

Anticipated acquisition by InBev NV/SA of Anheuser-Busch  
Companies, Inc

ME/3826/08

The OFT's decision on reference under section 33(1) given on 18 November  
2008. Full text of decision published 12 December 2008.

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

**PARTIES**

1. **InBev NV/SA (InBev)**, headquartered in Belgium, was formed as a result of the merger in 2004 between the Belgian brewer Interbrew and the Brazilian brewer AmBev. InBev produces and/or distributes a number of beers in over 30 countries. In the UK, foremost among these are the well-known Stella Artois and Beck's brands of Belgian and German origin, respectively. Annex 1 to this decision contains a list of all the parties' beer brands supplied in the UK.
2. **Anheuser-Busch Companies, Inc (Anheuser)** is the leading U.S. brewer and owner of the well-known beer brand, Budweiser. Its 2007 worldwide turnover was £9,484 million, £[ > 100] million of which was generated in the UK.

**TRANSACTION**

3. InBev is proposing to acquire the entire issued and outstanding share capital of Anheuser for US\$52 billion in cash.

## **JURISDICTION**

4. As a result of this anticipated transaction, the enterprises InBev and Anheuser would cease to be distinct.
5. As Anheuser's turnover in the UK is in excess of £70 million, the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. 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.
6. Besides the UK, the OFT understands that the proposed merger has received merger control clearance in the United States (subject to divestitures) as well as Germany, Brazil, Mexico, China (subject to commitments), Bosnia, and Serbia and Montenegro.
7. The transaction was notified to the OFT on 26 August 2008. The OFT's administrative target date by which to reach a decision in this case was 21 October 2008.

## **BACKGROUND**

8. The parties overlap in the brewing and supply of beer in the UK. More specifically, the merger adds Anheuser's well-known premium lager beer brand, Budweiser, to InBev's portfolio of lager brands including Stella Artois and Beck's (both popular in Great Britain) and Tennent's (popular in Scotland and Northern Ireland).

## **PRODUCT MARKET**

9. The parties submitted that the appropriate market definition in this case is the supply of beer or, at its narrowest, supply of lager beer separately by sales channel (to the on-trade and off-trade, see below).

### **Lager and other beers (ales, stouts)**

10. In past cases, the European Commission (Commission) and the Competition Commission (CC) have adopted market definition lenses no broader than

beer,<sup>1</sup> and although not deciding the point, the Commission has raised the possibility that the product market in the UK context could be narrower than beer, noting that it may be appropriate in some circumstances to segment, for example, by premium or standard beers, or by lagers, stouts and ales.<sup>2</sup>

11. The parties argued that, from the supply-side perspective, other types of beer (ale and stout) should be included in the same product market as lager beer since the technology for brewing these different beer types is similar.<sup>3</sup> In support of this argument, the parties point to the fact that some brewers are already active in the manufacture and supply of different types of beer including InBev itself, Heineken/S&N, Molson Coors and Carlsberg.
12. From the demand-side, however, all customers responding to the OFT's questionnaire in this case said that they did not believe that there was any significant demand substitution between lager beer and other types of beer (ale or stout). This is consistent with [ ].<sup>4</sup> It is also supported by the overwhelming weight of [ ].
13. The OFT therefore is confident that, for the purposes of this case, it would be misleading to define the product market as wider than lager.

### **Standard lager and premium lager**

The alcohol content distinction

14. Customer responses and the parties' internal documents in this case indicate that industry categorisations of 'standard' and 'premium' lager are common, and are generally associated with alcohol content. Premium lager is generally considered to be above around 4.3 to 5 per cent alcohol by volume (ABV), although this threshold is imprecise and potentially arbitrary: for example, the best-selling lager brand in Great Britain is Carling,

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<sup>1</sup> See most recently Case M.4952 - *Carlsberg/Scottish & Newcastle Assets* (7 March 2008) citing earlier cases, see also CC Report in *Interbrew SA and Bass plc*, January 2001, Cm 5014, paragraph 4.22.

<sup>2</sup> In Case M.3182 - *Scottish & Newcastle/HP Bulmer* (30 June 2003), the Commission also considered whether cider should be defined as within the same product market as lager from a demand-side perspective in the UK, but declined to do so.

<sup>3</sup> While the technology used is similar, the brewing process itself differs between what is known as top fermenting and bottom fermenting.

<sup>4</sup> [ ].

universally regarded as a standard lager, but whose ABV at 4.1 per cent is only marginally below the notional 4.3 per cent ABV threshold for premium lager.

#### Views of parties and other lager suppliers

15. Respondent competitors in this case generally submitted that there was little distinction between premium and standard lagers: from a supply-side perspective, the technology for brewing standard and premium lager is the same, the only material difference in terms of production being the level of alcohol content. The parties also submitted survey data from InBev internal documentation showing [ ] (and therefore suggestive, it was argued, of a single product market from the demand side).<sup>5</sup>
16. The parties also provided some evidence showing that the share of supply of lager in Great Britain has been increasing among some rival standard lager brands – Carling, Foster's and Carlsberg – and declining among some premium lager brands, notably InBev's Stella Artois, indicative it was suggested, of blurring of the distinction and customer switching between the two segments. The OFT, however, does not find this evidence to be persuasive in itself of switching in response to relative price movements between the segments. For example, the evidence provides negative correlations between the shares of supply accounted for by standard and premium lagers. Moreover, even if there were no substitution at all between the two types of lager, when the share of all lager that standard lager accounts for increases, for whatever reason, the corresponding share of premium lager will consequently fall.
17. Similarly, the parties supplied the shares over time of certain standard and premium lager brands, claiming this showed a degree of switching between them (for example, when one goes up and the other concurrently goes down). However, only a relatively small number of brands were selected by the parties for this analysis and, without prejudice to the possibility that there has been consumer switching between standard and premium lagers, the OFT cannot be sure on the basis of the evidence presented to it that a single lager product market is warranted.

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<sup>5</sup> Based on a survey of 6,525 lager drinkers. The parties also provided copies of press articles reporting that drinkers have been turning away from premium lagers to weaker lagers.

18. Notwithstanding the apparent correlation between industry usage of standard and premium segmentation and ABV distinctions, the OFT considers that there is a risk of arbitrariness in segmenting lagers by alcohol content, especially given the supply-side ease with which alcohol content can be adjusted.
19. The OFT attached more weight to consumers' brand preferences, as reflected in the parties' internal classifications of their own premium lager brands as competing primarily, though not exclusively, with other premium lager brands. Whether based on ABV, taste or simply brand perceptions, consumer preferences will in fact determine demand-side substitution patterns. In short, while ABV may be a proxy, if there is to be a standard versus premium distinction, it should be based on consumer preferences.

#### Evidence of consumer preferences

20. The following evidential sources suggest premium lager might best be viewed separately from standard lager (without in this particular case ignoring the constraints standard lagers may place on Stella Artois in particular):
  - Third party views tend to support a distinction – wholesale and retail customers believed there were significant differences between premium and standard lager, and that they were obliged to stock both types in both the on- and off-trade. The large majority of lager brands listed by third parties as competitors to the parties' premium brands were themselves premium lagers, not standard lagers.
  - Pricing data supplied by the parties showed that premium lagers retail at prices typically around [20–40] per cent higher than most standard lagers, which could be consistent with separate product markets. (However, the parties argue that there is a continuum of pricing of lagers, and that some premium lagers, such as [ ], are priced at lower levels than many standard lagers).
  - The parties' internal documents also tend to make a distinction between premium and standard lagers. For example, [ ]. Nevertheless, some of the parties' documents also recognise the existence of some competitive interaction between the two segments. [ ].

## Conclusions

21. If there are concerns in this particular case, they relate to premium lager overlaps, and in focusing on premium lager as a candidate product market, the evidence discussed above far from conclusively indicates whether sufficient customers would be willing to switch from premium to standard lagers, in response to a five to ten per cent price increase, to make such a price increase unprofitable for a hypothetical monopolist.
22. On the contrary, there are reasonable grounds for believing that premium lager might be subject to profitable monopolization, but this would be based on UK consumers' willingness to pay more for lager products they perceive as premium – whether because of image, taste or ABV, or a combination of them – and not because the product simply has greater ABV than standard lager. Conversely, there is more analysis that could be done on the hypothetical question of market definition that might yield the opposite conclusion of a single lager market.
23. Given that the OFT's analysis of the actual question of the effect of the merger does not differ in its conclusions based on the hypothetical questions underpinning whether premium lager is a separate market or not, this issue can be left open. That said, the OFT has considered it instructive in measuring closeness of competition between the merging parties' premium brands to consider premium and standard lager share data both separately and in aggregate.
24. Nevertheless, in doing so, the OFT is conscious that in a case where the brand responsible for most of the combined post-merger shares of supply, Stella Artois, is 'closer' to the standard end of the premium spectrum based on its ubiquity and consumption patterns in the UK, it would be misrepresentative to ignore the constraints placed on Stella Artois from standard lagers, among others. (This conclusion may not be true in another merger combining different portfolios of premium lager brands.) For this reason, when focusing on premium lager concentration data in this case, the OFT has given appropriate weight to such constraints from standard brands owned by rivals in its competitive assessment, recognising the risk of otherwise overstating the relative degree of market power held by the merged firm.

## Supply of lager to the on- and off-trade

25. The on-trade channel refers to pubs, bars and restaurants, where consumers drink on the premises, while the off-trade channel refers to supermarkets, off-licenses and other retail outlets where consumers purchase alcohol for consumption off-premises, typically at home. The parties argue that these two sales channels constitute separate product markets, consistent with the approach adopted by the Commission in previous cases<sup>6</sup> and by the CC in Interbrew/Bass.<sup>7</sup>
26. The on-trade channel accounts for just over 60 per cent of the total volume of beer distributed in Great Britain.<sup>8</sup> Brewers can supply their lagers directly to the relevant retailers or they can supply wholesalers. The vast majority of lager sold on-trade in the UK (the evidence currently available to the OFT indicates somewhere between 75 and 85 per cent) is draught lager served from a pressurised keg. Lager sold in the off-trade sector is packaged in bottles or cans.
27. Generally speaking, there is little demand-side substitution at the wholesale level between the on- and off-trades (although the licensing laws in Northern Ireland make a common ownership of both on-trade and off-trade premises more likely). Nonetheless, some third parties told the OFT that end consumers would switch between the two sectors, especially from the on-trade to the off-trade, if relative prices were to change significantly. On the supply-side, some differences exist between the two sectors, most notably in the requirement to contribute toward promotional funding in the off-trade sector (see the barriers to entry and expansion section below).
28. The OFT has not found it necessary to conclude on whether separate product markets between the supply to the on-trade and the off-trade exist in this case since the outcome of its analysis is not dependent on it, but has found it useful to examine the proposed merger separately in respect of both channels, as well as irrespective of channel.

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<sup>6</sup> For example, Carlsberg/Scottish & Newcastle Assets and Carlsberg/Holsten.

<sup>7</sup> Paragraph 2.27.

<sup>8</sup> AC Nielsen data.

## Packaging formats of lager

29. The OFT also examined in this case whether the relevant product market should be delineated by packaging form: that is, by bottled lager, canned lager and draught lager.
30. There is some evidence to support segmenting the product market by packaging form. Some wholesalers told the OFT that some of their off-trade customers who purchase bottled lager are reluctant to switch to canned lager (although whether sufficient marginal consumers would do so is another matter). Pricing data (in relation to the on-trade in Great Britain) show that the per unit retail price of bottled lager is typically around 40 per cent more expensive than the same brand of beer packaged in a can.
31. On the supply-side, competitors told the OFT that switching to a different packaging format is easy and can be achieved very quickly. The evidence before the OFT indicates that there are no capacity constraints in bottling in the UK. However, although it may be feasible to switch between packaging formats, the parties did not provide information indicating whether such supply-side substitution would be profit-maximising given the purchasing patterns of consumers buying bottled and canned lager, respectively: there is some evidence before the OFT that suggests new entrants into beer typically start by supplying bottled beer and, once a customer base has been established, move into draught beer (see the barriers to entry and expansion section below). The OFT is not aware of any examples on a significant scale of switching in the other direction.
32. In this particular case, the issue is primarily of significance in relation to concentration data in on-trade supply of premium lager, where the parties will have a high combined share of bottled premium lager.<sup>9</sup> But on balance, the OFT is reluctant to conclude that draught premium lager does not constrain bottled premium lager in the on-trade sufficient to render monopolisation of bottled premium lager unprofitable.

