

Completed acquisition by Information Resources Inc. of Aztec Group

ME/6211/2013

The OFT's decision on reference under section 22(1) given on 13 December 2013. Full text of decision published 24 March 2014.

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.

1. **Information Resources Inc. ('IRi')** is a US-based provider of market research services, including retail measurement services of goods sold through convenience retailers, grocery multiples, and health and beauty retailers. IRi is majority owned by a private equity fund managed by New Mountain Capital, a US private equity group. IRi generated revenues of £[] million in the UK in 2012.
2. **Aztec Group ('Aztec')** is active in a range of market research activities. In the UK it operates through two subsidiaries Litmus and Salesout. **Litmus** provides retail measurement services, in particular of goods sold through convenience retailers and grocery multiples. **Salesout** provides market research for consumer goods sold through food service providers and wholesalers such as cash and carry operators. Prior to sale to IRi, Aztec was wholly-owned by Dentsu Aegis (**'Aegis'**). Aztec's worldwide revenues in 2012 were £[] million, of which £[] million were generated in the UK.

TRANSACTION

3. IRi acquired the entire issued share capital of Aztec from its owner Aegis on 3rd September 2013 for a consideration of around £[] million, less adjustments for cash, outstanding debt and net working capital.

4. The OFT received a satisfactory submission on 18th October 2013. As a result, the OFT's administrative deadline is 13th December 2013. The statutory deadline is 3rd January 2014.
5. The OFT has hold-separate undertakings in place.

JURISDICTION

6. As a result of this merger IRi and Aztec have ceased to be distinct. The turnover test set out in section 23 of the Enterprise Act 2002 (the Act) is not met. The merged parties overlap in the provision of disaggregated ePOS data with an estimated combined share of supply of [35 to 45] per cent. As such, the share of supply test in section 23(4) of the Act is met.
7. The OFT therefore believes that it is, or may be the case, that a relevant merger situation has been created.

PRODUCT MARKET

8. In the UK, the parties overlap in the supply of market research that relates to sales of fast moving consumer goods (FMCG), in particular electronic point of sale data collected in retailers (ePOS data). Aztec (but not IRi) provides similar data collected from wholesalers.
9. Purchasers of the data tend to be major suppliers of FMCG. Some retailers also purchase the data or receive analysis and insight as part of their contract to supply data. In this decision, this is referred to as a 'saleback agreement'. Manufacturers of FMCG as well as retailers use the market research data to assess demand for their products and for competing products, to develop strategies to engage more effectively with consumers and to help them better negotiate with retailers and wholesalers.

Type of data

10. Market research encompasses a wide range of products and services aimed at measuring and understanding customer attitudes, sales and purchasing behaviour, market trends and industry dynamics. Market research data may be collected through a number of different means:

- from shop tills at the point of sale located at retailers, including multiple retailers and convenience stores (ePOS or transactional data)¹ and equivalent data from wholesalers
 - through loyalty cards
 - through consumer panels, which typically collect purchase information by means of scanners provided to household panel members who scan items purchased
 - through customised research²
11. The parties submitted that data sourced through the different methods listed above are substitutes for ePOS data collected and sold by the parties.
12. In a 2001 decision the European Commission (EC) noted a distinction between 'retail tracking' of consumer purchases at the point of sale through scanning technology and/or manual audit (also referred to as ePOS data), and consumer panels and customised research (although without concluding on a precise product market definition).³
13. Evidence received from third parties suggested that from the demand side, loyalty card, consumer panel, and customised research data is substitutable for ePOS data only to a very limited extent. The vast majority of customers indicated that they would not switch to other data in response to a five per cent rise in the price of ePOS data. The parties submitted that the merged entity will be constrained by providers offering products which are based on other types of data, namely loyalty card data, transactional data, consumer panels and customised research. Based on the evidence it has received, the OFT considers that such data provides some constraint on the parties, but that this constraint is limited. This is considered further in the competitive assessment.

¹ 'Transactional data' differs from ePOS data in that it contains more detailed information collected at the point of sale (such as which products are bought together). Litmus provides this data to a limited extent. Most third parties who responded to the OFT were not familiar with this term, although one competitor suggested that transactional data is an input into ePOS data and that it is a substitute. The OFT notes that the inclusion or exclusion of transactional data in the relevant market does not make a material difference to the competitive analysis and so it is not considered further.

² Litmus provides this service on a very limited basis and IRI does not provide this. These are bespoke projects undertaken for specific clients based on one-off data sets.

³ Case No. COMP/M.2291, *VNU/Nielsen* (decision of 12 February 2001).

14. As a result, the OFT has considered the supply of ePOS data separately from other data types.

Aggregated and disaggregated ePOS data

15. Data collected at the point of sale may be used in one of two ways. First, data from a single retailer may be sold, in order to help a brand owner understand its sales patterns within a particular retailer (which may include information on sales in individual stores belonging to that retailer). This data is referred to as disaggregated data.⁴
16. Second, the data from each retailer (and potentially wholesaler) may be combined, sometimes along with sample surveys and additional modelling to account for retailers where data is unavailable, in order to provide brand or category level totals for the UK as a whole (or for particular types of sales channel). This data is known as aggregated data.
17. Both parties supply disaggregated ePOS data, while only IRI provides aggregated ePOS data. Aztec does not currently provide aggregated data, although it has been making efforts to do so.
18. The parties argued that aggregated and disaggregated ePOS data are complements, rather than substitutes. They argued that aggregated ePOS data allows a brand to analyse its sales across the UK in comparison with competitors, while disaggregated ePOS data allows it do so within particular retailers or stores. Disaggregated ePOS data could be used, for example, to identify problems in the supply chain: for example, if sales fall sharply in a particular store, this may indicate a stock problem which can then be investigated by the manufacturer. The parties therefore argued that since aggregated and disaggregated ePOS data serve different purposes, they are not functionally interchangeable and are commonly purchased together.
19. Consistent with this, the OFT's market investigation did not support the possibility of substitution between aggregated and disaggregated ePOS data

⁴ Where the data in question is brand-level and/or category-level detail, but at *retailer* level, this is known as 'named account data'; where the data is brand level across many stores it is sometimes known as 'disaggregated data'. Suppliers almost always provide both, as the disaggregated data is an input into their named account data. This distinction has not been considered further for this reason.

on the demand-side. Most third party respondents said they would not switch between disaggregated data and aggregated data in response to a price rise in either, and indicated that they did not view these products as substitutes for each other.

20. The OFT considers that the boundaries of the relevant product market are generally determined by reference to demand-side substitution. The OFT may, however, where appropriate, aggregate several narrow markets into one broader one on the supply-side.⁵ The parties submitted that it would be difficult for a supplier of disaggregated ePOS data to begin supply of aggregated ePOS data. The parties submitted that different technologies are needed to produce aggregated and disaggregated ePOS data, with aggregated ePOS data being much more complex to create. The OFT notes that this is supported by the difficulties faced by Aztec in its efforts to produce such data, and by comments to the OFT from competitors.
21. As a result, the OFT considers the supply of aggregated and disaggregated ePOS data separately. The rest of the market definition section focuses on disaggregated data where the parties' activities currently overlap.

Disaggregated ePOS data

Grocery multiple retailers and convenience retailers

22. The parties submitted that they differ in their focus. Aztec is focused in the convenience segment, where it has a number of exclusive contracts with retailers for the purchase of their sales data for use primarily in its disaggregated ePOS product. IRi focuses on providing ePOS data from grocery multiple retailers and health and beauty retailers.
23. On the demand side, third parties who replied during the OFT's investigation did not consider that disaggregated ePOS data from the convenience market and disaggregated ePOS data from the grocery multiple retailer market were substitutes for one another. The majority of customers indicated that grocery multiple and convenience sector ePOS data were

⁵ This would apply where: production assets can be used by firms to supply a range of different products that are not demand-side substitutes and firms can shift capacity between these products relatively easily; and the same firms compete to supply these different products and the conditions of competition in the supply of each are the same. See *Mergers Assessment Guidelines*, paragraph 5.2.17.

complements given that brands are generally interested in data about sales of their products across all sales channels.

