06 – Anticipated acquisition by Ruby Acquisitions Limited (Oaktree Capital Management) of Richmond Foods plc.

<sup>22</sup> Merger Assessment Guidelines, paragraph 5.4.2 and 5.4.6.

<sup>23</sup> Data source provided by the parties.

less than [40-50] per cent with a low increment of no more than [0-10] per cent.

48. In own-label, the only area of overlap is in still flavoured water, where the parties' have a combined share of supply of [30-40] per cent with a minor increment of [0-10] per cent from Cooke Bros. More generally, Cooke Bros has limited activities in own-label supply, the only other category being in fruit juices where Cott has no own-label production.<sup>24</sup>

### **Closeness of competition and the schools channel**

49. The parties submitted that in each overlapping product category they are not each other's closest competitor. The parties submitted that, in any event, there would remain a number of stronger rival branded NAB suppliers (such as Coca Cola, Britvic, AG Barr, Nestlé and Danone) in each category to constrain the merged parties.
50. Cooke Bros is best known for its Calypso brand of soft drinks which are single serve drinks targeted at children (in lunch box format) and also sold to schools. Cott, on the other hand has a very limited branded range and focuses on own-label soft drinks targeting a different demographic. Cott's branded CSDs are RC Cola, So Clear, Macb and Old Jamaica. However, Cott does have the SUSO brand in carbonated and still fruit flavoured drinks which are indirectly supplied to schools through its sales to wholesale customers.
51. One school customer suggested that there may be some overlap between the parties' respective SUSO and Calypso brands given that both are targeted at schools and comply with the School Food Regulations, but these come in different pack sizes and may not be competing. The OFT's investigation has identified a number of direct suppliers into the schools channel which included Radnor Hills, Aimia, Sunmagic, Sunpride, Princes and Appletise.
52. Furthermore, no school channel customers raised concerns about the merger and did not believe that their negotiating strength would be affected. Whilst there is some overlap between the SUSO and Calypso

<sup>24</sup> In own-label CSDs, Cott has a market share of [50-60] per cent but Cooke Bros is not active in this area.

brands, the two products come in different package sizes and because of this, school channel customers did not consider the parties to be close competitors.

53. School channel customers also considered that the parties' post merger share of supply in this segment would be low and competitors submitted that a number of other brands will remain providing the parties' brands with adequate constraint such as; Zing, Evoid, Aqua Fruta, Just Juice, Sunny D, Sunpride, Vimto Ribena, Panda and JuiceBurst. These brands are among those currently supplied to the schools channel through six other competitors.
54. On the evidence available, the OFT considers that the merger does not raise any horizontal unilateral effects and therefore finds no realistic prospect of a substantial lessening of competition (SLC) on this basis.

## **NON HORIZONTAL ISSUES**

55. Although third parties did not raise any concerns in relation to vertical foreclosure or portfolio effects, given that Cott is an upstream supplier of co-packing and Cooke Bros is a supplier of freeze pops, the OFT considered whether there are likely to be foreclosure and portfolio issues resulting from the merger.
56. In line with its Merger Assessment Guidelines, the OFT frames its foreclosure and conglomerate analysis by reference to the ability and incentive of the merged entity to weaken the competitive offering of rival firms, and the effect, if any, this may have on competition.<sup>25</sup>

### **Foreclosure of rival NAB suppliers**

57. The OFT considered whether the merger would allow the parties the ability and incentive to foreclose rivals from the supply of NABs through the refusal to provide co-packing services or increasing the price of these services. The parties submitted that neither Cott nor Cooke Bros account for more than 15 per cent share of supply of any inputs. The OFT's market testing corroborated that the parties' share was less than 15 per cent in co-packing. Third parties were generally of the view that there are a

<sup>25</sup> Merger Assessment Guidelines paragraph 5.6.6

number of alternative contract packers across the UK. The OFT therefore considers that the parties will have no ability to foreclose rival NAB suppliers and that there is no realistic prospect of an SLC on this basis. The OFT has not found it necessary to consider incentives and effect in relation to this theory of harm.

### **Portfolio effects**

58. In relation to portfolio effects, the parties submitted that they had no ability or incentive to successfully deploy a bundling strategy that would foreclose rivals. In particular, the parties submitted that neither party has market power in any product market. They considered that Cooke Bros' NAB brands are weak.
59. In ambient freeze drinks<sup>26</sup> Cooke Bros estimated it had an [80-90] per cent share of supply through its Mr Freeze, Calypso freeze pops and Jubbly ice lollies. Although the OFT noted that there are no horizontal overlaps in freeze pops or ice lollies between the parties it considered these products for the purposes of its assessment of any portfolio effects. Cooke Bros argued that these only accounted for £[ ] in annual sales and that it faced competition in strong ice cream brands from major suppliers such as Mars, Unilever and Nestlé.
60. Some third parties corroborated the competitive constraints confirming that ice lollies and ice cream are alternatives to freeze pops. More generally third parties noted that the procurement of freeze pops was a separate purchasing decision from the purchasing of NABs (with different buying teams responsible for each).
61. On the basis of the evidence available, the OFT does not consider that the parties will have the ability or incentive to engage bundling strategies using Cooke Bros' freeze pop range with Cott's NAB brands in such a way as to foreclose rivals. The OFT does not, therefore, consider there is a realistic prospect of an SLC.

<sup>26</sup> See footnote 18.

## **BARRIERS TO ENTRY AND EXPANSION**

62. Given that no competition concerns arise in this case the OFT does not need to conclude on entry and expansion.

## **THIRD PARTY VIEWS**

63. Third party comments have been taken into consideration and discussed above where relevant. Overall, third parties did not raise significant competition concerns and most customers were not concerned about the proposed merger.

## **ASSESSMENT**

64. The merging parties overlap in the production and supply of NABs; more specifically, in branded non-cola flavoured CSDs, branded still drinks (flavoured water and fruit drinks) and branded bottled water. In addition the parties overlap in own-label flavoured water.
65. In considering the relevant frames of reference in this case, the OFT looked at past decisional practices of the OFT, CC and EC. However, given that the merger does not raise any competition concerns on any basis, the OFT did not conclude on any aspects of the relevant frames of reference but took the narrowest possible approach in its assessment of the competition issues.
66. The OFT considered possible horizontal unilateral effects and non-horizontal foreclosure and portfolio effects (given Cott supplies NAB co-packing services and Cooke Bros supplies freeze pops) in its competition assessment. The OFT, on the evidence available, was unable to find a realistic prospect of an SLC in any of the theories of harm with the central reason being the parties low combined share of supply in the narrowest plausible candidate markets. In addition, the evidence also suggests that the parties are not close competitors. Cott focuses on own-label NABs whereas Cooke Bros' focus is on branded NABs.
67. Furthermore, the parties target different demographics with Cooke Bros highly focussed on sales to children and the schools channel and has adopted specific packing formats to cater for this group, whereas Cott

targets adults of a specific age group through the wholesale channel and large multiple retail/grocery groups.

68. Within the schools channel there is some overlap between the parties' respective brands Calypso and SUSO. However, the parties' share of supply is considered to be low in this channel by third parties and a number of competitors with a large number of alternative brands will remain.
69. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a SLC within a market or markets in the UK.

## **DECISION**

70. This merger will therefore **not be** referred to the CC under section 33(1) of the Act.