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<sup>9</sup> With respect to canned lager, the OFT has not found it necessary to segment its analysis between bottled premium lager and canned premium lager given that Anheuser only accounts for a very small share of premium canned lager sales in Great Britain or Northern Ireland, and therefore such segmentation would not affect the OFT's analysis.

33. In the on-trade, draught premium lager volume and value figures are three to five times that of bottled premium lager, accounting for approximately 75–85 per cent of all premium lager sold to the on-trade, with bottled premium lager accounting for the remaining 15–25 per cent. In these circumstances, and in the absence of any specific evidence to the contrary, it would be unrealistic to conclude that bottled premium lager is not constrained on the demand-side by draught premium lager in the on-trade. By definition, premium lager brands that have gained on-trade share to the point they are available in draught are popular with premium lager drinkers in pubs, bars and restaurants, and it would seem highly questionable that their enhanced 'on tap' popularity behind the bar decreases, rather than increases, the constraint they provided to other bottled premium lagers. The OFT would therefore want to do further demand-side analysis before concluding in favour of lager segmentation by packaging format for market definition purposes in a merger case
34. Therefore, while examining the supply of bottled premium lager to the on-trade (as the OFT does in this decision) may provide a useful sensitivity test as to the predicted competitive effects of the proposed merger, it should be borne in mind that share of supply only of bottled lager effectively treats draught lager as providing no constraint, which will present an unreliable account of market power post-merger – and in this case, the 'binary fallacy' has the consequence of exaggerating the position of the merged firm.
35. However, because the OFT's conclusion on the effects of this merger do not differ based on these packaging distinctions, it has not needed to conclude on this point, but rather has examined the proposed merger on the basis all packaging formats and by packaged (bottled and canned) and draught lager separately.

## **GEOGRAPHIC MARKET**

36. The parties submitted that the appropriate geographic market for this case is the UK or, at its narrowest, Great Britain and Northern Ireland separately. In Interbrew/Bass the CC considered that there were two geographic markets: Great Britain and Northern Ireland.<sup>10</sup> In past cases the

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<sup>10</sup> Paragraph 2.26.

Commission has considered that the geographic market for the supply of beer is national.<sup>11</sup>

37. Competitors tended to agree with the parties that the relevant geographic markets are Great Britain and Northern Ireland. One disagreed saying that the whole of the UK was the relevant market.
38. One customer thought that Scotland could constitute a separate market, especially given the strong demand for InBev's Tennent's brand of lager in Scotland which is not replicated elsewhere in the UK to the same extent. Tennent's is a standard lager that is priced considerably less (by volume) than InBev's main premium brands which are also cheaper than the Anheuser brands that are being acquired. However, the evidence before the OFT does not point towards a separate geographic market for Scotland. In particular:
  - Wholesale pricing data provided by the parties does not reveal any differences in pricing behaviour by the parties between Scotland and the rest of Great Britain.
  - Major customers (wholesalers, large pub companies, large supermarket chains and large off-licence operators) are supplied nationally at a single price.<sup>12</sup>
  - Marketing campaigns and expenditure are spread across the whole of the UK (but sometimes may differ in Northern Ireland from Great Britain).
39. This view is consistent with the parties' internal documents, which indicate that the geographic market is at least Great Britain-wide. For example, both parties' internal documents analyse the market (including competitors, consumer trends and profitability) on the basis of the whole of the UK as well as on a narrower basis (for example, Great Britain).<sup>13</sup>

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<sup>11</sup> For example, Carlsberg/Scottish & Newcastle Assets and Carlsberg/Holsten.

<sup>12</sup> The obvious exception is Budweiser draught beer in Northern Ireland which is supplied by Diageo.

<sup>13</sup> Both parties' internal documents also undertake some analysis on a much smaller regional basis.

40. Past CC and Commission decisions notwithstanding, the geographic market may be wider than the UK, certainly in relation to a candidate product market of packaged premium lagers, where imports from Europe, North America and Asia, including by the parties, are common. Certain draught lager is imported into the UK from at least the Republic of Ireland.
41. However, without prejudice to the possibility that the geographic market may be wider than the UK, the OFT has found it possible to clear the transaction on the cautious basis of assessing the proposed merger using geographic lenses of Great Britain and, separately, Northern Ireland. As no concerns arise on this basis, none will arise when adopting a wider geographic definition.

## **CONCLUSION**

42. The OFT has not found it necessary to conclude on precise market definition boundaries in this case. Without prejudice to the possibility that not all these lenses constitute robust market definitions in the traditional sense, the OFT has adopted a cautious approach and has examined the proposed merger on the basis of an extensive series of permutations to evaluate closeness of competition between the parties: the respective supply of lager and premium lager, to each of the off-trade and on-trade sectors, in Great Britain and, separately, in Northern Ireland, and by all packaging formats and by bottled packaging separately.

## **POSSIBLE OVERLAP INVOLVING CORONA**

43. As noted previously, Anheuser is the owner of the Budweiser beer brand. In addition to Budweiser, the OFT has given consideration as to whether or not to include sales of Corona within those of Anheuser (and therefore prospectively the merged group) for the purposes of its competitive assessment on the basis that Anheuser has a significant equity interest in Diblo, the company that owns the rights to the Corona brand.
44. Notwithstanding Anheuser's equity interest, the parties argued that Corona should be treated as a separate, and competing, premium beer to Anheuser's Budweiser brand for the purposes of the OFT's assessment for two reasons.

- First, Anheuser does not have voting or other effective control over Grupo Modelo (and therefore of Dablo). At the time of InBev's submission to the OFT, 76.75 per cent of the share capital in Dablo was held by Grupo Modelo (Anheuser's direct equity interest in Dablo was only 23.25 per cent). Although Anheuser also owns 35.12 per cent of Grupo Modelo's share capital (giving it 43.9 per cent of voting rights), and has nine of the 19 positions on the board of Grupo Modelo, 56.1 per cent of Grupo Modelo's voting rights (and the remaining 10 of its Board positions) are held by an independent third party.<sup>14</sup> Therefore, although Anheuser has (directly and indirectly) just over half of the equity interest in Dablo, it does not have voting or other effective control over Grupo Modelo nor, in turn, over Dablo).
  - Second, Corona is independently distributed in the UK by Wells and Young (W&Y) in Great Britain,<sup>15</sup> and McCabes in Northern Ireland, on what Anheuser understands (without having actual knowledge) is on exclusive terms. Anheuser therefore does not set the prices or control the competitive positioning of Corona in Great Britain or Northern Ireland.
45. The OFT considers that under the current distribution arrangements Corona is operating as an independent brand to, and competitive constraint on, Anheuser's brands. Further, the OFT accepts that there is no indication from the documentary evidence seen by the OFT or from third party comments that Anheuser's brands and Corona do not compete independently with each other in the market at present.
46. However, Anheuser has over half the equity interest in Dablo, and therefore in Corona, and presumptively has material influence over Dablo through its Board positions and voting rights.<sup>16</sup> Therefore, notwithstanding the appearance of fully independent competition between Anheuser's brands and Corona, Anheuser still enjoys a financial benefit from sales of Corona. The causal effect of the merger is that InBev will inherit this position, thereby creating a partial ownership (structural) link between InBev and

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<sup>14</sup> Banco Nacional de Mexico SA holds these shares in trust on behalf of certain individuals.

<sup>15</sup> The parties noted that [ ].

<sup>16</sup> The OFT does not have the information necessary to confirm this definitively, but the levels of voting rights and board positions described above would normally clearly give rise to a working presumption of material influence in accordance with the OFT's Substantive Assessment Guidance, paragraph 2.10.

Corona's owners of the calibre that can in principle result in dampened competition between the linked firms.

47. In this case, it does not appear realistic that InBev would have the incentive to seek to veto or otherwise terminate Corona distribution in the UK, even assuming (for the sake of argument) that it would have the ability to do so, not least because Corona represents only [0–5] per cent of on- and off-trade UK lager sales. However, inheritance of such an interest could in theory weaken InBev's incentives to compete with Corona because it will receive some benefit, albeit indirectly, from its equity interest in Diblo, and therefore potentially a degree of recoupment of lost sales of its own product consistent with standard unilateral effects theories involving partial ownership theories.<sup>17</sup>
48. Rather than conduct an exhaustive inquiry into the arrangements and incentives that will exist as between InBev and Diblo/Grupo Modelo post-merger, the OFT has on a cautious basis chosen to consider this overlap on the 'worst-case basis' as if InBev were to control Corona in the same way as it would the target Budweiser brand post-merger. This approach applies equally to sales of Corona in GB (where it is distributed by W&Y) and Northern Ireland (where it is distributed by McCabes). To the extent that the OFT's competitive conclusions are unaltered even if Corona were treated as being wholly controlled by InBev (which would normally equate to up to 100 per cent financial interest) the OFT's conclusions would also not change to the extent that InBev has a lesser interest in Corona.<sup>18</sup>
49. Ultimately, the increment to the post-merger share of supply is marginal in all circumstances other than if premium packaged lager to the on-trade was considered separately (see below). However, even in this situation, despite Corona representing a material share of supply, the competitive assessment

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<sup>17</sup> The OFT does not have information on the financial arrangements relating to the distribution of Corona by Wells and Young and McCabes (eg whether the distributors pay a fixed fee to Diblo/Grupo Modelo or pay a share of the profits made from sales). In the absence of such information, the OFT cannot exclude that InBev's own incentive to compete against Corona would not be dampened by any benefit it receives from sales of Corona as a result of the structural links.

<sup>18</sup> The worst-case scenario analysis adopted by the OFT with regard to the structural link between InBev and Corona's owners post-merger rules out concerns even if (as the parties argued is unlikely) the merged entity were appointed as distributor of Corona in Great Britain or Northern Ireland, therefore meaning that InBev would control its competitive position akin to acquiring the brand. It would not, however, prejudice the applicability of Chapter I of the Competition Act 1998 to such distribution changes in the future.

would not change if Corona were treated as under the control of Anheuser for the reasons explained in paragraphs 93–95 and 116 below.

50. For these reasons, the OFT's competitive assessment results in clearance even taking into account the structural link between InBev and Corona's owners.

## **UNILATERAL EFFECTS IN GREAT BRITAIN**

### **INTRODUCTION**

51. The principal effect of this merger is to transfer Anheuser's leading premium lager brand, Budweiser, into the existing InBev portfolio of premium lager brands – Stella Artois, Beck's.
52. The OFT's approach in testing unilateral effects theories involving a combination of products differentiated through branding (which may in this case correspond closely with taste and/or ABV) is to determine whether the merger combines close brands, that is, brands that significantly constrained one another pre-merger (symmetric constraint theory) or failing that, whether one brand constrained the other but not vice versa (asymmetric constraint theory). More detail on this approach can be found in the OFT's 2008 decision involving Homebase and Focus, discussing earlier cases.<sup>19</sup> In contrast to most retail market mergers, where the focus on unilateral effects is at least as much on non-price factors as it is on price, the OFT's focus here is price-centric, because product quality and innovation for the relevant brands are likely to be set on a consistent worldwide basis from the firms' global headquarters (outside the UK), and the OFT has no reason to believe that the merger would adversely affect such parameters.
53. In conducting its analysis, the OFT has considered an array of concentration lenses (or candidate market definitions) to aid its unilateral effects analysis. Such data can act both as a screening device to rule out possible theories of harm (for example, if the post-merger market shares on a candidate market definition is very low), as well as forming a springboard

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<sup>19</sup> See Completed acquisition by Home Retail Group plc of the 27 leasehold properties from Focus (DIY) Limited, 12 May 2008, where the issue was the multi-product offer of outlets in a retail-level merger, rather than individual products being merged at the manufacturing or wholesale level, as in the present case.

for developing a testable theory based on high post-merger market shares possibly indicating prima facie close competition between the parties. A second step in the analysis, if the working conclusion is that a merger does combine close brands, is to consider further various countervailing constraints or effects, notably expansion, brand repositioning, new entry, buyer power, and demand- and supply-side efficiencies (for example, pricing efficiencies between complementary brands or variable cost reductions passed through into lower prices).