24. On the supply side, although in principle it might be possible for a provider focused on grocery multiple retailer data to move into the provision of convenience data, the OFT notes that technical issues and the exclusive contracts, which Aztec has in place with several large convenience retailers, may impede providers from easily and quickly moving into the supply of ePOS data from the convenience segment. Further, the conditions of competition differ across disaggregated ePOS data from convenience retailers and disaggregated EPOS data from grocery multiple retailers. IRI and [] each told the OFT that they make very small numbers of sales of disaggregated ePOS data from convenience retailers where Aztec is considered to be relatively strong. IRI and [] instead focus on the supply of disaggregated and aggregated ePOS data from grocery multiple retailer, which Aztec provides to a much lesser extent.
25. The OFT has therefore considered the supply of disaggregated ePOS data from the convenience segment and the supply of disaggregated ePOS data from the grocery multiple segment separately.

Wholesale and retail disaggregated ePOS data

26. Aztec (through Salesout) provides disaggregated ePOS data from wholesalers, but IRI does not. The parties submitted that wholesale data and retail data (either disaggregated ePOS data from convenience retailers or aggregated ePOS data) are separate markets.
27. The parties submitted that on the demand side the customers of wholesale data tend to be different to those of retail data, as the products sold through the wholesale channel are often different to those sold through the retail channel. The parties submitted that customers of wholesale data do not (as with retail data customers) generally want insights into end consumer behaviour, but instead into the efficiency of their supply chain.
28. In support of the parties' view, third parties who responded to the OFT did not generally consider wholesale data and retail data to be substitutes for one another. However, it does appear that in certain circumstances wholesale data supplements retailer data, for that segment of convenience retail which is too fragmented for data collection to be practical (that is,

independent retailers that purchase stock from wholesalers), and that as a result Litmus uses wholesale data from Salesout as an input into its convenience data offering.⁶

29. The parties also presented supply-side arguments, that the competitor set differs between wholesale and retail data, that the pricing mechanism is different, and that the 'go to market' approach is different: while retail data market research is sold to customers by providers such as Nielsen, IRi and Litmus, wholesale data is often provided directly to users by the wholesalers themselves (using Salesout's services to do so), and included in the contracts between wholesalers and their major suppliers rather than through separate negotiations between manufacturers and market research providers.
30. Based on evidence provided by the parties and supported by third parties, the OFT considers wholesale data and disaggregated ePOS data from retailers separately. The parties do not overlap in the supply of wholesale data.

Summary on product market definition

31. The OFT has therefore assessed this merger separately in relation to:
 - (i) disaggregated ePOS data from convenience retailers;
 - (ii) disaggregated ePOS data from grocery multiple retailers; and
 - (iii) aggregated ePOS data.

GEOGRAPHIC MARKET

32. In a previous decision,⁷ the European Commission has assessed similar market research activity at a national level, although the precise market definition was left open.
33. In this case, the parties submitted that the geographic market definition can be left open, in the absence of competition concerns. Nevertheless,

⁶ Aztec presentation (annexe 22.1 provided by the parties in response to questions of 14 October 2013), page 7

⁷ Case No. COMP/M.5232, *WPP/TNS*

following the past precedent noted above, the parties have assessed the merger on a national basis.

34. Responses from third parties to the OFT's market investigation supported assessing the merger at a UK level and the OFT has therefore assessed the merger on this basis.

THE COUNTERFACTUAL

35. The application of the test of whether a merger will lead to a substantial lessening of competition involves a comparison of the prospects for competition with the merger, against the competitive situation without the merger. The latter is called the 'counterfactual'.⁸ The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the OFT to predict with some confidence. In its competitive assessment, the OFT may still consider the effects of the merger in the context of an event or circumstance occurring, even if that event or circumstance is not sufficiently certain to include in the counterfactual.⁹ An example might be when a competitor is growing and will be a stronger competitor in the future.
36. In this case, [] that Litmus is []. However, set against the OFT's published guidance on the evidentiary standard, the parties have not been able to demonstrate to a sufficient degree that the exiting division test¹⁰ is met in this case for the purpose of the counterfactual assessment. The parties did supply some evidence that Aegis had decided to [] absent the merger. However, the parties did not supply evidence sufficient for the counterfactual that, if Litmus had exited, there would not have been another purchaser for Litmus. Nor did they demonstrate what would have happened to Litmus' sales had it (and its assets) exited.¹¹ This is not to say that Litmus had not become a weaker competitor to iRI over the past few

⁸ Mergers Assessment Guidelines, paragraph 4.3.1

⁹ Mergers Assessment Guidelines, paragraph 4.3.2

¹⁰ Merger Assessment Guidelines, paragraphs 4.3.13 to 4.3.18. Where a firm is part of a larger corporate group the OFT will examine the reason why a profitable parent company would have closed that subsidiary. There may be several reasons why a profitable parent would not close a subsidiary which appeared to be []. These considerations are in addition to the questions set out in paragraphs 4.3.16 to 4.3.18, that is, would there have been an alternative purchaser and what would have happened to the sales of the exiting firm?

¹¹ Mergers Assessment Guidelines, paragraph 4.3.8

years. This is discussed further in the competitive assessment in paragraphs 50 to 53.

37. The OFT has also considered whether one or both of the parties were potential competitors to the other (that is whether IRi would have entered into the ePOS data from convenience retailers segment and whether Litmus would have entered into the aggregated ePOS data segment). If so, the merger may result in a loss of a potential entrant.¹²
38. However, the OFT does not consider the evidence in this case to be sufficiently compelling for it to take account in its counterfactual assessment the possibility of one or both of the parties entering or expanding into segments in direct competition with the other party. However, the OFT has taken account of this possibility in its competitive assessment in paragraphs 82 to 90.
39. The OFT has taken as the counterfactual in this case the pre-merger levels of competition.

COMPETITIVE ASSESSMENT

Shares of supply

40. The parties submitted that their combined share of supply of disaggregated ePOS data (for both grocery multiples and convenience retailers together but excluding aggregated ePOS data) is [35 to 45] per cent, with an increment of nine per cent. This is not so low as to rule out concerns about unilateral effects, although the OFT notes that constraints from other data (such as loyalty card data), although limited, mean that the nine per cent share may to an extent overstate the constraint lost as a result of the merger. The only other significant provider of disaggregated ePOS data in the UK is Nielsen with an estimated [50 to 60] per cent share of supply. The parties also noted two other competitors in the supply of this data, each with small shares. Evidence from third parties did not suggest that these competitors exert a constraint disproportionate to their small shares of supply.

