

Anticipated acquisition by the Coca-Cola Company of a minority interest in Fresh Trading Limited

ME/4091/09

The OFT's decision on reference under section 33(1) given on 26 May 2009. Full text of decision published 11 June 2009

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

PARTIES

1. **The Coca-Cola Company** (TCCC) is a global manufacturer of non-alcoholic beverages including a range of carbonated soft drinks (its brands include Coca-Cola, Diet Coke, Sprite, Fanta, Dr Pepper and Schweppes branded products including lemonade and tonic water), still drinks (for example, Oasis, Powerade and Vitamin Water) and fruit juices/nectars (for example, Minute Maid and Five Alive).
2. **Fresh Trading Limited** (Fresh Trading) is a manufacturer and distributor of the non-alcoholic beverages 'Innocent' (a smoothie) and 'This Water' (a fruit juice/nectar). In 2008 Fresh Trading's UK turnover was [over £70] million, of which smoothie sales accounted for around £[] million.

TRANSACTION

3. On 30 March 2009 TCCC, through its indirect wholly-owned subsidiary company European Refreshments, entered into an Investment Agreement to acquire an [15–20] per cent shareholding in Fresh Trading for approximately £30 million (the Transaction). As a part of the Transaction TCCC will appoint a director [to Fresh Trading's Investment Board].

4. The parties notified the Office of Fair Trading (OFT) of the Transaction via a Statutory Merger Notice on 8 April 2009. The extended statutory deadline in this case is Tuesday 26 May.

JURISDICTION

5. The parties submitted that TCCC will at the very least acquire the ability materially to influence the policy of Fresh Trading for the purposes of the Enterprise Act 2002 (the Act). The OFT agrees with this assessment and considers that the Transaction will give TCCC material influence over Fresh Trading.¹
6. As a result of the Transaction TCCC and Fresh Trading will cease to be distinct for the purpose of the Act. The UK turnover of Fresh Trading exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
7. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

MARKET DEFINITION

8. Combined the parties manufacture and supply a large range of products. The products which are of relevance to this case are juices/smoothies/nectars and carbonated soft drinks.

Product scope

Juices and smoothies

9. The parties submitted that they consider the appropriate product market definition as all non-alcoholic beverages. However, the parties also acknowledged that the OFT may wish to examine the proposed merger on a narrower basis and suggested a definition of all juice beverages (encompassing 100 per cent juice beverages, nectars and still drinks). The OFT considered even more narrow product market definitions of:

¹ Material influence is the lowest level of control that may give rise to a relevant merger situation.

- 100 per cent juice beverages
 - nectars (fruit juice content between 25 and 99 per cent)
 - smoothies (that is, a fruit drink made from pure crushed fruit but which may also contain a small amount of fruit juice or puree, yoghurt, milk or soymilk and is smooth in texture),² and
 - juice beverages from concentrate.
10. From the demand side, third party retail customer comment broadly agreed with the OFT's suggested narrow definitions. Some third parties thought that further segmentation between chilled and ambient products would be appropriate since these can be aimed at different customers.
 11. On the supply side, one third party competitor also thought that a distinction between chilled and ambient products was necessary. However, a further competitor thought that the OFT's suggested market definition was too narrow and it should rather be non-alcoholic, non-carbonated fruit beverages.
 12. As to whether smoothies constitute their own product market, retail customers were unanimous in their comment to the OFT that although there is a degree of competitive interaction between smoothies and other fruit based beverages they would not switch to other beverages if faced with a 10 per cent price increase of smoothies. Therefore, there is some evidence that smoothies could be treated as a distinct product market.
 13. One competitor told the OFT that smoothies (such as Innocent) have been stealing sales from chilled 100 per cent fruit juices in recent years. If true, this gives some credence to the argument that the appropriate definition is wider than just smoothies. Likewise, the parties told the OFT that when chilled 100 per cent fruit juices are on promotion in the major supermarkets, sales of Innocent smoothies fall over the promotion period.
 14. A TCCC internal document [] suggests that [].

² This definition is taken from the Mintel market intelligence report 'Smoothies', October 2008.