54. As set out below, in this case, concentration data generated prima facie unilateral effects theories in relation to merger effects in premium lager in general and in categories within premium lager. However, as further explained, the extensive weight of qualitative and quantitative evidence ultimately permitted the OFT to dismiss unilateral effects theories on the basis that (a) the parties' brand are not particularly close and (b) brands of competitors are equally close or closer. Given that the merger does not combine sufficiently close substitutes both in absolute terms and relative to rival brands, it was not therefore necessary to rely to any substantial degree on one or more countervailing constraints, although some of the evidence on these reinforces the conclusion in favour of clearance (for example, the entry analysis in bottled premium lager, and buyer power in Northern Ireland).

#### **Unilateral effects can be screened out based on an 'all-lager' candidate market**

55. In testing unilateral effects theories in a differentiated product market, candidate market definitions tend to serve a valuable role not in establishing hard and fast boundaries, but instead in serving to screen out competition concerns. In this respect, on any concentration lens that does not break out premium lager separately, it is particularly the small increment represented by Anheuser brands (in the [0–10] per cent range), when combined with post-merger share figures (around 20–40 per cent range) and the presence of substantially-sized rivals (with shares in the [10–35] per cent range) that suffice to rule out prima facie unilateral effects concerns in both Great Britain and Northern Ireland. (The full data are set out in Annex 2. These conclusions are reinforced by the evidence scrutinised more closely in order to dismiss concerns that arise when premium lager data are considered.)

### Prima facie concerns arise based on a 'premium lager' candidate market

56. InBev would account for [45–55] per cent of the supply of premium lager in each of the on-trade and off-trade in Great Britain, with Anheuser brands adding an increment of around [5–15] per cent to InBev's share. By their key brands, InBev's Stella Artois accounts for around [30–40] per cent, Anheuser's Budweiser around [5–15] per cent, and InBev's Beck's around [0–5] per cent. These shares, set out in the table below, are high enough to raise prima facie competition concerns, irrespective of whether the on- and off-trade channels are considered individually or combined. While the worst-case addition of Corona adds a further [0–5] per cent increment, this alone would not affect the OFT's prima facie concerns one way or the other.

**Table 1: Supply of premium lager (Great Britain, 2007)**

Supplier (all brands)	All	Off-trade	On-trade
Key premium lager brands	per cent (value)		
<b>InBev</b> Stella Artois Beck's	[35–45]	[35–45]	[35–45]
<b>Anheuser</b> Budweiser	[5–15]	[5–15]	[5–15]
<b>Post-merger</b>	[45–55]	[45–55]	[45–55]
Corona (W&Y)	[0–5]	[0–5]	[0–5]
<b>Heineken/S&amp;N</b> Kronenbourg 1664 Heineken	[15–25]	[10–20]	[15–25]
<b>Carlsberg</b> Carlsberg Export Holsten Pils	[10–20]	[10–20]	[5–15]
<b>Molson Coors</b> Grolsch	[0–10]	[0–10]	[0–10]
<b>SABMiller</b> Peroni Miller Genuine Draft	[0–10]	[0–10]	[0–10]
Others	[0–10]	[0–10]	[0–10]

Source: Parties' estimates and OFT estimates based on information from third parties. For on-trade data, see notes to Table 2.

**Prima facie concerns are most acute in on-trade premium lager (especially in bottled format)**

57. In delving more deeply into the concentration picture in relation to on-trade premium lager sales, prima facie unilateral effects concerns arguably become more acute, as set out in the table below, when packaging formats are considered separately and in combination.

**Table 2: Supply of premium lager, on-trade (Great Britain, 2007-8)**

Supplier/major brand	All	Draught	Bottled
	per cent		
Stella Artois		[35-45]	[0-10]
Beck's		[0-5]	[10-20]
Other InBev		[0-5]	[0-5]
<b>Total InBev</b>	[30-40]	[35-45]	[20-30]
Budweiser ( <b>Anheuser</b> )	[5-15]	[0-5]	[25-35]
<b>Post-merger</b>	<b>[45-55]</b>	<b>[35-45]</b>	<b>[45-55]</b>
Corona (W&Y)	[0-5]		[10-20]
Kronenbourg 1664		[20-30]	
Heineken		[0-10]	
<b>Total Heineken/S&amp;N</b>	[20-30]	[25-35]	
Holsten			[0-10]
Carlsberg Export		[0-10]	
<b>Total Carlsberg</b>	[0-10]	[0-10]	[0-10]
Grolsch		[0-10]	
<b>Total Molson Coors</b>	[0-10]	[0-10]	
Peroni			[0-10]
Miller Genuine Draft			[0-10]
<b>Total SABMiller</b>	[0-10]		[10-20]
Others	[5-15]	[10-20]	[10-20]

Source: Parties' estimates based on Nielsen data and OFT estimates based on information from third parties.

Best available data for 2007/2008, per cent<sup>20</sup>

<sup>20</sup> The figures in this table are derived from different sources between each category and therefore the categories are not on a consistent basis with each other. The total on-trade figures are for 2007 whereas figures for bottled and draught are for the year to May 2008. Other information available to the OFT indicates that the parties have been losing market share recently and therefore the total on-trade figures may be overstating the parties' current position.

## **CANDIDATE THEORIES OF HARM**

58. The concentration data in Table 1 form the basis for a prima facie unilateral effects theory based on a merger of close premium brands in the off-trade, while the data in Table 1 and 2 form the basis of three variants of a prima facie unilateral effects theory of harm in relation to the on-trade:
- The merger combines the #1 premium brand in draught format, Stella Artois, with the #1 premium brand in bottled format, Budweiser
  - The merger combines the #1 and #2 premium brands in bottled format, Budweiser and Beck's, and
  - The merger combines the top three premium brands in bottled format, Budweiser, Beck's and Corona (on a worst-case basis, see above Corona discussion).
59. These theories were then tested by the OFT in relation to internal documentary evidence, third party views, and econometric evidence, to see whether they gained any traction. In the event, as set out below, while not every single item of evidence failed to support such theories, the overwhelming weight of evidence tended to contradict, rather than support, theories based on high combined share and increment data on the various candidate markets considered. Accordingly, these theories did not form the basis for a reasonable OFT belief, objectively justified by relevant facts, of a realistic prospect of a substantial lessening of competition.

## **BUDWEISER DOES NOT CLOSELY CONSTRAIN STELLA ARTOIS IN ANY SALES CHANNEL**

60. Unilateral effects in a branded consumer product market occur where the two brands combined under common ownership post-merger are the top two (that is, first and next-best) choices for a substantial proportion of consumers, such that higher prices of the first-choice product would trigger migration of price-sensitive marginal consumers to the second-choice product (revenue that the merged firm would recoup when it owns the

second choice).<sup>21</sup>

61. In this case, if enough Stella Artois drinkers (their first preference) would switch away from Stella if prices rose (as price-sensitive marginal consumers) and would switch to Budweiser (their second preference), InBev would have lost these sales pre-merger but would recoup them post-merger, potentially making a price increase on Stella Artois profitable. The below evidence suggests that too few Stella Artois drinkers would do this for profitable recoupment by InBev.
62. While in both the off-trade (supermarkets, off-licenses and so forth) and the on-trade (pubs, bar and restaurant chains), the merged firm will be dealing with intermediate customers, in both cases, if end-consumers do not regard the products being combined under common ownership as particularly close substitutes relative to rival brands, then intermediate customers' preferences are unlikely to differ in the direction of creating a concern: rather, they will be free to switch to equally good substitutes in the eyes of their own retail customers, without sacrificing profits (in terms of sales per unit of retail shelf space), and so actual or threatened switching to such substitutes will be a credible response in pricing negotiations with the merged firm.

### **Consumer preferences derived from off-trade purchasing patterns**

63. As far as off-trade consumer behaviour is concerned, market research on consumer preferences, prepared in the ordinary course of business,<sup>22</sup> shows that, in the 12-week period between the end of April 2008 and the end of July 2008, [0–10] per cent of Stella Artois drinkers also drank Budweiser.
64. Although the sales data is not ideal 'revealed preference' evidence – in that it does not measure consumer switching behaviour in response to relative price movements – it is nevertheless probative of consumers' top-ranked

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<sup>21</sup> If the proportion of consumers who view the merged brands as first- and second-best choices is not substantial enough, then any attempt by the merged firm to increase the price of one or both of these brands will be defeated by marginal consumers switching to other brands that they regard as the next-best alternative.

<sup>22</sup> Such evidence is generally among the most probative of all evidence, because ordinary course of business materials aid real-world decision-making by managers responsible for setting competitive variables, rather than being prepared in the context of persuading a competition authority of an argument.

brand preferences in circumstances where market research indicates that premium lager consumers are not generally brand-loyal to a single lager brand but instead have a selection of three to five or more favourite brands: [ ] show that the average UK beer buyer purchased a repertoire of [5–10] brands during the course of the 12 months to July 2008. Another survey asked consumers how many brands they expect to purchase within their next 10 purchases – the average result was [0–5].

65. Taken in tandem, what the above suggests is that if [0–10] per cent of Stella buyers *also* bought Budweiser, then at the very most that same proportion would consider Budweiser as the other one of their top two favourite brand choices. Naturally, some proportion—unknown to the OFT—of the remaining [over 90] per cent of Stella drinkers will be infra-marginal to Stella, that is, they will not drink any other lager brand. Given the apparent promiscuity of lager drinkers on average alluded to in the preceding paragraph, however, this would appear to be a small proportion.<sup>23</sup> Consequently, it is difficult to conceive that Budweiser would even rank among the favoured brands – let alone be ranked as the second brand preference to which consumers would first turn if their favourite brand become pricier – for the evidently very high proportion of marginal Stella drinkers that never purchased Budweiser at all over the over the period in the survey.<sup>24</sup>
66. Put differently, a figure of something more than [0–10] per cent, if that were read as the likely proportion of all marginal consumers that would switch to Budweiser if Stella prices rose, would be a diversion ratio well below the level that has previously given the OFT cause for concern in horizontal, branded goods mergers: in other words, the small gains to InBev of lost Stella sales recouped as Budweiser sales would be outweighed by its large losses to third party brands, and the post-merger price increase would fail to be profitable.

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<sup>23</sup> In order for the number of beer brands bought on average to be between three and five, for there to be anything other than a tiny proportion of UK beer buyers to purchase only one brand (that is, to be infra-marginal), there would need to be an implausibly significant proportion of UK beer consumers buying an improbably large number of different brands (for example, up to ten).

<sup>24</sup> It is a maximum worst-case figure because it assumes that for every Stella drinker that also buys Budweiser, any marginal switching away from Stella would be to Budweiser even though such customers could also be buying third party brands to whom they might be more likely to switch.