¹² Mergers Assessment Guidelines, paragraph 4.3.19

41. Separate shares of supply for disaggregated ePOS data from grocery multiple retailers and disaggregated ePOS data from convenience retailers were not provided by the parties, although the OFT understands from third party replies during its market investigation that Aztec supplies the vast majority of convenience data (one third party stated Aztec provided 'almost the entirety' of convenience sector data) partly as a result of the coverage obtained through its exclusive contracts. Neither IRi nor Nielsen believe that they compete in the supply of disaggregated ePOS data from convenience retailers. The parties submitted that IRi has [] to supply convenience data, and that this data is from ([]). Nielsen has stated that it does not compete in the supply of disaggregated ePOS data in the convenience sector and considers that Aztec holds a high market share.
42. In their responses to the OFT, the vast majority of third parties considered that neither IRi nor Nielsen competed for the supply of disaggregated ePOS data from the convenience sector, because of Aztec's exclusive contracts with retailers and resultant coverage. Indeed, this is supported by internal business documents provided by the parties which point to IRi and Nielsen having access to convenience data covering only [] per cent¹³ of sales made in that segment, compared to Aztec, which has 100 per cent coverage of the convenience segment, and to the 100 per cent coverage that IRi and Nielsen have of the 'mass market' (grocery multiples) channel.¹⁴
43. The OFT therefore considers, based on the evidence available to it, that Aztec is the main supplier of disaggregated ePOS data from convenience retailers, as a result of its exclusive contracts, with very limited competition from any other provider (including Nielsen or IRi).
44. While Aztec is relatively small compared to IRi and Nielsen, the OFT considers that the loss of a small competitor may still raise competition concerns where that competitor represents a disproportionate or growing competitive constraint. Given the shares of supply of Nielsen and IRi, while the greatest competitive interaction may be between these two firms, the presence of an additional supplier may allow it to act as a significant competitive constraint. The relative size of firms can directly influence

¹³ Data coverage refers to the proportion of data over the whole convenience sector which a provider has access to.

¹⁴ See, for example, *Project Diamond, Board of Directors Presentation, August 9 2013*, slide 16, provided as Annex 5 to the parties' submission. [].

firms' incentives to compete, with smaller firms commonly finding themselves, for example, more willing to reduce price in order to win new custom, where a larger firm may be reluctant to do so.

45. Separate shares of supply estimates were also not provided for aggregated ePOS data from grocery multiple retailers. The OFT understands from replies to its market investigation that the current supply of such data is broadly split evenly between only two suppliers, Nielsen and IRi, and that Litmus is active to a limited extent, if at all.

HORIZONTAL ISSUES

46. The OFT has considered the loss of competition between Aztec and IRi in the supply of:
 - disaggregated ePOS data from convenience retailers;
 - disaggregated ePOS data from grocery multiple retailers; and
 - aggregated ePOS data.
47. In each of these cases, there is some evidence, as outlined below, of an existing competitive constraint between the parties. The full extent of this existing constraint is in some cases limited. In addition to this existing constraint, however, the OFT is conscious that the merger may result in the loss of potential or greater future competition between the parties in segments where one of them is currently active and a significant supplier and the other is not currently active (or is active to only a limited degree) but may represent a potential entrant or expanded competitive force. The OFT has paid particular regard to areas into which one of the parties has been actively seeking to enter or expand.¹⁵
48. The OFT has examined the possibility that the loss of any existing competition, as well as potential or greater future competition, between the parties resulting from the merger may allow the merged firm to unilaterally raise prices above those that would prevail absent the merger, or to unilaterally deteriorate its competitive offering in some other way.

¹⁵ See Merger Assessment Guidelines, 5.4.13 to 5.4.18

General evidence on competition between the parties

49. Before considering each of the segments separately, the OFT has examined general evidence that applies across all of the markets, namely:

- Litmus, specifically (as opposed to Aztec), is in []; and
- Bidding data submitted by the parties.

(i) Litmus' financial difficulties

50. [] that Litmus is [] and not capable of []. [] that it is experiencing [], and that this has led to []. Further, the parties argued that Aztec had no realistic plans for turning the business around.

51. The parties submitted that IRI's due diligence on the Litmus business indicated that it has suffered, and [], from [] operational difficulties and a []. It was [] ([]). In Litmus' 2012 financial statement, Ernst and Young, Litmus' auditors, noted that []. The parties submitted that since that time Aegis had decided to sell the business or, []. This was confirmed by Aegis. Litmus's financial position, according to the parties, has since []: it is now expected that Litmus will generate [].

52. IRI's internal documents revealed [], and that the overall rationale of the merger was not focused on Aztec's UK businesses but on accessing the Aztec business elsewhere including in Australia and New Zealand. In the context of a merger involving businesses in a number of countries, the [] of Litmus (present only in the UK) was noted as a []: 'Litmus has a challenged reputation in the market and []'.¹⁶

53. []. The parties argued that Litmus had been attempting and failing to produce an [], and failing to []. This was supported by documentary evidence of customer concerns provided by the parties, and by customer comments received directly by the OFT. [] that this has led it to become [] and to [] in areas of activity outside of aggregated Epos data. Further, the parties submitted that Litmus is now [].

(ii) Bidding and negotiation data

¹⁶ See IRI board of directors presentation, 9 August 2013

54. The OFT received information from IRi relating to the contracts worth more than £40,000 for which it has bid or for which it has been involved in a negotiation during the past three years, as well as instances where IRi had lost a contract to Aztec outside of a bidding process. This information relates to all contracts – rather than to specific data types – due to the prevalence of contracts and negotiations involving multiple data types (for example, both aggregated ePOS data and disaggregated ePOS data from grocery multiple retailers).
55. The OFT also received evidence about the number of occasions on which Aztec has competed against Nielsen. From the information submitted, it appears that Aztec bid in [below 10] of [over 100] contracts worth more than £40,000 where IRi had also bid in the past three years, and won only [] of these contracts.¹⁷ Very few of IRi's bids included [] data, where Litmus is strong. Litmus does not record bidding information, and so the data includes only those instances where IRi is aware it has competed against Litmus. However, analysis of customers lost and gained by the parties showed [] switched its purchase of disaggregated ePOS data from IRi to Aztec (outside of a bidding process) in the time period covered by the bidding data. The bidding data indicates that Nielsen is a much stronger competitor to IRi than Aztec, since Nielsen appears [] times in the same [over 100] contract negotiations. Nielsen also described only [] occasions on which it has faced competitive interaction with Litmus.
56. The parties submitted that in each of the [] cases where the parties bid against one another, the circumstances indicate it is unlikely that Aztec provided a competitive constraint on IRi or vice versa: where Aztec won the contract, this related to the provision of data to a []. The parties argued that this is an area where IRi does not compete strongly, and that it only bid because the previous [] involved the provision of the []. In respect of the other two contracts where Aztec bid against IRi, the parties submitted and third parties confirmed that Aztec was not considered to be a serious contender because it was not perceived to have the technical capability to produce the product required.

¹⁷ Of the [] contracts for which Litmus bid, [] was for disaggregated ePOS data only, and the other [] included aggregated and disaggregated ePOS data. The parties submit that in the latter [] cases the customer did not consider Litmus [] element of the contract. Among other contracts for which IRi bid but Litmus did not, the [] included aggregated ePOS data and disaggregated ePOS data from grocery multiple retailers. [] included disaggregated ePOS data from convenience retailers.

57. The evidence suggests that current competition between Aztec and IRI is weak and that Aztec currently is not commonly competing against IRI.

Constraint from other data types

58. In the course of its investigation, the OFT received some evidence from brand customers of switching from products based on ePOS data to loyalty card data. For example, one customer switched from IRI to Dunnhumby, and another partially switched by reducing its spend on IRI to Aimia (Sainsbury's loyalty card data) and Dunnhumby. Others mentioned that consumer panel data can provide some of the same insights as provided by aggregated ePOS data. However, the majority of customers did not consider other data types to be substitutes for ePOS data. Competitors providing these other data types did not themselves consider that they compete strongly with either of parties to the merger.
59. Based on the evidence it has received, the OFT considers that such data provides some constraint on the parties, but that this constraint is limited.