15. The OFT has also examined the role of branding and whether it is necessary to separate a relevant product market for branded drinks and own label soft drinks. It found that major retailers offered own brand options in all product categories outlined in paragraph 9 above. Major multiple retailers told the OFT that branded smoothies were more expensive than own label products, often considerably so, and that they commanded a high degree of customer loyalty. A third party from the catering and hospitality sector also expressed the view that own label products were imperfect substitutes for branded products.
16. One TCCC internal document []. In addition, a competitor has told the OFT that branded and own label juices and smoothies compete directly against each other and that its experience has shown that volumes lost in the branded product have been picked up by an own label product.
17. The OFT has not found it necessary to conclude on the precise market definition in this case. Without prejudice to the precise market definition, for smoothies, the OFT has examined the proposed merger, wherever it could, on the narrow basis that smoothies (that are always sold chilled, and whether branded or own label) formed their own product market separate from other fruit-based beverages. However, the OFT has also considered a wider product market definition which includes smoothies and chilled 100 per cent fruit juices together (again, on both branded and branded plus own label bases).
18. For other fruit-based drinks relevant to this investigation (such as Innocent's This Water) – and, again, without prejudice to what the precise product market definition is – the OFT has examined the merger on the basis of chilled 100 per cent fruit juices beverages and nectars (which have fruit juice content between 25 and 99 per cent). The OFT notes that this product scope does not include ambient drinks or drinks with fruit content of less than 25 per cent, and therefore does not include TCCC's brands Minute Maid (which is ambient), Vitamin Water (which is not fruit based) and Oasis (which contains less than 25 per cent fruit).

Carbonated soft drinks

19. In 2005 the European Commission's (the Commission) preliminary assessment was the supply of carbonated soft drinks to the take-

home channel formed a distinct product market and that the supply of carbonated soft drinks to the on-premise channel formed another distinct product market.³

20. The OFT has adopted these definitions for the purpose of its investigation in this case. The table below lists some well known brands according to the type of beverage.

Geographic scope

21. The parties submitted that the geographic market is UK wide. All third parties agreed that it is at least UK wide (with some suggesting that it may even be wider than the UK).
22. The OFT notes that TCCC uses different bottlers in Great Britain than in Northern Ireland. This might suggest that Great Britain and Northern Ireland are separate geographic markets.
23. However, the merger analysis in this case does not concern wholesale distribution of relevant drinks, but their manufacture and supply. Moreover, the competition assessment in this case does not depend on such segmentation. The OFT therefore has not found it necessary to conclude on the geographic market and has examined the proposed merger on the basis of the UK for all of the product categories discussed in this decision.⁴

UNILATERAL EFFECTS AND VERTICAL ISSUES

24. The OFT does not consider that the parties overlap in the supply of any beverage within a likely product market apart from a very small amount of chilled Minute Maid.⁵ The parties submitted that Canadian data show that Minute Maid accounted for less than [0–5] per cent of chilled 100 per cent fruit juice beverages in 2007 but even this small amount is an over estimate of the current position since []. No third parties were concerned about unilateral effects arising in this decision.

³ Case COMP/39.116, Commission Decision of 22 June 2005.

⁴ In 2005 the Commission also found that the geographic market for carbonated soft drinks to both the on-premise and take-channels was national.

⁵ The OFT notes that using a wider product market definition comprising all juices (ambient and chilled) would capture a direct overlap between the parties, although the Transaction would only result in a small market share (of less than 10 per cent) and accretion (of less than [0–5] per cent).

25. Therefore, the OFT believes that unilateral effects do not arise in this case.
26. Moreover, the parties do not operate at different stages of the supply chain in any common market and so the possibility of vertical issues does not arise in this case.

CONGLOMERATE ISSUES

27. In light of third party comments in this case, the OFT investigated the likelihood of a substantial lessening of competition arising as a result of the Transaction from conglomerate effects. Conglomerate mergers do not involve a loss of direct competition between parties (which would be examined as a part of unilateral or coordinated effects analysis), nor do they involve suppliers that are vertically related in some way (that is, they are active at different stages of a supply chain). Instead, conglomerate mergers involve goods or services which are not competing in the same market.
28. Generally, in competition terms, conglomerate mergers are benign or even efficiency-enhancing. However, in certain circumstances, a conglomerate merger can result in the merged entity foreclosing rivals (through tying and bundling or through 'portfolio effects') and thereby increasing its own market power and profitability.⁶ The OFT only regards foreclosure as anti-competitive where it results in a substantial lessening of competition in the foreclosed market(s), not merely where it disadvantages one or a few competitors.
29. The third party concerns that the OFT received in this case were that, following the Transaction:
 - TCCC and Fresh Trading could leverage the strength of TCCC's brand(s) to influence the buying decisions of retailers in order to reduce the number of competing brands offered in the chilled 100 per cent juice, smoothie and, what some third parties referred to as 'enhanced water' categories
 - TCCC and Fresh Trading could use the prevalence of Coca-Cola chillers to reduce the number of rival products in Coca-Cola chillers