## Closeness of competition based on other evidence

67. This working conclusion derived from consumer purchasing patterns is reinforced by other evidence:

- Although InBev's internal documents for Stella Artois in the on- and off-trade do mention Budweiser, other lagers, both premium and standard, are mentioned more often and discussions in these documents regarding the targeting of marketing activity tend to refer to these lager brands and not to Budweiser. The documents are consistent with the intuitive proposition that Stella Artois' closest competitors are [ ] with greater shares of supply than Budweiser, and also that Stella Artois does face material competition from rival [ ]. In no sense is Budweiser, whether in the on-trade or off-trade, identified in a way to suggest that it is a particularly close competitor relative to rival lager brands based on brand profile, consumer appeal, or in any other respect. On the contrary, the parties' internal documents indicate that in terms of consumer perceptions of the product – which partly derives from the particular lager taste, in conjunction with brand image cultivated through advertising – Stella Artois is a heavier- or stronger-tasting 'Continental'-style lager and Budweiser is a lighter- or milder-tasting 'American'-style lager.
- The econometric analysis of demand for lager in the off-trade supplied by the parties (further discussed below) suggested that the closest competitors to Stella Artois are [several non-Anheuser Continental premium lagers and at least one standard lager].
- The OFT did not receive customer switching examples from intermediate customers in either the off- or on-trade to suggest that such customers have historically switched, or threatened to switch, from Stella Artois to Budweiser to constrain InBev's wholesale terms. Conversely, the parties did provide two examples of draught Stella Artois being 'delisted' [ ] as well as a recent press report from The Evening Standard suggesting that sales of Peroni soared in the summer of 2008 at the expense of Stella Artois.

68. Accordingly, the OFT can confidently dismiss a theory of harm that Stella Artois prices will rise, or terms of trade will worsen towards customers, as a result of this merger.

## STELLA ARTOIS DOES NOT CLOSELY CONSTRAIN BUDWEISER IN THE OFF-TRADE

69. The OFT has considered the following asymmetric theory in greater detail, because all else equal, it is intuitively more likely that the leading premium lager brand, Stella Artois, might constrain the price of a smaller brand, Budweiser, than vice versa. It is therefore appropriate to segregate the analysis to consider the off- and on-trade channels separately. The OFT's analysis shows that Stella Artois is no closer a constraint on Budweiser in the off-trade than numerous other competing lagers.
70. The data on consumer purchasing patterns referred to above suggests that in the off-trade, only [5–15] per cent of Budweiser drinkers also purchase Stella Artois. Although this is a higher proportion than the other way around (less than [0–10] per cent), it is still a relatively low figure, not least given that it assumes all price-sensitive (marginal) Budweiser drinkers that also drink Stella would in fact switch to this brand, rather than any other, in response to a price rise for Budweiser (see footnote 24). Even allowing for the fact that some small proportion of Budweiser drinkers will be infra-marginal to that brand (see footnote 23), the imputed diversion ratio from Budweiser to Stella is still low.<sup>25</sup>
71. Unlike InBev documents from the perspective of Stella Artois, internal Anheuser documents do provide some greater traction for the theory that Stella Artois closely constrains Budweiser, because they indicate that Budweiser benchmarks itself against – and takes marketing action in response to – [ ]. However, the exact same conclusion is true for [ ]. This is almost identical to the findings of the TNS report on consumer preferences (in the off-trade sector in Great Britain) which found Budweiser's main competitors (by brand) were [several premium lagers].
72. However, there is no reasonable basis in this evidence for concluding that Budweiser and Stella Artois have a particularly loyal following among a

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<sup>25</sup> The OFT notes that, in order for the thought experiment reported in the text accurately to proxy a diversion ratio, it would need to be the case that both Stella and Budweiser were available to consumers in the off-trade every time they made a purchasing decision between them. Given the ubiquity of the Stella Artois brand—and the well-reported discounting of the brand by supermarkets to which the parties in part attribute its diminished brand equity—this seems reasonable. The evidence available to the OFT also suggests Budweiser is widely available in the off-trade.

subset of consumers as first and second brand preferences, with other brands more distant, instead, the evidence suggests (as also indicated by TNS data) that almost all consumers purchasing either brand will purchase a range of favourite brands depending on promotional discounting, and possibly a desire for product variety, and that for Budweiser drinkers, this range will predominantly include those from among the [ ] well-known third party premium lager brands listed above: [several non-InBev premium lager brands]. The combination of the purchasing patterns and the multiple brand loyalty of UK beer drinkers (sampling as many as five or more brands over a year) tends to suggest that:

- Because many off-trade sales are bulk purchases of four-, six-, eight-, twelve- or twenty-four packs on some form of promotion, if Anheuser raised the price of Budweiser, many consumers would be marginal, and so InBev post-merger would retain comparatively less incremental revenue on infra-marginal consumers who would pay the higher price.
- Moreover, of the many switching customers, a proportion will switch to an existing InBev brand such as Stella Artois, but it would be very risky to assume that recouped sales would be sufficient to offset the greater risk of customer switching to numerous rival brands, not least if rivals chose to drive sales through promotional activity (as is very common in the off-trade) aided by, or in conjunction with, supermarkets and off-licenses.

73. Moreover, econometric results submitted by the parties showed further competitive constraints. Following an increase in its price, the econometrics found lost demand for Budweiser was diverted, in order of importance, to [several non-InBev premium lager and standard lager brands].<sup>26</sup> Two important conclusions can be drawn from this econometric exercise. First, no InBev brand (in particular, Stella Artois or Beck's) was

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<sup>26</sup> The econometric study used a standard two-stage budgeting model where the first stage models how much lager is bought by consumers and the second stage models which brands are bought. The econometric specification used in the second stage was the Almost Ideal Demand System model. Estimation was based upon a sample of weekly pricing (that is, average revenue) and volume data for 10 brands of lager (including one 'other premium' brand and one 'other standard' brand) over three years in the off-trade in Great Britain, sourced from AC Nielsen and aggregated from supermarkets' scanner data.

identified as being a close competitor to Budweiser.<sup>27</sup> Second, the closest competitor to Budweiser was a third party standard, rather than premium, lager. Consequently, it is reasonable to consider that the parties' combined market shares discussed in Table 2 above may overstate the degree of competition between their brands. In other words, it would not be appropriate to assess the impact of the proposed merger solely through the lens of premium lager without taking account of constraints from outside of this segment, such as from standard lager.

74. The majority of off-trade customers were not concerned about the proposed merger. That said, a select number did express some concern to the OFT that their negotiating positions would be weakened after the proposed merger since they viewed Budweiser and Stella Artois as being substitutable. However, all of these customers were able to identify a number of other substitutable brands for Budweiser including Heineken, Kronenbourg 1664, Grolsch, Carlsberg Export and Peroni, tending to support the conclusions drawn above.
75. On the basis of the available evidence before it, the OFT does not therefore believe that the merger combines sufficiently close brands in respect of the off-trade in Great Britain: the weight of evidence is that several strong competing brands – each no less close a competitor to Budweiser than Stella Artois is – will discipline InBev's Budweiser pricing strategy to the off-trade post-merger. As such, no realistic prospect of unilateral effects concerns arise.

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<sup>27</sup> The OFT raised a number of issues with the parties' econometric analysis, which the parties acknowledged. However, the parties suggested that the issues that the OFT raised went to the precise empirical magnitude of the own- and cross-price elasticities estimated by their model but not to the ranking of those elasticities. The parties said that this would have affected the evidentiary weight that the OFT could place on the parties' estimates had they used their model for (say) merger simulation or to formally implement a SSNIP test for market definition. However, given that this was not the aim of their econometric modelling, the parties said that the OFT should still be able to rely directionally on the parties' estimates as to which brands competed most closely with which other brands. The OFT agreed with this assessment.

## **STELLA ARTOIS DOES NOT CLOSELY CONSTRAIN BUDWEISER IN THE ON-TRADE**

76. As set out in detail below, the OFT's analysis suggests that in the on-trade, several other bottled premium lagers are closer competitors to Budweiser than is bottled or draught Stella Artois.

### **Significance of the concentration data as indicative of a merger of close brands**

#### Share data and prima facie concerns

77. In terms of the concentration data in Table 2, more recent estimates of the parties' share of supply contained in their internal documents show that both brands, but especially InBev's Stella Artois brand, have been losing shares of sales recently, and that their current combined share of the supply of premium lager to the on-trade is somewhere around [45–55] per cent (as indicated by the parties share of supply of draught lager in Table 2). On such a revised measure, the overall on-trade share attributed to Stella Artois is around [30–40] per cent and for Budweiser is [5–15] per cent.
78. These revised figures make the overall on-trade concerns somewhat less acute, but do not remove them, and still leave the contention that the merger combines the two top-selling bottled brands, and if Corona is included, the three top-selling brands, in circumstances where bottled lager sells at a substantial premium per unit relative to draught lager, including premium brands on tap. (While bottles are a more costly format, the potential issue is that consumers are willing to pay more, not that the price differential is unrelated to distribution costs.)
79. However, these preliminary concerns noted, the OFT has nevertheless been able to rule out concerns in on-trade supply, even in relation to high combined shares in bottled lager (which is reserved almost exclusively for premium brands, as standard brands will be on draught or not stocked at the on-trade venue in question).
80. In Great Britain, the majority of Anheuser's on-trade sales of Budweiser are in bottles. These are bought by on-trade customers, along with other brands of premium bottled lagers sourced from other brewers, for retail sale

from chilled cabinets. Likewise, the vast majority of on-trade sales of InBev's Beck's brand are in bottles. Conversely, the majority of InBev's on-trade sales and share figures are attributable to its Stella Artois brand which is sold to on-trade customers in kegs for retail as a draught premium lager – typically alongside one or more other brands of draught premium lager.

81. As noted above, the OFT has ruled out a theory of harm in this case that Budweiser constrains the pricing of Stella Artois.<sup>28</sup> When considering this issue in relation to combined shares from a 'low' of [40–50] per cent to a high of [60–70] per cent (the aggregate share of Budweiser, Beck's and Corona in the bottled segment), it is clear that these figures over-estimate the significance of Budweiser as a constraint on the pricing of Stella Artois and thereby overstate the potential concern, not least because there is clear evidence that Stella Artois faces some competitive constraint from standard lager competitors in draught form in the on-trade.

The competitive interaction between draught and bottled premium lagers

82. In determining whether draught Stella Artois, which accounts for the bulk of the overlap and combined share figures, constrains Budweiser (in bottled form, Budweiser has a negligible draught presence in Great Britain), the best view on the evidence is that draught premium lagers do constrain bottled ones.
83. This should hold true notwithstanding that bottled lagers are substantially more expensive: it is a truism that lower-priced products can constrain higher-price products if there is enough marginal custom that would switch between the products in response to movements in relative (quality-adjusted) price. So while the parties provided evidence indicating substantially higher pricing points for bottled Budweiser compared with draught Stella Artois (these data showed that on average, from April 2005 to May 2008, the price of Stella Artois was £[ ] cheaper than Budweiser – equivalent to around [20–40] per cent less), this evidence is not dispositive

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<sup>28</sup> In other words, a draught Stella Artois drinker is substantially more likely to switch to another draught lager than switch to a bottled Budweiser, and accordingly, an on-trade pub, bar or restaurant in negotiations over keg pricing is substantially more likely to switch, or threaten to switch, to premium draught lagers, such as [ ], and potentially other standard lagers in kegs, in this context, the pricing of bottled Budweiser does not appear to play a material role in the setting of Stella Artois keg prices.

that draught Stella Artois imposes no competitive constraint on bottled Budweiser.

84. Put differently, the argument cannot be had both ways: if the constraints from draught lager in the on-trade are such that if bottled premium lager is too narrow to be a relevant market and are such that the market must include draught, then the leading premium draught lager should be presumed by the same token to constrain the leading bottled lager.
85. It therefore follows that draught Stella Artois, the leading premium on-trade lager (coupled with its smaller bottled presence) is best regarded as a constraint on bottled Budweiser in the on-trade.