Disaggregated ePOS data from grocery multiples

60. The OFT recognises that Aztec is focused primarily on the supply of ePOS data from the convenience sector where IRI has a very limited presence, whereas IRI is focused in the supply of ePOS data from grocery multiple retailers. However, Aztec is also active in the supply of disaggregated ePOS data from grocery multiple retailers. The parties informed the OFT that Aztec has [] per cent data coverage of the grocery multiple sector,¹⁸ and that in order to be able to provide disaggregated ePOS data, full coverage may not be necessary as brands can purchase disaggregated ePOS data on a retailer-by-retailer basis. The OFT notes that Aztec currently supplies disaggregated ePOS data from grocery multiple retailers in [] of its [] customer contracts and that the parties overlap (at least) in the supply of data from Tesco, Sainsbury's, Asda, Morrisons, and Ocado.
61. In the [] instances in which IRI and Aztec have bid for the same contracts, Aztec's offer included disaggregated ePOS data from grocery multiple retailers.

¹⁸ IRI and Nielsen have 100 per cent coverage of retail sales in the grocery multiples segment. See 'Project diamond' presentation to the board of IRI directors (August 9 2013), page 16.

62. However, [] that Aztec is a weak competitor in this area, highlighting the bidding data discussed above, and pointing to Aztec's offer being unattractive to many customers. In particular, the parties argued that most customers wish to purchase aggregated ePOS data, and that for data compatibility reasons they prefer to purchase their disaggregated ePOS data from the same supplier. The parties submitted that Aztec's inability to provide aggregated ePOS data therefore means that it does not compete strongly for the business of such customers.
63. In support of this argument, the parties submitted that [] per cent of IRI's clients purchase both aggregated and disaggregated ePOS data from the same supplier. Responses from customers and competitors during the OFT's market investigation also supported this argument to some extent.
64. The parties also argued that, in general, where Aztec provides disaggregated ePOS data from grocery multiple retailers, it is as an adjunct to its provision of disaggregated ePOS data from convenience retailers, and in particular that its supply of disaggregated ePOS data from multiple grocery retailers is focused on supply to customers for whom convenience data is especially important, and to tobacco brands in particular. In support of this the parties provided information showing that only [] of Aztec's contracts include only disaggregated ePOS data from grocery multiple retailers without disaggregated ePOS data from convenience retailers. Only £[] million of Aztec's total revenues, that is, [] per cent, are derived from the disaggregated ePOS data from multiple grocery retailers. Further, over [] per cent of these revenues are derived from a single customer, [], who is primarily a customer of disaggregated ePOS data from convenience retailers. This supports the parties' argument that Aztec's sales of disaggregated ePOS data for grocery multiple retailer are made as an adjunct to contracts focused on disaggregated ePOS data from convenience retailers. Absent [], the proportion of fees related to data from disaggregated ePOS data from grocery multiple retailers is no more than [below 20] per cent.
65. A significant number of customers who replied during the OFT's market investigation, supported the parties' submission claiming that Aztec is a weak competitor in this segment. A comment from one customer typifies several of the responses received by the OFT: 'Although Litmus claims to be able to replicate IRI and Nielsen services for Multiple Grocers, this has not really been what they are about'.

66. The OFT also received comments from a small number of customers indicating that the parties compete in the supply of disaggregated ePOS data from grocery multiple retailers and that the merger would remove an important competitor to IRi. The issue of a reduction in the level of choice and competition in the disaggregated ePOS data from grocery multiple retailers was raised by a small number of both brand-owners and retailers who buy data (or receive it as part of a sale back agreement). Moreover, a small number of third parties noted that Aztec is strengthened as a competitor overall, as a result of its unique position in convenience data and customers' preferences for buying different data types together. For example, some customers noted that the wider offering of Aztec makes it a stronger competitor than would otherwise be the case. A number also noted that it is not essential that disaggregated ePOS data is purchased alongside aggregated ePOS data and that they are willing to purchase disaggregated ePOS data separately (including in relation to individual named retailers).
67. As a result, the OFT considers that there are some marginal customers that consider the parties to compete and could potentially switch between them (or threaten to do so) and benefit from this rivalry. Aztec represents a competitor to IRi (and to Nielsen) for those customers requiring only disaggregated ePOS data from grocery multiple retailers, and for those that would consider Aztec's combined offer of disaggregated ePOS data from grocery multiple retailers and disaggregated ePOS data from convenience retailers to be a substitute for IRi's disaggregated ePOS data from grocery multiple retailers. However, the number of these marginal customers appears to be very limited and the OFT notes that even these marginal customers were, in the main, unconcerned about the competitive effects of the merger.
68. As a result, taking the evidence in the round, the OFT considers that although Aztec has some presence in the disaggregated ePOS data for multiple grocery retailers market, the extent of its constraint on IRi is very limited and the competition lost as a result of the merger is likely to be minimal. The OFT considers that the merger does not raise concerns of unilateral effects in the supply of disaggregated ePOS data from grocery multiple retailers.

Disaggregated ePOS data from convenience retailers

69. As noted earlier, the OFT understands that Aztec has a relatively strong position in the sale of disaggregated ePOS data from convenience retailers. According to the parties, the overall coverage of its data, across convenience sales, is 90¹⁹ to 100 per cent²⁰ (the OFT understands from the parties' internal documents that []). Aztec also has a high market share in the sale of disaggregated ePOS data from convenience retailers.
70. Aztec has a number of exclusive contracts with convenience retailers. Their expiration dates range from [] to [], and some contracts have been very recently renewed. The OFT has received comments from third parties during its investigation that Aztec's exclusive contracts cover a large proportion of the larger convenience retailers.
71. According to the parties, all but [] of Aztec's contracts include disaggregated ePOS data from convenience retailers, and more than [] of its revenue comes from sales of this data. In contrast, IRi and Nielsen have a very limited presence in the supply of disaggregated ePOS data from convenience retailers, although both were active in this sector until [] when Aztec ended its agreements with both firms to on-supply this data. IRi's internal documents show that it has data covering [] per cent of the segment,²¹ but on a disaggregated basis IRi currently sells disaggregated ePOS data from convenience retailers from only [], to only [], and the parties submitted that this is a minor adjunct to the multiple grocery retailer data provided in the same []. The [] in question did not raise concerns about the merger. Disaggregated ePOS data from convenience retailers was included in only [] of the contracts for which IRi bid in the last three years.
72. The parties argued that, with the exception of [], IRi uses this data only as an input into its aggregated ePOS data products, and that even there, it does not try to produce [] for narrow product categories, since it lacks the expertise to do so. In relation to the [] where IRi provides disaggregated ePOS data from convenience retailers, IRi submitted that it purchased this

¹⁹ Aztec presentation []

²⁰ 'Project diamond' presentation to the board of IRi directors (August 9 2013), page 16

²¹ 'Project diamond' presentation to the board of IRi directors (August 9 2013), page 16. This essentially refers to the proportion of the convenience sector it obtains information on.

retailer data in the first place only as a necessary part of a wider contract [].

73. The absence of any material existing competition from IRi (or Nielsen) was supported by customers, where it was frequently noted that for much of the data provided by Aztec, neither IRi nor Nielsen competes.
74. Despite the limited extent of current competition between the parties, the OFT has also examined the extent to which IRi may act in the future as a competitive constraint on Aztec in the supply of convenience data.
75. In response to the OFT's market investigation a number of concerns were raised by retailers about their negotiating strength relative to the parties and the effects this may have on the data received by brand-owners. The OFT has therefore examined the extent to which the merger may give rise to the following two effects.
76. First, the merger removes one potential bidder for the purchase and sale-back of the data to retailers and this may result in the retailer having less choice about the provider from whom it receives such services. Customers of disaggregated ePOS data include both brand-owners and, in some cases, the retailers themselves. The OFT considered whether any loss of rivalry between the parties may lead to a deterioration of the competitive offer to retailers that purchase data, even if these 'purchases' are part of a wider agreement in which the retailer is itself paid for the use of its data. However, the parties submitted that they do not currently compete in the sale back of data to retailers, since IRi holds only one such contract, and Aztec holds none. This was supported by some evidence from retailers suggesting that [] is particularly strong in [].
77. Second, if there is reduced competition in the purchasing of the raw data from grocery multiple retailers, there may be an adverse effect on the quality of the product offering to customers.²² This possibility was raised by a number of retailers, but generally not by the majority of customers themselves. However, where IRi has bid for the purchase of convenience data (and not won), it may also indicate that IRi is a potential competitor in the supply of this data that could exert a future constraint. This includes the possibility that bids for non-exclusive purchases by IRi and Nielsen

²² See Merger Assessment Guidelines 5.4.19

could win against an exclusive bid by Aztec, giving IRi access to more convenience data which it could then supply on to brands and retailers. The OFT received some concerns that the merger would remove this potential competition.