⁶ See chapter 6 of the OFT's *Mergers - substantive assessment guidance* (OFT516) and, for a more recent statement, Joint publication by the OFT and the Competition Commission, *Merger Assessment Guidelines*, Consultation Document April 2009, paragraphs 4.152ff.

installed in smaller retail outlets (such as convenience stores) as well as in major supermarkets

- TCCC could use its strong position in the supply of its products to foodservice wholesalers, contract caterers and quick service restaurants to prevent other brands from being supplied to these customers, and
- TCCC would have an expanded portfolio of products making it more likely that customers would only contract with TCCC (or its bottler) which would lead to some foreclosure of rival products.

30. The OFT examined these concerns which are discussed below within the frameworks of 'tying and bundling' and 'portfolio effects'. However, before these theories of harm are discussed, the relevant market shares are set out and the distribution systems for both parties are outlined, since these are germane for the discussion that follows. The OFT also briefly summarises the commitments given by TCCC to the Commission which are also relevant in this case with respect to the third party complaints that the OFT has received.

Market shares

31. Data on shares of supply from Nielsen and Canadean data (which are commonly used in the industry) are presented in Table 1 for beverage categories approximating the OFT's preferred product scope (paragraphs 9 to 20).

Table 1: Estimated shares of supply, per cent, 2007

	100 per cent fruit juices (chilled)		100 per cent fruit juices (take home)*		Chilled nectars		Chilled 100 per cent fruit juices and nectars	
	All	Branded	All	Branded	All	Branded	All	Branded
TCCC	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Fresh Trading	[5-10]	[15-25]	[10-20]	[20-30]	[5-10]	[10-20]	[5-15]	[15-25]
Combined[±]	[5-15]	[15-30]	[10-25]	[20-35]	[5-15]	[10-25]	[5-20]	[15-30]
PepsiCo	[25-35]	[55-65]	[20-30]	[50-60]	[40-50]	[50-60]	[25-35]	[55-65]
Own label	[45-55]	-	[50-60]	-	[10-20]	-	[40-50]	-
Ocean Spray	-	-	-	-	[10-20]	[15-25]	[0-5]	[0-5]
Other	[5-10]	[10-20]	[5-10]	[20-30]	[10-20]	[10-20]	[5-10]	[10-20]

* Based on value. All other shares are based on volumes.

[±] Despite the Transaction being a minority shareholding, on a cautious basis all of Fresh Trading's share has been allocated to TCCC in the OFT's analysis.

Source: The parties based on Nielsen and Canadean data, and Canadean Limited.

32. In addition to the estimated shares presented in Table 1, the OFT has estimates shares of supply for other beverage categories used in this decision. The parties submitted shares of supply for '100 per cent fruit juice not from concentrate' which includes smoothies and which is similar to the OFT's category of chilled 100 per cent fruit juices.⁷ On this basis Fresh Trading was estimated to have a [10–20] per cent share, TCCC [0–5] per cent and PepsiCo [50–60] per cent (own labels were estimated to account for around [15–25] per cent of sales).
33. For smoothies alone, Innocent smoothies have been estimated to account for [55–65 per cent] of all smoothie sales in the UK in 2007.⁸ Some third parties who spoke to the OFT have higher estimates; they told the OFT that Fresh Trading accounts for around 75–80 per cent of their smoothie sales.
34. For carbonated soft drinks, the parties submitted that TCCC accounted for around [60–70 per cent] of take home sales and around [40–50] of on-trade sales in 2007.

Distribution system

35. The parties to the proposed Transaction adopt different approaches to distribution.

TCCC

36. TCCC's products are ambient products and wholesaled by Coca-Cola Enterprises (CCE) in Great Britain and by Coca-Cola Hellenic Bottling Company (CCHBC) in Northern Ireland. [Endnote 1] TCCC sells its [] to CCE or CCHBC and it is these companies, not TCCC, which contract with retailers (or other wholesalers such as cash and carry operators).
37. While major retailers (such as the large supermarket operators) and those in the foodservice and restaurant sectors are likely to contract directly with CCE or CCHBC, smaller retailers (such as convenience store operators who are not part of a major supermarket chain) are likely to acquire their TCCC beverages from specialist wholesalers or cash and carry operators, and not CCE or CCHBC. These distribution arrangements have been corroborated by third party customers with whom the OFT has spoken.