**Stella is not a particularly close constraint from among the set of closer or equally close constraints on Budweiser**

86. However, to the extent that Stella Artois (mainly in draught but also in bottled format) constrains Budweiser, the weight of evidence available to the OFT does not support an asymmetric theory that InBev could profitably raise Budweiser (but not Stella Artois) prices to the on-trade post-merger. In particular:

- Bearing in mind also on-trade specific evidence consistent with this conclusion, the direct off-trade evidence on consumer preferences (see above) does not put Stella Artois (or Beck's) as a substantial next-best choice to Budweiser. To the extent that off-trade lager drinkers' preferences are a proxy for on-trade lager drinkers' preferences, Stella Artois (or Beck's) therefore are not next-best choices for Budweiser. These data do admittedly relate to consumers' preferences for drink-at-home purchasing in the off-trade, and preferences for consumers drinking at home may be different in some respects from when they go out to a pub, bar or restaurant. However, in light of the internal documentary evidence and widespread agreement on their different flavour and Continental European/American branding profiles, the OFT considers that such preferences are unlikely to change in the direction of Budweiser drinks considering Stella (or Beck's) a substantially closer substitute when they go out than when they drink at home. (On the contrary, the

opposite may be true, as developed below in the Beck's/Budweiser analysis.)<sup>29</sup>

- Third party comments made to the OFT by market participants corroborate internal market research documentation in characterising Stella Artois and Budweiser as quite differentiated (rather than close) in flavour and brand positioning – the former as a 'Continental style' lager in terms of flavour and brand positioning, while Budweiser is a lighter-tasting 'North American' style. It is plausible, albeit unverified, that the merger should be regarded as merging complements (not substitutes) for at least a subset of on-trade customers, because draught Stella Artois fulfils a need for a mainstream Continental-style premium draught lager on tap, while bottled Budweiser caters to the smaller number of drinkers that are willing to pay more (per unit) for the taste and/or American brand association of Budweiser (for these on-trade customers, the merged could be efficient as a merger of complements: see conglomerate effects section).
- Equally, the documentary evidence that relates specifically to the on-trade, or covers both on- and off-trade, does not present a different picture from that gained in respect of consumer preferences in the off-trade: it does not single out Stella Artois, for example, as 'first among equals' in the brands that Budweiser keeps a competitive eye on, again suggesting that, to the extent that Stella Artois is a close competitor, it is no closer than the same range of other major rivals ([ ]) in the eyes of consumers, which in turns means that on-trade customers could effectively use such brands as leverage in pricing and terms of trade negotiations with InBev post-merger. There is some support in the evidence for the proposition that on-trade customers could turn to other brands of North and/or Latin American origin that are (arguably) closer to Budweiser, discussed in more detail in the Beck's/Budweiser analysis below.

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<sup>29</sup> Despite the proposition that draught Stella Artois should be treated as a substitute to bottled Budweiser, it is plausible that further inquiry at a more granular customer level would reveal that most on-trade customers would not substitute draught Stella volume for bottled Budweiser volumes, or regard them as complements – see below.

- Anheuser internal documents also identify an increased threat to the Budweiser brand from standard lagers in the on-trade sector.<sup>30</sup> This is also reflected in the econometric evidence provided by the parties that showed a standard lager, [ ], as the closest competitor to Budweiser.<sup>31</sup> Accordingly (as was the case for the off-trade), this is an additional reason why the parties' combined share data for the supply of premium lager to the on-trade in Table 2 may overstate the degree of competition between the parties' brands.
- Finally, the points developed below in relation to the price-sensitivity of intermediate on-trade customers are also relevant in this analysis.

### **NEITHER BECK'S NOR BUDWEISER ARE CLOSE COMPETITORS FOR 'FRIDGE SHELF SPACE' IN THE ON-TRADE**

87. The overlap between Budweiser and Beck's occurs primarily in relation to premium lager in bottled format, as Beck's is primarily sold in bottles in the on-trade (and off-trade) in Great Britain. If this brand combination post-merger does not raise concerns in the on-trade, where the brands are the two top sellers, no concerns will arise in any other respect.
88. Perhaps the best way of characterising the theory of harm is to posit that, if the two brands are first and second choices for bottled premium lager for a substantial proportion of on-trade clientele in pubs, bars or restaurants, then they will be close substitutes for fridge shelf space in the on-trade, as intermediate customers substitute one for the other entirely, or adjust allocation of shelf space in favour of one brand at the expense of the other, depending on the profitability of doing so (which will reflect, among other things, the wholesale prices that they are charged).

### **Each brand has closer bottled lager competitors in the on-trade than the other**

89. Focusing for initial purposes very narrowly on bottled-premium-lager competitors only (but see above discussion) relevant evidence again does

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<sup>30</sup> 'UK Industry and Share' presentation.

<sup>31</sup> As discussed further below, while these data relate to end consumers' preferences for drink-at-home purchasing in the off-trade, the OFT considers that it is reasonable to consider that the same consumers' preferences are unlikely to change when they drink lager in a pub, bar or restaurant (or elsewhere in the on-trade).

not suggest the competitive dynamic between Beck's and Budweiser is particularly important. In particular:

- Beck's internal documents provided to the OFT do not mention Budweiser to the same extent as other competing [ ] (whether with respect to the on-trade or off-trade) — even as a brand against which Beck's benchmarks itself, still less so as one that Beck's competes with in terms of targeting its marketing activity.<sup>32</sup> Indeed, internal documents relating to Beck's indicate that Beck's is positioned between [ ]. Conversely, Budweiser documents do not particularly reference Beck's in a way that suggests concerns: from Anheuser's perspective, the discussion as for Stella Artois applies, conversely, Anheuser's documents do identify [ ] as a recent entrant that is a threat to its Budweiser brand.
- As discussed above in relation to the Stella/Budweiser overlap, off-trade consumer preferences would appear to have read-across in this context: brand recognition and the respective tastes of the products are unlikely to change and there no evidence suggesting that consumers are likely to consider Beck's and Budweiser substantially closer substitutes when they go out than when they drink at home. If anything, it may be that consumers will be more willing (experimental) to try a wider rather than narrow brand range of bottled premium lager when they go out than when purchasing for home drinking. Such consumption patterns would provide openings for newer or less well-known brands, because consumption is often in the guise of trying as few as one or two bottles of a particular brand, rather than purchasing bulk multi-packs that accounts for much of off-trade sales.
- Entry and expansion by brands new to the UK or with a small presence tend to do this via on-trade bottled sales, which applies to various of the 'exotic' brands and can be achieved through direct bottled imports, rather than costlier local brewing (which can itself also be achieved through licensing incumbents, rather than de novo entry). The long tail of competing brands account collectively for 15

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<sup>32</sup> In this regard, the OFT notes that it is not sufficient for one product merely to benchmark itself against another for this to be documentary evidence that the two products may be in the same relevant market. Rather what is needed is documentary evidence of commercial actions (pricing or marketing, for example) being taken by one product in response to changes in the commercial actions of another.

per cent of supply (see Table 2). Some Anheuser documents also identify a number of more 'exotic' non-European brands which have experienced strong growth over recent years in the UK, including [ ]. Indeed, if taste or brand positioning based on a beer's 'region of origin' are any guide (and there is internal market research commissioned by Beck's to support this), then these more exotic brands, in addition to other [ ] could variously – and the choice might be different for different on-trade venues – be at a minimum equally credible substitutes for Budweiser than Beck's would be, while for Beck's other Continental European lagers would be closer in taste and brand position.

- In this connection, it may be relevant that on-trade retailers' demand for lager may be more responsive to changes in brewers'/distributors' prices to them than is end-consumers' demand to changes in the retailer's on-trade price because end-consumers demand is likely to be unitary (that is, to buy a drink or not to buy a drink), whereas retailers' demand is likely to be more granular (that is, how many facings to give a particular lager in a given fridge). This means that retailers' preferences for lagers may plausibly be wider than those of end-consumers because retailers can adjust fridge space allocation.<sup>33</sup>
- The parties argued that after the merger on-trade customers would have sufficient choice of premium lager suppliers and provided some evidence to show that switching costs are low, including (a) InBev being de-listed from [ ] pub outlets in Great Britain because [ ], and (b) InBev being de-listed from [ ].

90. Finally, as discussed above in the section on market definition, a focus only on bottled premium lager competition (and share data) in the on-trade is questionable, given the constraint provided by sales of draught premium lager, which account for approximately 75–85 of premium lager sales to the on-trade. In this case, while Stella Artois is admittedly the leading draught premium lager, the OFT has been able to dismiss concerns arising

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<sup>33</sup> Whether retailers' brand preferences with respect to brewers/distributors are in fact wider than consumers' brand preferences with respect to retailers depends amongst other things on the nature of wholesale versus retail pricing (for example, how closely the structure of wholesale pricing mirrors the price-per-unit model of retailers) and on the degree to which changes in wholesale prices are passed through into changes in retail prices (which in turn depends on the nature and degree of competition between brewers/distributors relative to that between retailers).

from the on-trade overlap between Stella Artois draught and Budweiser bottled lager, for the reasons set out above (paragraph 86ff).

91. Taking this evidence in its totality, the OFT therefore does not believe the unilateral effects theories tested are supportable. This is consistent also with the fact that a majority, but not all, on-trade customers were unconcerned about the merger, and could identify sufficient credible post merger alternatives to InBev's portfolio of brands.
92. Accordingly, the merger does not create a realistic prospect of a substantial lessening of competition in the supply of premium lager to the on-trade in Great Britain, even if assessed through the narrow lens of packaged (bottled) format.

### **INCLUSION OF CORONA WOULD NOT CHANGE THE ANALYSIS**

93. Unlike in other segments described above where Corona's share would be very small, Corona's share in premium bottled lager was estimated by the parties to be [10–20] per cent, which if assumed for worst-case analysis purposes to fall within InBev's control, would create a combined share of supply of around two-thirds of all bottled lager in the on-trade (given that almost all bottled lager is of premium brands). Of course, the merger itself would not internalise any competition between Budweiser and Corona, because InBev did not control either brand pre-merger. Instead, the focus here is on the Beck's vs. Corona overlap.
94. Two pieces of evidence suggest there could be a concern. First, Corona's current share of bottled premium lager, second, the econometric evidence provided by the parties suggests that [ ] are seen as being close substitutes. In particular, while the evidence points to several other beers being relatively close alternatives to Beck's, it showed that shoppers in the off-trade are most likely to divert their spending to [ ] in response to a price increase of Beck's. However, the overwhelming weight of the evidence discussed in relation to dismissing concerns as between Beck's and Budweiser also applies as between Beck's and Corona. In particular:
  - InBev's internal documents, and in particular those relating to Beck's, do not make particular reference to [ ].

- Customers contacted by the OFT named a number of alternative beers to Corona as substitutes for Beck's, including Kronenbourg 1664, Peroni, Holsten Pils, Miller Genuine Draft as well as a number of more niche premium lagers such as Asahi, Cobra, Kingfisher, Sol and Tiger.
- Although the econometric evidence indicates that [ ], the evidence also points to [several premium and standard lager brands] as being relatively close substitutes. This tends to support the difference in flavour profile between Beck's and Corona (Beck's being a Continental style lager and Corona a Latin style lager).
- Corona's share in bottled premium lager is likely to over-estimate its competitive significance because it does not take account of constraints from draught lager (which constitutes the vast majority of sales of premium lager to the on-trade). On the basis of an all premium lager market to the on-trade, Corona's share is significantly lower, at around only [0–5] per cent.

95. For these reasons, the OFT does not, on balance, have concerns even if InBev were assumed to have full control over Corona in the UK.<sup>34</sup>

## **UNILATERAL EFFECTS IN NORTHERN IRELAND**

### **INTRODUCTION**

96. The OFT does not repeat in detail in this section its analyses described above concerning closeness of competition between the parties' brands, which apply equally strongly in Northern Ireland.

97. Rather, it has sought in this section to examine issues specific to Northern Ireland, including third party comments received relating to Northern Ireland, to determine whether its conclusion as regards absence of unilateral effects in Great Britain applies equally in Northern Ireland.