78. However, the parties argued that IRi is not a likely potential competitor in the supply of disaggregated ePOS data from convenience retailers, highlighting in particular that the last time it bid for a contract to purchase from a retailer with whom Aztec has an exclusive contract was in []. Even where convenience retailers have no exclusive contract with Aztec, [], demonstrating the absence of any [] to supply ePOS data from convenience retailers.
79. The parties submitted that IRi has no internal documents which discuss its intentions in relation to [], because it has not [] to building this business.
80. The OFT recognises that, given the limited number of suppliers active in the supply of ePOS data generally, IRi is potentially one of very few likely suppliers of convenience data. However, the evidence suggests that IRi has negligible current activity in the convenience sector and there is no evidence to suggest that it had any intention of becoming more active in this area, absent the merger. As a result, the OFT does not believe that the merger will result in a substantial lessening of competition in the supply of disaggregated ePOS data for the convenience sector.

Aggregated ePOS data

81. Aztec currently has a very limited number of contracts for the supply of aggregated ePOS data but, in each case, has been unable to supply this product, an area where IRi is active and has a relatively strong position. The OFT has examined the extent of the constraint exerted by Aztec currently and the extent to which it may represent a potential competitor to IRi, thus providing a constraint which may be lost as a result of the merger.
82. In principle at least, Aztec has the ability to combine the disaggregated data that it collects into an aggregated product. [], however, that despite Aztec's attempts to build an aggregated product over the course of a number of years, and investing significant resources in doing so, [], its subsidiary, Litmus has become []. [] that Aztec is not able to [] data to

customers and so does not and [] in the supply of this data (either stand-alone aggregated data or in combination with disaggregated data).²³ As outlined above, the parties point to Aztec having entered contracts to provide such data and [], [] as a supplier.

83. However, it is clear from the parties' internal documents provided to the OFT that Aztec has for a number of years held the clear intention of providing [] data. For example the OFT notes an [] in which it implies that the firm is currently offering to supply brands with [] information for some sub-segments. It also states that Aztec has '[]'.²⁴ However, there was some indication that, [],²⁵ albeit the internal documents are very mixed and do not present a conclusive view. The OFT notes that Aztec in the UK had been in [] from its previous parent, Aegis and has a contract with [], an existing convenience customer, to produce an [] product.
84. The OFT received comments from customers that the merger will remove a competitor with the potential to provide aggregated ePOS data, and to disrupt and improve competition – in the context of a market where competition has in the past been between IRi and Nielsen only. For example, one retailer noted that they believed Aztec was about to launch a service to rival IRi and Nielsen, and another noted that the merger would reduce competition.
85. Nielsen argued that []. However, where these customers have responded to the OFT's enquiries, they have not been concerned about a reduction in competition – this supports the parties' argument that Aztec has been trying and failing to produce such data.
86. In relation to the [] product which Aztec has been endeavouring to produce, Aztec has been []. The parties have informed the OFT that despite the aggregated ePOS product relating to [] only and being limited in scope, Aztec does not have the [] it. They submitted that the production of aggregated ePOS data is complex and labour intensive, and that it is [] [] of Aztec to undertake.

²³ For IRi, [] per cent of its clients purchase aggregated and disaggregated data together as a combined product.

²⁴ Aztec presentation Annex 22.1 page 3.

²⁵ See Annex 5 to the parties' submission.

87. [] described a number of lengthy and difficult stages which still remain to be completed before Aztec can provide even a [] product, and [] that even with significant funding it would be [] for Aztec to complete these stages. For example, an aggregated ePOS product requires coding of items' barcodes, a lengthy and labour intensive process which IRI has streamlined to a high degree of expertise over the past 20 years. While many steps in the coding process require human intervention, IRI has developed an automated coding process which populates attributes for a barcode directly from the web and/or product images. [].
88. Aztec has already received significant [], according to the parties. [] that a number of failed efforts had been made to improve the Aztec business, including changes in [], and investments of working capital by [] £[] million in 2011 and £[] million in 2012. However, the parties submitted that the parent company (and wider group) does not have the necessary expertise to support Aztec to complete its [] product – []. Moreover, Aegis provided evidence to the OFT that absent the merger, it would not have [].
89. Given the evidence received about Aztec's failed efforts to produce aggregated ePOS data, the OFT concludes that absent the merger Aztec would be unlikely to be able to enter this market.

Conclusion on horizontal effects

90. The OFT does not consider that the merger raises concerns of unilateral horizontal effects in the supply of disaggregated ePOS data from convenience retailers, disaggregated ePOS data from grocery multiple retailers or aggregated ePOS data.

NON HORIZONTAL ISSUES

91. Given IRI's relative strength in the supply of aggregated ePOS data and disaggregated ePOS data from grocery multiple retailers and Aztec's relative strength in the supply of disaggregated ePOS data from convenience retailers, and in light of customer and competitor concerns, the OFT has also examined the possibility of the merger giving rise to non-horizontal issues.

92. Conglomerate effects may arise in mergers of firms in different markets that are not vertically related— either because the products they produce are complements or are unrelated.²⁶
93. Generally, in competition terms, conglomerate mergers are often benign (if they involve unrelated products) or even efficiency-enhancing (if they involve complements). However, in certain circumstances, a conglomerate merger of complementary products can result in the merged entity foreclosing rivals (through, for example, tying or bundling).²⁷ The OFT only regards foreclosure as anti-competitive where it results in a substantial lessening of competition in the foreclosed market(s), not merely where it disadvantages one or more competitors.
94. In this case, several third parties expressed concern relating to the effect of Aztec’s exclusive contracts for the supply of disaggregated ePOS data from convenience stores. Broadly speaking, these concerns were that by bringing together the disaggregated ePOS data from convenience retailers that Aztec provides, with the disaggregated ePOS data from multiple retailers and the aggregated ePOS data that IRi provides, the merger could allow IRi to foreclose its rivals in the supply of these latter two data types and, as a result of the weakened competitive constraint from those rivals, to increase prices or reduce quality. More specifically, third parties who replied during the OFT’s market investigation raised concerns that the parties would:
- i. tie or bundle supply of disaggregated ePOS data from convenience retailers with supply of disaggregated ePOS data from grocery multiple retailers, or make changes to the data so that there is compatibility between the disaggregated ePOS data from convenience retailers and ePOS data from multiple retailers provided by IRi, but not with rivals’ ePOS data from grocery multiple retailers.
 - ii. use the newly acquired disaggregated ePOS data from convenience retailers as an input into IRi’s aggregated ePOS data to create full coverage of the grocery multiple and convenience retailer sectors (and not supply data to Nielsen for the same purpose) and that the parties could also engage in tying or bundling involving aggregated ePOS data.