⁷ The parties' estimates are based on Canadian data.

⁸ Mintel International Group Limited, Smoothies, October 2008.

38. CCE and CCHBC are not completely independent from TCCC. The parties submitted that TCCC has around a 35 per cent shareholding in CCE and around a 23 per cent shareholding in CCHBC.

FRESH TRADING

39. Fresh Trading contracts directly with major retailers (and some wholesalers) unlike TCCC which sells its products to intermediary wholesalers (CCE/CCHBC) in order to reach major customers. [Endnote 1] In terms of physical distribution, Fresh Trading uses specialist wholesalers on a sub-contract basis. Smaller retailers (for example, convenience store operators) and those who sell the products for consumption on-premise can source Fresh Trading's products from chilled wholesalers and cash and carry operators.
40. A TCCC internal document says [].

TCCC commitments to the European Commission

41. Following an investigation⁹ by the Commission under Article 82 of the EC Treaty in 2005,¹⁰ TCCC (and related bottlers (Coca-Cola)¹¹) gave commitments to the Commission. These expire on 31 December 2010. In broad terms, the commitments (among other things) provide:
- **No use of Coca-Cola's strongest brands to sell less popular products.** Coca-Cola will not require that a customer that only wants to buy one or more of its best-selling brands (for example, regular Coke or Fanta Orange) also has to purchase other Coca-Cola products such as its Sprite or its Vanilla Coke. Similarly, Coca-Cola will no longer offer a rebate to its customers if the customer commits to buy these other products together with its best-selling products or to reserve shelf space for the entire group of products.
 - **20 per cent of free space in Coca-Cola's coolers.** Where Coca-Cola provides a free cooler to a retailer and there is no other chilled beverage capacity in the outlet to which the consumer has a direct access and which is suitable for competing CSDs, the outlet operator will be free to use at least 20 per cent of the cooler provided by Coca-Cola for any product of its choosing.¹²

⁹ Case COMP/39.116, 22 June 2005.

¹⁰ Based on a decision taken under Article 9(1) of Council Regulation No 1/2003.

¹¹ Including CCE and CCHBC.

¹² European Commission press statement IP/05/775, 22 June 2005.

Tying and bundling

42. Third party concerns in this case included a concern that, after the Transaction, TCCC and/or Fresh Trading will be able to leverage their strong position in carbonated soft drinks and juices/smoothies to tie or bundle these with other, less popular, TCCC or Fresh Trading products. The other products which may be subject to tying or bundling might be Fresh Trading's This Water or TCCC's products which have comparatively weak brand strength; for example Minute Maid or one or more of the Schweppes juices, Five Alive, or flavoured/enhanced waters (Oasis or Vitamin Water). Or it may be the case that TCCC will be able to leverage its strong position in carbonated soft drinks to tie or bundle these with Fresh Trading's Innocent smoothies. As a result of tying or bundling, third parties claimed, rival brands will be foreclosed and TCCC's and/or Fresh Trading's market power will be enhanced as a consequence.
43. The OFT has examined whether, after the Transaction, TCCC and/or Fresh Trading would have the ability and incentive to foreclose rivals, and what the effects of any such foreclosure will be.

Ability to foreclose

44. The ability to foreclose, the factors of which are discussed below, depends on:
- TCCC or Fresh Trading having market power in at least one product market which customers view as being particularly important
 - the products to be tied/bundled being supplied to mostly the same customer base, and
 - TCCC or Fresh Trading being able to credibly commit to a strategy of tying/bundling.¹³

Possessing market power

45. Estimated shares of supply (paragraph 34) indicate that TCCC may possess market power. Further, all customers (that is, in the on-trade, contractual catering and foodservice channels) contacted by the OFT said that Coca

¹³ See the joint publication by the OFT and the Competition Commission, Merger Assessment Guidelines, Consultation Document April 2009, paragraphs 4.152–4.167.