### **Distribution of Budweiser**

98. Distribution arrangements regarding Budweiser in Northern Ireland differ from those in Great Britain.

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<sup>34</sup> For the reasons explained in paragraph 48 above, this is a 'worse-case' scenario.

- Anheuser [ ] supplies packaged Budweiser in Northern Ireland.
- The [ ] right to brew, sell, market and distribute draught Budweiser is held by Diageo. Diageo also has a [ ] right to sell, market and distribute packaged Budweiser in the on-trade in Northern Ireland.<sup>35</sup>
- The parties submitted to the OFT that Diageo accounts for around [ ] per cent of all Budweiser sold in Northern Ireland.

99. The OFT has considered whether it is appropriate to attribute the share of supply of draught Budweiser in Northern Ireland to Anheuser for the purpose of undertaking its analysis in this case, similar to the way in which it considered whether the shares of supply of Corona should be added to those of Anheuser.

100. [ ] namely:

- Diageo does not simply distribute Budweiser in Northern Ireland, it also brews it (in the Republic of Ireland), neither InBev nor Anheuser have brewing facilities in the Republic and it may be the case that there are some efficiency advantages from having Budweiser brewed in the Republic and transported to Northern Ireland compared to having it brewed in Great Britain,<sup>36</sup> certainly Anheuser benefits from the arrangement in the Republic where Diageo accounts for around 33 per cent share of supply of lager to the on-trade in the Republic (and Budweiser alone accounts for around 19 per cent of lager sales to the on-trade in the Republic) whereas InBev accounts for around six per cent and Anheuser is not directly present,<sup>37</sup>
- Diageo's distribution contract in Northern Ireland [ ], and
- around [ ] (out of around 1,500) pubs in Northern Ireland are 'loan

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<sup>35</sup> Diageo brews draught Budweiser in Kilkenny, Republic of Ireland, under licence from Anheuser and then distributes it in the Republic of Ireland and Northern Ireland.

<sup>36</sup> The parties submitted that Diageo is run on an 'all Ireland' basis and that there are significant benefits in using Diageo for the manufacture and distribution of draught Budweiser.

<sup>37</sup> Irish Competition Authority, Proposed acquisition by Heineken NV of the assets relating to the business operated by S&N in Ireland, namely Beamish & Crawford plc, 3 October 2008, tables 5.1 and 5.2.

tied'<sup>38</sup> to Diageo,<sup>39</sup> around [ ] pubs are 'loan tied' to InBev, as such it may be the case that there is little commercial incentive for InBev to take away the distribution contract from Diageo or, if it did, that the share of Budweiser in Northern Ireland would fall.

101. On the basis of this evidence, it may well be that Anheuser will not withdraw Diageo's rights in order to brew and distribute draught Budweiser in Northern Ireland itself.
102. However, even under the current distribution arrangements, Anheuser is entitled to a [ ] resulting from Diageo's sales of draught Budweiser. Post-merger, this could in theory impact on InBev's incentive to compete with draught Budweiser because it will receive some benefit from the sales by Diageo, and therefore potentially a degree of recoupment of lost sales of its own product consistent with standard unilateral effects theories.
103. As with Corona (see above), the OFT has on a cautious basis considered it most straightforward to consider this overlap on the 'worst-case basis' as if InBev were to control draught Budweiser in the same way as it would bottled Budweiser post-merger. To the extent that the OFT's competitive conclusions are unaltered even if 100 per cent of draught Budweiser were treated as being within the merged group, then the fact that Anheuser/InBev will receive only [ ] will also be unproblematic.
104. The OFT has therefore 'tested' its competitive conclusions to see whether they would change even if the shares of draught Budweiser were treated as belonging to Anheuser. Ultimately, the OFT has found (for the reasons given below) that the inclusion of even 100 per cent of draught Budweiser within the merged group would not alter its conclusion that competition concerns do not arise in Northern Ireland.

### **Market segmentation**

105. The parties warned the OFT that data difficulties make it more difficult to undertake analysis segmented by the on- and off-trades in Northern Ireland

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<sup>38</sup> The parties submitted that a loan tie occurs when a brewer loans money at favourable rates to a pub and in return the pub is contractually tied to the brewer to source its beer from that brewer. The parties submitted that generally it only relates to draught beer (indeed, the evidence before the OFT indicates that pubs which are loan tied do stock packaged beer from a variety of brewers).

than for Great Britain. For example, they told the OFT that in Northern Ireland there are several hundred on-trade premises with off-licenses attached (and therefore it is difficult to determine whether the supply of lager is to the on-trade or off-trade).<sup>40</sup> Further, the parties submitted that wholesalers for the on-trade are increasingly sourcing packaged Budweiser from the off-trade for supply to the on-trade. Therefore, the boundaries between the on- and off-trades in Northern Ireland can be blurred. However, the OFT considered that it was useful nevertheless to distinguish between the off-trade and on-sales sales channels in order to determine whether competitive conditions differed between them in the supply of premium lager.

106. As was apparent in the Great Britain section, to the extent that this merger has a potential to create concerns, these would arise in relation to premium beer rather than on an all-lager market. The OFT has therefore focused its analysis in Northern Ireland directly on the supply of premium lager, since it is in this segment where the parties' combined share of supply is largest and therefore it is where competition concerns are most likely to arise.

#### **THE MERGING BRANDS ARE NOT CLOSE CONSTRAINTS IN THE OFF-TRADE**

107. The parties estimated that their combined share of the supply of all premium lager to the off-trade sector in Northern Ireland is around [35–45] per cent (increment of around [5–10] per cent). These data are based on the supply of premium lager to the grocery multiples in Northern Ireland which, the parties submitted, in their view offers the best insight into the supply of premium lager to the off-trade in Northern Ireland more generally.<sup>41</sup> By brewer, the parties estimated that SABMiller accounts for around [20–30] per cent, Heineken/S&N and Carlsberg account for around [10–20] per cent each and Molson Coors accounts for [5–10] per cent of the supply of premium lager to the off-trade in Northern Ireland.

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<sup>39</sup> According to the parties' estimates.

<sup>40</sup> Licensing laws in Northern Ireland allow any licensed pub to sell alcohol for consumption off-trade, albeit from an area physically separated from the pub.

<sup>41</sup> The parties submitted that there are a number of problems with data relating to Northern Ireland. For example, the parties understand that Winemark, Northern Ireland's largest off-licence chain does not take part in data collection exercises from research firms such as AC Nielsen. The parties consider that these data – the supply of premium lager to grocery multiples – are the best data available to proxy the supply of premium lager to the off-trade sector in Northern Ireland.

108. The OFT considers that competition concerns in relation to supply of premium lager to the off-trade in Northern Ireland will not arise for the following reasons.

- First, there will remain post-merger a significant number of alternative brands in the market. Customers who the OFT spoke to were able to identify alternative brands that they could switch to after the merger if the price of Budweiser were to increase, including Miller Genuine Draft (SABMiller) and Coors Light (which is distributed by Hollywood and Donnelly) which both have a more significant presence in Northern Ireland compared to Great Britain, Corona (McCabes), as well as Stella Artois and Beck's.
- Second, customers in the off-trade sector in Northern Ireland are able to access premium and standard lagers from a variety of sources, including from wholesalers, other retailers, and from brewers and wholesalers in Great Britain and the Republic of Ireland. For example, the parties submitted that two of the larger wholesalers servicing customers in Northern Ireland (Waverley TBS – owned by Heineken/S&N – and Matthew Clark Wholesalers<sup>42</sup>) are based in Great Britain.
- Third, customers in this sector benefit from various different forms of purchasing flexibility and/or buyer power.
  - The parties submitted that some Northern Ireland-based wholesalers (for example, Drinks Inc) are a part of purchasing groups who negotiate pricing and supply on a UK-wide basis. This membership would potentially protect them in the event that the merged firm did seek to change its commercial position as regards supply in Northern Ireland particularly.
  - In terms of the grocery multiples in Northern Ireland, the parties estimated that those with a UK-wide presence (for example, Tesco, Asda, Sainsbury's and Musgrave) account for around

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<sup>42</sup> The parties estimated that these two wholesalers are the UK's two largest wholesalers.

40 per cent of off-trade sales of beer in Northern Ireland.<sup>43</sup> These UK-wide grocery multiples negotiate supply prices centrally for their UK operations and therefore are clearly able to source lager (including premium lager) from outside of Northern Ireland.

- The parties also submitted that these grocery multiples have strong buyer power and are able to leverage their very strong positions in Great Britain to negotiate low prices from suppliers. The parties suggested to the OFT that the decline of off-licenses in general was evidence of the strong position in the market held by the grocery multiples. The parties also submitted that, combined with the large off-license chains in Northern Ireland, around 70–75 per cent of beer sales<sup>44</sup> in Northern Ireland is accounted for by large customers with significant negotiating power.
- The parties submitted to the OFT evidence of off-trade retail customers exerting some form of buyer power on each of them pre-merger by switching (or threatening to switch) to other brands of lager, including InBev being de-listed from [ ] in Northern Ireland [ ], and Anheuser's largest customer in Northern Ireland (representing around [ ] of its sales there) negotiating a lower price [ ].

109. Some Northern Irish customers, however, were concerned about the proposed merger. In particular, some wholesalers were concerned that they would not be able to continue to distribute Budweiser in Northern Ireland after the proposed merger while other (retail) customers were concerned about a possible reduction in negotiating power. In relation to these concern:

- In terms of the concerns from wholesalers, the OFT does not consider that any change in the wholesaling arrangements that may take place post merger can be regarded as leading to competition concerns. Budweiser accounts for around [0–5] per cent of the supply of all beer in Northern Ireland (which the OFT considers is

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<sup>43</sup> The OFT does not consider that there are any reasons to think that their share of the sale of lager or premium lager should be significantly different.

<sup>44</sup> The OFT does not consider that there are any reasons to think that their share of the sale of lager or premium lager should be significantly different.

plausibly the best measure when considering the impact on wholesalers). Given that these shares are relatively small, the OFT does not consider that there is a realistic prospect of downstream foreclosure of wholesalers which would result in consumer harm.

- In relation to (retail) customer concerns about a possible reduction in negotiating power, the OFT is satisfied that there will remain sufficient competition in terms of competing brands post-merger for the merger to create competition concerns.

110. Overall, given the range of competing products, the relatively modest increment caused by the merger, the variety of sources of supply, that the parties' internal documents which the OFT reviewed did not highlight any issues specific to Northern Ireland as a result of the merger, and some evidence of customer buyer power, the OFT considers that the proposed merger does not create a realistic prospect of a substantial lessening of competition in the supply of all lager or premium lager to the off-trade in Northern Ireland.

#### **THE MERGING BRANDS ARE NOT CLOSE CONSTRAINTS IN THE ON-TRADE**

111. The parties and third parties supplied the OFT with Nielsen data on packaged lager supplied in Northern Ireland to the on-trade. The data supplied by the parties and third parties were not identical but nevertheless very similar.

112. Given the parties do not currently overlap in the supply of draught lager in Northern Ireland ([ ]) the OFT considers that these data are useful in helping the OFT in its assessment of the competitive effects of the merger with respect to the supply to the on-trade, although the OFT notes that (as discussed in greater detail in the Great Britain analysis) the supply of packaged lager to the on-trade is a very narrow basis on which to conduct its analysis.

113. These data show that Budweiser's share of premium packaged lager is around [40–50] per cent<sup>45</sup> while Stella Artois' share is less than [0–5] per cent. Miller Genuine Draft is around [10–20] per cent and Corona's share is similar (around [10–20] per cent).

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<sup>45</sup> The parties submitted that Diageo [ ].

114. The OFT received some third party comment raising a concern that, as a result of the loss of constraint posed by Stella Artois and Beck's on Budweiser, the merged entity may find it profitable to raise the price of packaged Budweiser to the on-trade in Northern Ireland. However, on the basis of the evidence before it, the OFT does not consider this to be a realistic prospect.