²⁶ *Mergers Assessment Guidance*, paragraph 5.6.2

²⁷ *Merger Assessment Guidance*, paragraph 5.6.15

95. The OFT's consideration of both of these involves the extent to which the parties could draw sufficient customers away from competitors, in particular Nielsen, to reduce the competitive constraint that competitors place on the parties.
96. The OFT's approach in examining the possibility of such a scenario involves analysing the:
- a) Ability of the merging parties to undertake such strategies (would the merged firm have the ability to harm rivals?);
 - b) Incentive of the parties to do so (would the merged firm find it profitable to do so?); and
 - c) The effect of this strategy (would the effect be sufficient to reduce competition, for example, by foreclosing access to customers of significant competitors?).
97. In assessing these, the OFT takes into account the following factors²⁸
- a) whether customers have a demand for more than one of the products, and whether the products are complements (relevant to ability);
 - b) customer preferences for variety and one-stop shopping (relevant to incentive); and
 - c) the costs to rivals of providing variety and one-stop shopping at a scale to enable them to compete effectively with the merged firm (relevant to effect).

Ability to foreclose

98. The merger brings together Aztec's activities in the supply of disaggregated ePOS data from convenience retailers with IRI's activities in the supply of disaggregated ePOS data from grocery multiple retailers and the supply of aggregated ePOS data. While (as discussed in the earlier section on horizontal effects) Aztec already (pre-merger) supplied both disaggregated ePOS data from convenience retailers and from grocery multiple retailers, its coverage of multiple retailers was significantly lower than that of IRI. The merger therefore increases the set of full and competitive products

²⁸ See *Merger Assessment Guidelines*, paragraph 5.6.13.

which can be provided by the same firm. The OFT considers that there are means by which the merged firm could require, directly or indirectly, customers to buy disaggregated ePOS data from both convenience retailers and from grocery multiple retailers (and/or aggregated ePOS data). These include tying, bundled pricing, or, in particular, changes to data provided by IRI with respect to its technical compatibility with competitors' data.²⁹

99. The OFT considers that a merged firm's ability to foreclose is higher if:

- There are limited substitutes for at least one of the products in which the parties are active, which customers also view as being particularly important
- There is a large pool of shared customers for the products to be tied/bundled (see paragraph 95(i)).

Availability of alternatives

100. Third parties have indicated that there are limited substitutes³⁰ for disaggregated ePOS data from convenience retailers and that Aztec is the main provider of this. The vast majority of third parties did not consider that either IRI or Nielsen competed for the supply of convenience sector data, as a result of Aztec's exclusive contracts and resultant coverage. Neither Nielsen nor IRI consider that they compete in the supply of disaggregated ePOS data from convenience retailers.

101. Aztec's strong position in the supply of disaggregated ePOS data from convenience retailers appears to be largely driven by the exclusive contracts it holds with major convenience retailers (and wholesalers). The OFT understands from [] that the exclusive contracts cover a significant proportion of those retail sales in the convenience segment for which it is economical and practical to collect ePOS data. The [], however, that Nielsen retains some opportunities to improve its access to convenience ePOS data. [] that:

- a) Nielsen could bid for Aztec's exclusive contracts once they end and that, should Nielsen choose to put its resources behind such a

²⁹ Such compatibility issues may relate, for example, to file structures, categorisations of products and retailers (convenience, off-licence, etc.), and to bespoke calculations, time periods, or provision of extra details including 'attribute coding' which may constitute intellectual property.

³⁰ See paragraph 12.

proposition, Aztec (or IRI/Aztec) would likely not be in a position to compete;

- b) a number of convenience stores are not subject to any exclusivity arrangement. Indeed, there are certain convenience retailers with which Aztec does not have an exclusive relationship, whose data, [], Nielsen has chosen not to obtain; and
- c) Nielsen could seek to invest further in its modelling technology, including by reference to its consumer panel data offering.

102. While [] other providers could bid against Aztec to gain access to the data currently procured through exclusive contracts, such bidding may not preclude the foreclosure strategy since Aztec's exclusive contracts have expiration dates which range from [] to []. Further, the OFT considers that the previous competition investigation Nielsen has faced³¹ and the requirement that it undertake to refrain from entering into exclusive ePOS agreements³² will discourage it from bidding for such data on an exclusive basis. As such Nielsen bidding on a non-exclusive basis may be unable to outbid the offers made by the parties on an exclusive basis – since their bid could be on the basis of higher earnings that could be expected for an exclusive supplier. The OFT notes that, beyond the terms of the existing contracts, the extent to which the parties may seek to, or may be prevented from, renewing these contracts is not clear.

103. [] the OFT understands that ePOs data from convenience retailers account for approximately 20 per cent of UK sales of FMCG³³ but that for certain brands a higher proportion of their sales are made in convenience retailers. Given that non-convenience data is not a substitute for convenience data, the OFT considers that in the supply of disaggregated ePOS data from convenience retailers the parties have a product which a number of customers require and for which there are limited or no alternatives.

104. Nielsen's inability to access most ePOS data from convenience retailers is already occurring pre-merger as a result of Aztecs' exclusive contracts.

³¹ As a result of which undertakings were given to the European Commission by Nielsen in 1996 which prevented them entering into certain exclusive agreements for the purchase of ePOS data (European Commission - IP/96/1117 04/12/1996). The terms of these undertakings are no longer applicable.

³² [although Nielsen did not have any exclusive agreements at that time].

³³ The convenience segment as a proportion of total coverage also appears to be growing: [].

However, exclusive contracts are more likely to raise competition concerns where they are held by a firm with a high share of supply, and the merged firm may have a significantly higher share in ePOS data overall than is currently the case for Aztec.

105. Further to the points above relating to disaggregated ePOS data from convenience retailers, the importance of aggregated ePOS data has been repeatedly emphasised by the parties in their submissions, and third parties have said that high quality aggregated ePOS data is a key requirement for many customers. The OFT therefore considers that in improved aggregated ePOS data based on both convenience and grocery multiple retailer data, the parties may have data for which a sub-set of customers have a strong demand, and that these customers may have limited ability to switch to alternative providers who supply equivalent products.

The same customer base

106. A number of customers currently purchase disaggregated ePOS data from both convenience retailers and grocery multiple retailers. The OFT has received evidence of this from both the parties and [].

107. IRi has around [] contracts covering all ePOS data,³⁴ while Aztec has []. Of Aztec's [] contracts, [] include the sale of convenience data. Of these contracts:

- For [] contracts (with [] customers) the customers also buy ePOS data from grocery multiple retailers from IRi,³⁵
- It appears that in the case of [] further contracts, the customers purchase both types from Aztec;³⁶
- Aztec has a further [] contracts for disaggregated ePOS data from convenience retailers where the customer does not buy ePOS data from grocery multiple retailers from Aztec or IRi.³⁷

108. The parties submitted that the limited overlap in their customer base shows that there is only a small number of customers whose demand for ePOS

³⁴ The parties told us that they have [] contracts in total, that Litmus has [], and that they overlap in [] cases ([]).

³⁵ []

³⁶ []

³⁷ []

data from grocery multiple retailers could be affected by a tying or bundling strategy.