Cola is a 'must stock' brand. UK sales of TCCC carbonated soft drinks amounted to around £1.3 billion in 2007.¹⁴

46. In addition, CCE/CCHBC supply around [] retailers in Great Britain and [] in Northern Ireland with Coca-Cola branded chillers.¹⁵ While conditions attached to these chillers may vary across retailers, typically a retailer must use 80 per cent of the chiller space for TCCC products.¹⁶ This may give TCCC (via CCE/CCHBC) additional market power in many of these retail channels, especially for those outlets which do not have space for several chillers dedicated to drink sales.
47. Estimated shares of supply in smoothies (paragraph 33) indicate that Fresh Trading may also possess market power. However, there is some indication that the Innocent brand is not as strong as some of TCCC's existing brands. For example, the parties told the OFT that []. Further, customers in the on-trade, contractual catering and foodservice channels contacted by the OFT did not tend to view Innocent smoothies as 'must stock'.
48. Overall there are good prima facie reasons for the OFT to consider that TCCC has market power in the UK supply of carbonated soft drinks, and there is some evidence to conclude that Fresh Trading has market power in the supply of smoothies. It is plausible to expect that this would give TCCC and/or Fresh Trading the ability to bundle or tie sales of its Coca Cola and Innocent brands to sales of its secondary brands (for example, Minute Maid, Schweppes juices, Oasis, This Water or Vitamin Water) after the Transaction although it is not clear that TCCC's ability would be materially strengthened by the proposed Transaction.
49. However, it does not always follow that possessing market power in one market allows a firm to leverage that power into another market; especially if in the other market another firm has market power. The parties submitted that after the Transaction TCCC and Fresh Trading would face rivals who have sufficient market power to resist attempted foreclosure in all of the beverage categories in which third parties raised foreclosure concerns. The annex to this decision lists some of the better known brands in each beverage category. For example, PepsiCo in chilled 100 per cent fruit juices (Tropicana which has an estimated share of around 20–25 per cent¹⁷) and in other chilled juices (P&Js which has an estimated share of supply of

¹⁴ Mintel International Group Limited, 'Carbonated Soft Drinks', Market Intelligence, February 2009.

¹⁵ By contrast, the parties told the OFT that Fresh Trading has supplied around [] Fresh Trading branded chillers in the UK.

¹⁶ For chillers for which the commitments given to the Commission are applicable.

¹⁷ Based on the parties' estimates, Canadean data and Mintel data.

around 25 per cent¹⁸), Britvic¹⁹ in nectars (J20 which has an estimated share of around 30 per cent²⁰) and still drinks (Fruit Shoot, the leading brand with a 12 per cent share of supply²¹), Del Monte in ambient juices (Del Monte which is the third highest seller in the UK²²) and Princes (Princes, the segment leader) and GlaxoSmithKline (Ribena) in ambient juices.

50. Because of its finding on incentive (discussed below) the OFT has not needed to reach a view on whether rival firms possess market power sufficient to nullify a bundling or tying strategy by TCCC or Fresh Trading. However, the OFT does consider that the presence of some strong competitor brands in the beverage categories in which third parties raised foreclosure concerns is likely to impact on TCCC's and Fresh Trading's ability to substantially lessen competition through a foreclosure strategy. It is also not clear that the Transaction would strengthen any ability of either party to engage in foreclosure.

The same customer base

51. In many instances, the primary customers for TCCC's carbonated soft drinks products are the same as for Fresh Trading's products (especially Innocent smoothies). These customers are large multiple supermarkets, large cash and carry operators, smaller supermarkets and convenience stores, on-trade customers and catering/foodservice operators.
52. While the parties do have a pool of common customers the parties said that the commonality is diluted by the category-by-category negotiating that occurs with the primary customers, major retailers. In other words, the retailers' buying team negotiating the purchase of ambient carbonated soft drinks is not the same as the buying team responsible for chilled juices and smoothies and therefore the products are typically not purchased together. This separation of buying teams was corroborated by the major retailers.

¹⁸ Canadean data.

¹⁹ Britvic, in competition terms, is not completely independent from PepsiCo since it has a licence to produce, market and distribute some of PepsiCo's products (mostly carbonated soft drinks) in the UK. Separately, Britvic has its own brands of drinks such as J20. Some of PepsiCo's products – such as Tropicana, P&J and Copella – are distributed independently from Britvic.

²⁰ Canadean data.

²¹ Canadean data.

²² Canadean data.