- First, the increment to caused by the merger is only [0–5] per cent (in the form of Stella Artois share).
- Second, the Nielsen sales data referred to above (see paragraph 107) and other evidence (including the parties' internal documents) indicate that neither Stella Artois nor Beck's is a particularly important constraint on Budweiser.
- Third, that data (see footnote 41) also indicates that Budweiser's closest competitors in Northern Ireland principally fall into two categories: namely, [ ] which have a much stronger position in Northern Ireland than the rest of the UK [ ].
- Fourth, the issue of a loss of constraint between Budweiser and Beck's does not arise in Northern Ireland because Beck's is not present to any material degree.

115. In terms of unilateral effects, the OFT therefore considers that the proposed merger does not create the realistic prospect of a substantial lessening of competition in the supply of premium packaged lager to the on-trade in Northern Ireland.

#### **INCLUSION OF ALL SUPPLY OF BUDWEISER AND CORONA DOES NOT CHANGE THE ANALYSIS**

116. As discussed above, the OFT has undertaken a sensitivity test to determine whether its conclusions might vary if draught Budweiser and/or Corona were included in the merged entity's market share when analysing the impact of the merger in Northern Ireland.

- This exercise has confirmed that the competitive assessment would not differ even if the share of supply of draught Budweiser were

attributed to Anheuser. Given that Diageo accounts for only [ ] per cent of all Budweiser sold in Northern Ireland, the increment that would be represented by the addition of the draught Budweiser would not be material to the merged entity's share of supply, and is therefore not determinative in the context of any unilateral effects case.

- The OFT's conclusions would not change either even if Corona were included in Anheuser's shares. In Northern Ireland the increment arising from the merger is small (that is, on the basis of InBev's share) and therefore the proposed merger does not make any difference to the likely effect on competition even if Corona were treated as part of Anheuser in Northern Ireland. The analysis is particularly clear-cut here given that Beck's is not materially present in Northern Ireland.

## **COORDINATED EFFECTS**

117. The OFT considers coordinated effects first in Northern Ireland and then in relation to Great Britain, because the former warranted closer consideration.

## **NORTHERN IRELAND**

118. The OFT's substantive assessment guidance explains that a merger may substantially lessen competition by increasing the possibility that, post merger, firms in the same market may tacitly coordinate their behaviour to raise prices, lower quality or reduce output.<sup>46</sup> This does not necessarily mean express collusion of the type prohibited by the Competition Act 1998. Given certain market conditions, and without any express agreement, tacit collusion arises merely from an understanding that it will be in the firms' mutual interests to coordinate their commercial decisions. Coordinated effects may arise where a merger situation reduces competitive constraints in a market, thus increasing the probability that competitors will collude or strengthening a tendency to do so.

119. In the present case, one third party comment expressed concerns about the possibility that competitive conditions in the supply of lager in Northern

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<sup>46</sup> Mergers: substantive assessment guidance, OFT516, May 2003, paragraphs 4.11–4.16.

Ireland would be lessened by Diageo's and InBev's ability to coordinate their behaviour in the on-trade. The concern was based on the concentrated nature of the supply of all lager in Northern Ireland (InBev/Anheuser and Diageo account for over [80–90] per cent of the total post merger supply of all lager to the on-trade). The coordinated effects theory of harm is also based on the assumption that the proposed merger would make these two leading players substantially more symmetric and interrelated as a result of InBev's acquisition of the Budweiser brand's share of the lager market in Northern Ireland.

### **Supply to the off-trade**

120. The OFT was able to rule out the possibility of coordination in the supply to the off-trade relatively quickly. This is because:

- the OFT does not believe that pricing is sufficiently transparent in the off-trade sector to sustain coordinated behaviour (particularly given the different sources of supply to the off-trade – see above), and that in-store promotions and loss-leading by the multiple grocers distorts any information about wholesale pricing that retail prices might provide), and
- there is some evidence of some buyer power, at least from some of the off-trade customers, which might disrupt any coordination.

### **Supply to the on-trade**

121. In regard to the on-trade, the OFT investigated whether the merger would create or strengthen coordination in the supply of lager to 'loan tied' pubs in Northern Ireland.

122. Diageo and InBev have a number of pubs loan tied to them – around [ ] for Diageo and around [ ] for InBev. The most plausible coordinated theory of harm in relation to the supply of lager to the on-trade in Northern Ireland is that InBev would not supply packaged Budweiser to any pubs tied to Diageo and Diageo, likewise, would not supply any packaged lager to any pub tied to InBev. As a consequence, competition in the supply of packaged lager to around [ ] of the pubs in Northern Ireland would be reduced.

123. The OFT considers that essential prerequisites for firms to have the ability to undertake successful and sustainable coordination are that:

- the focus of any coordination (for example, price) needs to be apparent to all coordinating suppliers which means that there needs to be sufficient transparency in the market with respect to the coordinating factor so that suppliers do not need to resort to express collusion
- coordinating suppliers are able to monitor each others' behaviour in order to detect deviations from the coordination and to punish such deviations, and
- any coordination would not be undermined by factors that lie outside of the coordinating group (for example, entry by another supplier or countervailing buyer power).

124. To the extent that these conditions are fulfilled, the question then arises as to whether the firms would have the incentive to coordinate their behaviour. This is because, although tacit coordination is in the collective interests of the oligopoly, it is often in firms' short-term individual interests to 'cheat' on the tacit coordination by cutting price, increasing market share, or selling outside 'accepted' territories.<sup>47</sup>

125. One of the key questions that the OFT will consider in assessing whether the prerequisites for coordination are present in a market is whether the firms in question are relatively symmetric, including in terms of market share. This will provide indications of their ability and incentive to reach common understanding on the terms of coordination.

126. In assessing this theory of harm the OFT considers that it should do so on the basis of the supply of all beer, not lager or premium lager, since it is counterintuitive to assume that Diageo and InBev would coordinate on which pubs they would supply one type of beer but not to do likewise on other types of beer (for example, it is reasonable to assume that there are economies of scope in distribution).

127. Evidence provided by the parties to the OFT indicates that Diageo will be more than double the size of InBev immediately after the proposed merger with a very small increment (with respect to the supply of all beer to the

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<sup>47</sup> Ibid, paragraph 4.15.

on-trade sector<sup>48</sup>). Although (by way of test to the OFT's competitive conclusions) adding Budweiser draught to Anheuser's share of supply would very slightly increase the merged entity's share of supply, and reduce that of Diageo, the differential would be immaterial in the context of all beer supplied to the on-trade.

128. Further, it is likely that the cost bases of the two firms are different which greatly reduces the competing firms' incentives to coordinate their behaviour in Northern Ireland, based on a number of factors, including:

- a discrepancy in their shares and volumes, and
- differences in the product mixes: Diageo is supplying, among other beers, draught Guinness and draught Budweiser from the Republic of Ireland to the on-trade in Northern Ireland while InBev and Anheuser are supplying packaged lager from Great Britain as well as draught Tennent's.

129. On such a basis, the OFT does not consider that the merger creates competition concerns on the basis of coordinated effects in Northern Ireland.

## **GREAT BRITAIN**

130. The OFT does not consider that the proposed merger will create or strengthen coordinated effects in Great Britain.

131. In the supply of all beer (whether to the on-trade or off-trade) the merged entity will be reasonably symmetric<sup>49</sup> with its key competitors Heineken/S&N, Molson Coors and, to a lesser extent, Carlsberg. However, the increment attributable to the merger is very low on these measures (less than [0–5] per cent) and therefore the merger is unlikely substantially to increase InBev's ability or incentive to coordinate with Heineken/S&N, Molson Coors and Carlsberg.

132. On other narrower measures of supply (although these would appear a less pertinent frame of reference in terms of coordinated effects analysis) using

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<sup>48</sup> If the supply of all lager to the on-trade sector was used, Diageo would be around 50 per cent bigger than InBev.

<sup>49</sup> By share of supply.

premium lager market share information shows that there is a lack of symmetry in supply and therefore considerably lessened incentives to coordinate.

133. In addition, the OFT believes that transparency in the wholesale supply of beer (or lager) is insufficient to enable effective monitoring of any deviations from the coordinated behaviour (which would embolden suppliers to cheat on the coordination), because the supply chain is complex, and monitoring observable retail prices would not give a reliable guide to upstream terms of trade. Wholesale prices are negotiated with each customer individually and retail prices – especially in the off-trade – are not necessarily effective indicators of wholesale prices.

134. Furthermore, the evidence before the OFT indicates that there are sufficient numbers of large customers in both the on- and off-trades who possess sufficient degrees of buyer power to disrupt any coordination in the supply of beer (or lager) to them.<sup>50</sup>

135. For these reasons the OFT does not consider that the merger will not realistically create or strengthen the prospect of coordinated effects in Great Britain.

## **PORTFOLIO EFFECTS**

136. Mergers between firms producing products that are not close substitutes can nonetheless still give rise to anticompetitive effects if they (i) enhance the merged firm's scope to condition sales of one product or products on sales of another or others (that is, bundling or tying) and/or (ii) if they otherwise enhance the market power of the merged firm's portfolio of products, for example by enabling the merged firm to insist that its customers buy its full range of products, thereby preventing its competitors with less extensive ranges selling their products to the same customers (known as 'portfolio effects').<sup>51</sup> Set against this, bundling/tying and portfolio power can also be pro-competitive.<sup>52</sup>

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<sup>50</sup> See paragraphs 150–154 below.

<sup>51</sup> See chapter 6 of 'Mergers: substantive assessment guidance', OFT516, May 2003.

<sup>52</sup> See, for example, *Completed acquisition by Global Radio UK Ltd of GCap Media plc* OFT decision of 8 August 2008 (case number ME/3638/08).

137. In respect of bundling/tying, the OFT received no evidence that customers in either the on- or off-trade regarded any of InBev's lager brands as 'must stock',<sup>53</sup> nor, consequently, that InBev had conditioned sales of some or all of its lager brands on sales of any of them. Neither did the OFT receive any evidence that Budweiser was regarded as a 'must stock' lager brand in the on- or off-trade. In the light of this, the OFT does not consider that there is a realistic prospect that the addition of Budweiser to InBev's portfolio of brands could increase InBev's ability to condition sales of any of its products on sales of Budweiser.
138. Turning to portfolio effects, the OFT received no evidence that InBev's competitors could not match its portfolio of brands even with the addition of Budweiser. Significantly, the OFT did not receive any concerns from third parties in relation to any form of portfolio concerns. Further, and as alluded to above, mergers between firms producing products that are not close substitutes can give rise to pro-competitive pricing efficiencies if the products involved are complementary. In this regard, one on-trade customer (a pub group) told the OFT that it saw the merger as an opportunity to obtain an improved price on Budweiser. On the basis of the above, the OFT does not consider that the merger gives rise to a realistic prospect of anticompetitive portfolio effects.

## **ENTRY AND EXPANSION**

139. The parties submitted that barriers to expansion (in the supply to both the on- and off-trade segments) are low. In Interbrew/Bass the CC concluded that barriers to entry were likely to be greater in the supply of draught beer than in packaged beer (because of difficulties in getting access to the on-trade).<sup>54</sup>
140. The parties submitted that recent examples show that any existing barriers to entry and expansion are surmountable. They told the OFT that Heineken's 5 per cent brand has almost doubled its sales in the UK since 2004, sales of Corona have seen around a 10-fold increase during this time and Peroni (SABMiller) has also seen sales double (since 2006). Customers

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<sup>53</sup> For example, InBev gave the OFT examples of [ ] being de-listed by customers in the on-trade following commercial disputes, and examples of supermarkets insisting on InBev funding price promotions for [ ] in the off-trade. Neither set of examples is consistent with customers viewing InBev's leading brand as a 'must stock'.