109. Nielsen told the OFT that it had [] UK customers of its ePOS data. [] of these customers also buy disaggregated ePOS convenience data from Aztec, and these customers account for [] per cent of Nielsen's revenue in the UK. [] customers that it considers to be [].³⁸ [] of these are current customers of Aztec, and these [] customers account for [] per cent of []. Thus, [], the overlapping customer base between convenience and grocery multiples ePOS data is relatively small in number, [] high proportion [].
110. Further, several third parties expressed a concern that the parties may be able to use Aztec's exclusive contracts to force customers who buy both ePOS data from grocery multiple retailers and ePOS data from convenience retailers to take both of these products from them.
111. Responses from brand customers during the OFT's market investigation suggested that for those who use it, disaggregated ePOS data from convenience retailers is strongly complementary to disaggregated ePOS data from grocery multiple retailers (and aggregated ePOS data) and many have a strong preference for 'one-stop shopping', although some noted their willingness to purchase from separate providers. It seems likely therefore, that even in the absence of any technical or other tying, a proportion of Nielsen's customers that purchase disaggregated ePOS data from convenience customers (currently from Aztec) would be likely to switch to the parties also for their supply of ePOS data from grocery multiple retailers and aggregated ePOS data.³⁹ Tying or bundling by IRI could therefore strengthen this effect.
112. The importance of disaggregated ePOS data from convenience retailers to customers may be indicated by the share of their sales in that segment. Nielsen submitted that there are [] large brands (with sales of more than £100m) who are customers of Nielsen, and for whom convenience sales represent more than 25 per cent of their total UK sales. These brands account for [] per cent of Nielsen's customers, and [] per cent of

³⁸ This categorisation is largely based on the proportion of the customer's sales which are made through convenience channels

³⁹ The extent to which this is an efficiency gain resulting from the merger is considered later.

revenue. [] ([] per cent) of IRI's top 50 customers make more than 25 per cent of their sales in convenience retailers.

113. Thus, there is a moderate number of customers for whom convenience ePOS data is likely to be important. These customers appear to account for a disproportionate fraction of revenue and are therefore valuable customers. For almost all these customers, convenience sales still make up only a minority of all sales, however the OFT understands [] that sales made in convenience retailers deliver higher margins to manufacturers than those made in grocery multiples, making convenience a particularly important channel. The OFT notes that these customers are readily identifiable by the merged firm, through the data it holds on the proportion of each brand's sales that are made in the convenience sector.

Incentive to foreclose

114. The incentive to foreclose depends on whether tying/bundling is profit enhancing as a result of the merger. This depends on whether the gains from foreclosure in the affected market(s) outweigh any costs of foreclosure (including lost sales). For example, by tying the purchase of two products together, a firm may lose customers that wish to purchase only one. This is less likely for those customers that (as noted in paragraph 95(i)) have a preference for one-stop shopping.

115. The OFT considered that as the parties engage in individual negotiations with customers and have information about the proportion of customers' sales made in convenience stores, it would not be difficult for them to apply a strategy which principally affected those customers with demand for both disaggregated ePOS data from convenience retailers and other data, thus limiting the losses of other types of customers. For example, this could be achieved by restricting the compatibility of their convenience ePOS data with that of Nielsen (which automatically only affects those customers that demand both), or by pricing differently across different customers.

116. The parties argued that there are few customers with strong demand for disaggregated ePOS data from convenience retailers, so that the profits from encouraging or forcing these customers to also buy disaggregated ePOS data from multiple retailers and aggregated ePOS data would be limited. They also argued that it would in fact be difficult to identify those

customers, with a current preference for Nielsen data, at whom it would be most important to target such a strategy. Further, the parties submitted that there would be costs to a policy of degrading the compatibility of its convenience ePOS data with other data provided by Nielsen. These costs include the loss of some convenience ePOS data sales to marginal customers unwilling to switch their multiple retailer/aggregated ePOS data provider in order to get convenience ePOS data. The parties also noted the possibility that Nielsen could, in retaliation, degrade the compatibility of its own data with that of IRI – the parties submitted that such cooperation is important to IRI in a number of other countries.

117. The parties submitted that Aztec, which already has some disaggregated ePOS data from grocery multiple retailers, has not been operating a bundling strategy and argued that were such a strategy profitable, it would have already been occurring. However, the OFT considers that IRI, which has greater coverage of the grocery multiple retailer segment and a stronger reputation, as well as currently being able to provide aggregated ePOS data (which Aztec does not), is in a stronger position to undertake such a strategy than Aztec was previously. As already discussed, the OFT has received comments from customers that Aztec was seen as relatively weak at managing multiple channels of data and complex database segmentations - IRI may not suffer from the same concerns.
118. Nielsen argued that through a bundling/tying strategy IRI could attract customers that provide a large amount of revenue. As outlined above, [] of Nielsen's UK revenue from ePOS data is attributable to customers that currently purchase disaggregated ePOS data from convenience retailers from Aztec. []. Indeed, in respect of aggregated ePOS data, the OFT received a number of comments from customers that IRI's aggregated ePOS data will be much improved through its increased access to convenience ePOS data and that Nielsen will find it hard to compete if the parties continue to prevent Nielsen from using convenience ePOS data as an input into its own data.
119. Moreover, the parties submitted evidence which indicates that, in part as a result of the high fixed cost of data acquisition, variable margins are high at [] to [] per cent. The incremental gains to the parties of increased business are therefore potentially significant.

120. Behaviour resulting in foreclosure may, in certain circumstances, give rise to potential breaches of competition law. Such behaviour may include the use of exclusivity arrangements, either unilaterally or on the basis of an agreement between undertakings. In assessing how potential breaches of competition law might impact on the incentive to carry out a foreclosure strategy, the OFT may take into account whether the behaviour would be clearly, or highly probably, unlawful; whether the behaviour would be likely to be detected; and the potential consequences of such behaviour.⁴⁰
121. The OFT notes that certain exclusivity contracts in this sector have previously been subject to antitrust enforcement proceedings by the European Commission.⁴¹ However, on the basis of the evidence available to the OFT, it is not clear to what extent exclusive contracts relating to the sourcing of convenience data may be maintained, renewed or newly entered into post-merger and what the potential consequences of any such contracts would be.
122. In any event, the OFT also notes that the outcome of merger control is generally not determined by the extent to which customers may be protected if there were to be any subsequent hypothetical *ex-post* investigation under Chapter I or Chapter II of the Competition Act 1998 or through similar proceedings by the European Commission. If a merger qualifies for investigation under the merger control provisions of the Enterprise Act and is notified, the OFT is obliged to arrive at a decision.
123. In this case, the extent to which the use of any exclusive contracts may potentially warrant scrutiny under the Competition Act 1998 and/or Articles 101 or 102 of the Treaty on the Functioning of European Union (TFEU) has not been determinative of the outcome of the merger control assessment.⁴²

⁴⁰ *Merger assessment guidelines*, paragraph 5.6.14

⁴¹ XXVIth Report on Competition Policy 1996, page 144

⁴² For the avoidance of doubt, the OFT notes that this assessment of the parties' incentives – as well as the OFT's general assessment of foreclosure in this case – is carried out with reference only to the merger law provisions contained under the Enterprise Act 2002.

Effect on competition

124. To the extent that the merged firm has both the ability and incentive to engage in behaviour which to some extent forecloses its rivals, the OFT will consider the impact of such foreclosure on competition.⁴³
125. Several third parties argued that the merger will give IRi a decisive advantage stemming from its exclusive access to important ePOS data from convenience retailers and that as a result Nielsen could be weakened so that it exerts less of a constraint. [].
126. The parties submitted that, given the small proportion of customers (around [] per cent) purchasing both grocery multiple and convenience ePOS data, that the effect on Nielsen would be minimal and that such a strategy would certainly not be capable of foreclosing Nielsen. As the OFT noted earlier, though, these are high value customers; a significant proportion of revenue may well be drawn away from Nielsen.
127. However, the parties argued that even if Nielsen were to become loss-making in the UK, this would be unlikely to weaken Nielsen as a competitor here, since it is such a large business for whom the UK is an important part of its offer. IRi is itself loss-making in the UK at present and continues to compete hard.
128. [] Nielsen's overall strength, [] it is implausible that such a firm could be significantly weakened by a tying or bundling strategy of IRi's, and that Nielsen would retain customers as a result of its attractive offer. The OFT notes [] that Nielsen has a number of significant advantages in what it can offer to customers, which it will continue to enjoy post merger including [], which it can use to make its package to customers more attractive. [] that in a large number of countries Nielsen's market share in ePOS data is over [] per cent, including many where it has a [] per cent share. Many customers were in agreement that Nielsen was a strong competitor to IRi, including because of its advantage of global reach.