<sup>54</sup> Paragraph 2.49.

approached by the OFT corroborated that there were few costs involved in switching and/or stocking an additional brand.

141. The parties provided evidence showing that end consumers are willing to consume several brands of lager.<sup>55</sup> Such fluid preferences by end consumers are in turn likely to give greater scope for suppliers to expand their sales in the market place.
142. Comments from third parties indicated that the major cost in expanding was marketing, which is consistent with the CC's findings in Interbrew/Bass.<sup>56</sup> These costs are sunk (that is, a cost which cannot be recovered later, for example in a second hand market) and therefore represent a barrier to expansion. Although the main marketing message may be different for premium lagers than for standard lagers, marketing is not usually packaging specific (for example, Stella Artois in draught is not promoted differently to Stella Artois in bottles).
143. One third party told the OFT that to build up a market share of any significance in Great Britain and/or Northern Ireland can take more than 10 years and considerable marketing expenditure (perhaps in the millions of pounds).
144. In response, the parties told the OFT that, although marketing is expensive, the cost of producing it can be spread across several countries (for example, marketing campaigns in the Republic of Ireland will be more or less the same as marketing in Northern Ireland and Great Britain).
145. The parties told the OFT that for new entry, a supplier will need to:
  - get a listing with customers which may involve, for the on-trade sector, making a loan to the customer and, for the off-trade sector, paying a listing fee, and

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<sup>55</sup> [ ] data show that the average UK beer buyer purchased a repertoire of [5–10] brands during the course of the 12 months to July 2008. Another survey asked consumers how many brands they expect to purchase within their next 10 purchases – the average result was [0–5].

<sup>56</sup> Paragraph 2.40.

- be able to support various promotions in the off-trade (particularly in supermarkets).<sup>57</sup>

146. In terms of supporting off-trade promotions, the parties submitted that the brewer will provide to the retailer a level of promotional funding which would include the costs of the in-store fixtures and some contribution to the cost of reducing the price of the product while it is on promotion.

147. As discussed above, third parties told the OFT that entry usually starts with bottled lager, and further that entry does not require any UK-based brewing facilities and recent examples of bottled entry include Cobra, Corona and Sol.

148. In addition, third parties told the OFT that entry on a smaller scale is possible from micro breweries (in either bottled or draught form) which are usually linked to small, local/regional pub chains.

149. For the OFT's purposes, the role of entry and expansion has been factored into the above assessment (for example, in the on-trade bottled premium lager discussion) and it would be unhelpful to reach generic conclusions outside that context, and which are not necessary for the decision.

## **BUYER POWER**

150. The parties submitted that there is considerable countervailing buyer power in both the on- and off-trade sectors in Great Britain and Northern Ireland. All competitor third parties that the OFT spoke to agreed.

151. Large pub companies account for around a third of the UK's on-trade. Large supermarket chains account for around [60–70] per cent of sales in the off-trade sector while the major off-licence chains account for approximately another 10 per cent.

152. Large customers in both the on- and off-trade sectors said that they thought that they possessed at least some degree of countervailing buyer power – their purchasing volumes were large, switching costs were low and generally after the merger sufficient choice would remain.

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<sup>57</sup> Around [ ] per cent of InBev's sales in the off-trade sector are sold on promotion.

153. However, other customers (again in both the on- and off-trade sectors) were concerned that the proposed merger would reduce their negotiating ability and that prices may go up. If it were material to the outcome of this case, this evidence would indicate that countervailing buyer power among some customers may not be sufficient to protect other customers from price increases or a degradation of service quality.
154. For the OFT's purposes, the role of buyer power has been factored into the above assessment (for example, in relation to Northern Ireland) and it would be unhelpful to reach generic conclusions outside that context, and which are not necessary for the decision.

### **THIRD PARTY VIEWS**

155. The majority of customers contacted by the OFT during the course of its investigation were not concerned about the merger.
156. However, some customers in Great Britain and Northern Ireland did express some concerns. Their concerns generally centred on a potential loss of negotiating power as a result of the proposed merger, particularly in relation to premium lager. However, all concerned customers could identify other, competing, premium lagers to which they could easily switch.
157. Some wholesalers expressed concerns to the OFT that they may lose wholesaling contracts as a result of the proposed merger. In these instances the OFT did not consider that the volumes involved were sufficient to foreclose competitors to the extent that they created substantial competition concerns.
158. One third party expressed a concern with regard to the loss of constraint posed on the price of Budweiser in Scotland by the Tennent's and Stella Artois lager brands. However, the OFT has considered, but rejected, the prospect that Scotland should be treated as a separate geographic market to the remainder of Great Britain.
159. No competitors were concerned about the proposed merger including the effects of the merger on entry barriers for future premium lagers.

## ASSESSMENT

160. In the UK, the transaction transfers Anheuser's key premium lager brand, Budweiser (among others), to InBev's portfolio of premium lager brands, including the UK best-seller in this category, Stella Artois. Budweiser and InBev's Beck's brands are also the two top-selling premium lagers sold in bottled format in the UK on-trade of pubs, bars and restaurants.
161. As set out in greater detail above, the OFT adopted various candidate market definitions as screens for ruling out unilateral effects concerns, and as platforms for developing and testing several theories of harm that share in common the notion that the merger combines close brands in the eyes of consumers, raising prima facie concerns that a post-merger price increase by InBev would be profitable.
162. With respect to Great Britain, the OFT's focus (in both the off-trade and on-trade) was to a degree asymmetric, in that Stella Artois was a likelier candidate as a substantial constraint on Budweiser pricing in the UK than the other way around, reflecting their substantially different relative positions in the premium (and all) lager segment. In contrast, in respect of competition for 'fridge shelf space' in the on-trade, the focus was classically symmetric, because both Beck's (#2 with a [10–20] per cent of bottled premium lager sales in the on-trade) and Budweiser (#1 with [20–30] per cent) could prima facie be expected to be close substitutes to one another, based on share of sales data alone.
163. The overall general conclusion was that, while the parties brands do constrain one another, they are not sufficiently close given consumer preferences for purchasing a substantial range of premium (and other) lagers, and their willingness to switch to equally close or closer substitute brands to those of the parties: notable examples are Kronenbourg 1664, Heineken, Carlsberg Export, Grolsch, Peroni and Miller Genuine Draft, as well as brands with smaller penetration in the UK. Put differently, while Budweiser and Stella Artois may each have a set of loyal customers, the evidence showed that few would rank both brands as their top two choices, so they are not close competitors.
164. These end-consumer preferences permit both off- and on-trade customers in the UK to leverage switching, or threatened switching, to a substantial number of substitute brands sufficient to discipline InBev and deter post-

merger price increases related to the merger. Even adding Corona on a 'worst-case' basis – by treating Anheuser's structural link with Corona's owners as if it were to transfer full control over Corona's UK pricing – did not change the overall conclusion, despite a combined [60–70] per cent share of on-trade supply of premium bottled lager in Great Britain.

165. The same general conclusion holds true for Northern Ireland, assuming it is a separate market – but if anything, unilateral effects concerns are even weaker, because Beck's is not materially present and various lighter-tasting (North or Latin American-style) lager brands (Miller Genuine Draught, Coors, Sol) are more obvious substitutes to Budweiser than in Great Britain due to their higher penetration.
166. With respect to other theories of harm, the OFT examined but dismissed the possibility that the merger is likely to create or strengthen coordination between a distribution 'duopoly' of Diageo and InBev in Northern Ireland post-merger. Key to dismissing concerns was the post-merger asymmetry between the two putative duopolists, the lack of obvious mechanisms for reaching and monitoring coordinated outcomes, and the potential for disruption by customers able to procure from other sources, for example, in Great Britain. In Great Britain, a small overall increment in lager (and asymmetries in premium lager, where the increment is more substantial), a lack of transparency in a complicated supply chain, and disruption potential by powerful buyers eliminated concerns. With respect to anti-competitive portfolio effects, tellingly, no alleged competitor victim of such a strategy raised concerns, and the evidence did not otherwise support such a theory.
167. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

168. This merger will therefore not be referred to the Competition Commission under section 33(1) of the Act.

**Annex 1:**  
**Beer brands supplied in the UK by the parties**

UK brand	InBev Brewed in UK?	UK brand	Anheuser Brewed in UK?
Bass	Yes	Budweiser / Bud Ice	Yes
Beck's	No - imported from Germany	Estrella Damm	No - imported from Spain
Belle Vue	No - imported from Belgium	Harbin	No - imported from China
Boddingtons	Yes	Kingsbrucke	Yes
Brahma	Yes	Michelob	No - imported from USA
Cains **	Yes (but not by InBev)	Michelob ULTRA	Yes
Castlemaine XXXX *	Yes		
Diebels	No - imported from Germany		
Eiken Artois <sup>58</sup>	No - imported from Belgium		
Flowers	Yes		
Franziskaner	No - imported from Germany		
Gold Label	Yes		
Heldenbrau	No - imported from Germany		
Hertog Jan	No - imported from Netherlands		
Hoegaarden	No - imported from Belgium		
Kaltenberg Diat Pils **	No - imported from Germany		
Labatts	No - imported from Canada		
Labatts Ice	Yes		
Leffe	No - imported from Belgium		
Mackeson	Yes		
Moosehead **	No - imported from Canada		
Murphy's *	Yes		
Oranjeboom **	Yes - although InBev only fills one SKU in can form <sup>59</sup> .		
Peeterman Artois	Yes		
Poacher	Yes		
Quilmes	No - imported from Argentina		
Staropramen	No - imported from Czech Republic		
Stella Artois	Yes		
Tennents	Yes		

<sup>58</sup> InBev began marketing Eiken Artois in the UK only in 2008 (see press release dated 3 April 2008, available at [www.stella-artois-news.co.uk/content/eiken-artois-adds-new-dimension-to-the-stella-artois-family](http://www.stella-artois-news.co.uk/content/eiken-artois-adds-new-dimension-to-the-stella-artois-family)).

<sup>59</sup> All other Oranjeboom marketed in the UK is produced by other brewers.

<b>UK brand</b>	<b>InBev Brewed in UK?</b>	<b>UK brand</b>	<b>Anheuser Brewed in UK?</b>
Trophy	Yes		
Victoria **	Yes - but not by InBev		
Welsh	Yes		
Whitbread	Yes		

Note: \* Brewed under exclusive licensing agreement in the UK but not owned by InBev.

\*\* Marketed in the UK but not owned by InBev.

## Annex 2:

### Estimated shares of supply of lager in Great Britain (2007, per cent)

		Total trade	On-trade	Off-trade
InBev	By value	[15–25]	[15–25]	[20–30]
	By volume	[15–25]	[15–25]	[20–30]
Anheuser	By value	[0–5]	[0–5]	[5–10]
	By volume	[0–5]	[0–5]	[5–10]
<b>Combined InBev / Anheuser</b>	<b>By value</b>	<b>[20–30]</b>	<b>[20–30]</b>	<b>[30–40]</b>
	<b>By volume</b>	<b>[20–30]</b>	<b>[20–30]</b>	<b>[30–40]</b>
Wells & Young (Corona)	By value	[0–5]	[0–5]	[0–5]
	By volume	[0–5]	[0–5]	[0–5]
Heineken/S&N	By value	[25–35]	[25–35]	[15–25]
	By volume	[25–35]	[25–35]	[15–25]
Molson Coors	By value	[20–30]	[25–35]	[15–25]
	By volume	[20–30]	[25–35]	[15–25]
Carlsberg	By value	[10–20]	[10–20]	[10–20]
	By volume	[10–20]	[10–20]	[10–20]
SABMiller	By value	[0–5]	[0–5]	[0–5]
	By volume	[0–5]	[0–5]	[0–5]
Other Brewers	By value	[0–5]	[0–5]	[5–10]
	By volume	[0–5]	[0–5]	[5–10]

Source: Parties' estimates based on AC Nielsen data.