⁴³ The OFT may also need to take account of any stimulus to rivalry that may arise as a result of efficiencies from the merger – efficiencies are considered later. *Merger assessment guidelines*, paragraph 5.6.12.

Conclusion on non-horizontal effects

129. The OFT considers that the parties may have the ability and incentive to carry out a foreclosure strategy. Such a strategy may draw a significant number of customers away from Nielsen. However, it has not been necessary for the OFT to conclude on these points: the OFT considers that even with the loss of customers as a result of tying or bundling by the merged firm, Nielsen would continue to remain as a strong competitor providing significant constraints on the merged firm. The OFT therefore does not consider that any bundling/tying strategy gives rise to a realistic prospect of a substantial lessening of competition.

BARRIERS TO ENTRY AND EXPANSION

130. The OFT received some evidence that there are substantial costs of entry into the market for the supply of ePOS data, and received no evidence that entry would be timely likely or sufficient to counteract a substantial lessening of competition. No new entry has taken place in the last five years and no third party anticipated any new entry in the next two years. As has already been discussed Aztec has made attempted to produce aggregated ePOS data without much success.

131. Since the OFT concludes that this merger does not give rise to any competition concerns, it is not necessary to conclude on the issue of barriers to entry.

BUYER POWER

132. While some customers who responded to the OFT felt that they had a degree of buyer power, many noted that this power is or would be limited in the context of a market where only IRi and Nielsen had a significant market share. The OFT received no evidence to suggest that buyer power could have a sufficient constraining effect to counteract any significant lessening of competition resulting from the merger. However, given the lack of close competition between the parties, conclusion on this issue is not necessary to determine the outcome of this case.

EFFICIENCIES

133. Non-horizontal mergers can lead to efficiencies and this may result in the merged firm having increased incentives to compete to take business from rivals, or may involve reduced costs for customers or the provision of a better product.⁴⁴ It has not been necessary in this case to conclude on whether or not efficiencies arise from this merger as the OFT's ultimate conclusion is that no realistic prospect of a substantial lessening of competition arises as a result of the merger. However, the OFT notes that in the course of its investigation the parties submitted (and a number of third parties who responded to the OFT were in agreement) that the merger would result in a number of customer benefits and efficiencies. These included:

- allowing IRI to compete more effectively with Nielsen by giving it a broader, more compelling offering and by allowing it to spread its costs over a wider customer base.
- allowing IRI to extend its geographic offering and that this will allow it to compete more effectively for multinational customers and provided examples of customers that it had recently lost.
- facilitating one-stop shopping. The parties argued that customers have a preference for purchasing different disaggregated and aggregated data from the same supplier, and that by bringing together convenience data with IRI's multiple grocery and aggregated data, customers will benefit.
- allowing IRI to build on Aztec's existing offering and so bring new products to market, to the benefit of customers. In particular, an aggregated ePOS data product in the convenience retailer sector.

THIRD PARTY VIEWS

134. The OFT received comments and views from a large number of third parties, including competitors and customers. These are referred to above as appropriate but the OFT notes that the majority of third parties did not raise any concerns regarding the merger.

⁴⁴ See *Merger Assessment Guidelines*, Section 5.7.

ASSESSMENT

135. The parties overlap in the provision of disaggregated ePOS data in the UK with an estimated combined share of supply of [35 to 45] per cent. As such, the share of supply test in section 23 of the Act is met.

136. The OFT has assessed this merger separately in relation to:

- (i) disaggregated ePOS data from convenience retailers;
- (ii) disaggregated ePOS data from grocery multiples retailers; and
- (iii) aggregated ePOS data.

Horizontal Issues

137. The parties submitted that their combined share of supply of disaggregated ePOS data (both grocery multiples and convenience ePOS data together but excluding aggregated data) is [35 to 45] per cent, with an increment of [below 10] per cent. The only other significant provider of disaggregated ePOS data in the UK is Nielsen with an estimated [] per cent share of supply.

138. Separate shares of supply for disaggregated ePOS data from grocery multiple retailers and disaggregated ePOS data from convenience retailers were not provided by the parties, although the OFT understands from the parties and responses from third parties that Aztec supplies the majority of disaggregated ePOS data from convenience retailers. Neither IRi nor Nielsen submitted that they compete in the supply of disaggregated ePOS data from convenience retailers. The OFT therefore considers that the parties have a very high combined share in the provision of disaggregated ePOS data from convenience retailers, although with a small increment based on [] held by IRi.

139. In relation to the supply of disaggregated ePOS data from grocery multiple retailers, the increment is likely to be less than the [below 10] per cent mentioned above (which relates to multiple and convenience data combined). This is because Aztec gains only a minority of its revenue from the supply of disaggregated ePOS data from grocery multiple retailers (a segment which is larger overall than the convenience segment).

140. In relation to aggregated ePOS data, shares of supply estimates were not provided by the parties. The OFT understands from third party responses that the current supply of such data is broadly split evenly between only two suppliers, Nielsen and IRI, and that Aztec is not presently active in this market. The parties provided evidence that Atec was attempting to enter this market and had bid for a number of contracts which included an aggregated element but that its efforts to do so had largely failed despite having the []. Third parties confirmed Aztecs' efforts and failure to produce aggregated ePOS data. The OFT did not therefore consider that it was a likely entrant into disaggregated ePOS data.
141. The OFT considered general evidence of competition between the parties that applies equally across all of the markets. Based on the evidence provided by the parties and third parties, and on its own analysis, the OFT concluded that IRI and Aztec are not close competitors in the UK in any of the markets identified, for the following reasons:
- Litmus, specifically (as opposed to Aztec), is in []; and
 - Bidding data submitted by the parties.
142. In relation to disaggregated ePOS data from grocery multiple retailers the OFT's investigation revealed that Aztec is only marginally active and its offering is an adjunct to its convenience offering. Although it supplies [] of its customers with disaggregated multiple retailer data, a [] accounts for more than [a high proportion] of its revenue in this sector. This is in line with evidence that it rarely competes against either IRI or Nielsen in this market.
143. In relation to disaggregated ePOS data from convenience retailers Aztec has almost the entirety of market share. IRI is only marginally active in this segment with [] supplying such data. IRI uses disaggregated ePOS data from convenience retailers primarily as an input into its aggregated ePOS product. The OFT's investigation did not reveal strong evidence to suggest that IRI is a likely potential entrant into this segment.
144. The OFT does not consider that the merger raises a concerns of horizontal unilateral effects in the supply of disaggregated ePOS data from convenience retailers, disaggregated ePOS data from grocery multiple retailers or aggregated ePOS data.

Non-horizontal effects

145. Following third party concerns, the OFT investigated the likelihood of a substantial lessening of competition arising as a result of the merger from conglomerate effects as a result of tying and bundling.
146. The OFT considers that the parties may have the ability and incentive to carry out a foreclosure strategy. Such a strategy may draw a significant number of customers away from Nielsen. However, it has not been necessary for the OFT to conclude on these points: the OFT considers that even with the loss of customers as a result of possible tying or bundling by the merged firm, Nielsen would continue to remain as a strong competitor providing significant constraints on the merged firm. The OFT therefore does not consider that any bundling/tying strategy gives rise to a realistic prospect of a substantial lessening of competition.
147. The majority of customers did not express concerns about the merger. A number expressed the view that the merger would enable IRi to provide a better service in terms of one-stop shopping, improved aggregated data, and international coverage.
148. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.