TCCC or Fresh Trading can credibly commit

53. TCCC submitted that TCCC cannot credibly commit to a tying or bundling strategy since TCCC's products are ambient products and wholesaled by CCE in Great Britain and by CCHBC in Northern Ireland; whereas Fresh Trading's products are chilled products and distributed by Fresh Trading itself. [Endnote 1] CCE and CCHBC's are unable to wholesale and distribute chilled products (since they do not have the facilities to do so). TCCC submitted that after the proposed Transaction it is most unlikely that these companies will wholesale and distribute Fresh Trading's products.
54. The OFT considers that the alignment of incentives between CCE/CCHBC and TCCC does not necessarily depend on any physical ability to distribute chilled products (since this can be overcome) but rather economic incentives (discussed below in paragraphs 62 to 72).
55. However, the OFT appreciates that it is CCE or CCHBC that negotiates and contracts with customers, not TCCC itself, which creates a further obstacle to TCCC's ability credibly to commit to a tying or bundling strategy.
56. Further, the parties told the OFT that regardless of the shareholding links between TCCC and its bottlers, TCCC cannot, in practice, direct the behaviour of CCE and CCHBC, and especially the behaviour in question which in practical terms is likely to require an agreement with Fresh Trading in order to credibly commit to a tying or bundling strategy.
57. The parties also submitted that committing a tying or bundling strategy is made more difficult by the retailers' separate buying teams who they negotiate with (discussed above in paragraph 52).
58. In terms of using the Coca-Cola branded chillers to successfully implement a tying or bundling strategy involving Fresh Trading brands or weaker TCCC brands, the parties submitted that:
 - commitments are in place (paragraph 41 above) which allow retailers to use 20 per cent of the chiller space for any products that they choose, and so TCCC (or CCE/CCHBC) will not have the ability to foreclose rivals using Coca-Cola branded chillers
 - the Commission's investigation and subsequent commitments have provided a deterrence against tying and bundling which will continue after the commitments have expired

- the Coca-Cola branded chillers are not turned on continuously but rather they are turned off when the store is not open. This will prevent store owners from stocking Fresh Trading's products in them since these products need to be chilled continuously, and
 - there is no evidence that TCCC has previously tried to force retailers to stock less popular TCCC products in the Coca-Cola branded chillers in the UK.
59. The OFT notes that the commitments given to the Commission expire at the end of next year and therefore cannot be relied upon to prevent tying and bundling by TCCC. As for the deterrence effect, the OFT has examined this case on the basis of whether the Transaction would materially change TCCC's or Fresh Trading's ability and/or incentive to foreclose rivals. It does not consider it appropriate in this case to rely on ex post competition laws to resolve concerns about foreclosure.²³
60. Customers who have a Coca-Cola branded chiller told the OFT that they were not concerned about TCCC (or CCE/CCHBC) using the chillers to force them to stock (through tying or bundling) unwanted products since:
- this has not happened previously even though TCCC has some brands which are relatively unpopular
 - the chillers are not suited to Innocent smoothies or This Water since these products are targeted at different consumers than the TCCC products which are stocked in the chillers,²⁴ and
 - some larger retailers told the OFT that they could always substitute their chiller for a non-branded one (without conditions attached).
61. Finally, the parties told the OFT that as Fresh Trading's products account for a very small proportion of retailers' sales (which was confirmed by the retailers themselves) this reduces Fresh Trading's ability to credibly commit to a tying or bundling strategy since, in this scenario (of Fresh Trading

²³ The Commission takes a similar approach in its Guidelines on the assessment of non-horizontal mergers (2008/C265/07). It says that in examining the incentives to undertake certain behaviour the Commission will examine the possibility that the conduct is unlawful. In particular, the Commission will consider, on the basis of summary analysis, (i) the likelihood that the conduct would be clearly, or highly probably, unlawful under Community law; (ii) the likelihood that this illegal conduct could be detected; and (iii) the penalties which could be imposed (paragraph 46).

initiating the tying or bundling), many retailers will reject the bundle on the basis that in doing so they would be giving up only a small amount of sales generated by Innocent smoothies.

Incentive to foreclose

62. The incentive to foreclose depends on whether tying/bundling becomes more profit enhancing as a result of the Transaction. This depends on whether the gains from foreclosure in the affected markets outweigh any costs of foreclosure in the markets for the tying/bundling products with market power. Retailers told the OFT that they would not consider de-listing Coca Cola, and some said that they would not delist Innocent either: consequently, the costs of foreclosure (at least in relation to large retailers) in these markets may not be great, especially in the scenario of TCCC initiating the tying or bundling.
63. One possible way for tying or bundling to be profit enhancing is if such behaviour effectively forecloses a rival brand which is constraining the price of the brand that is being tied/bundled with TCCC's or Fresh Trading's strong brand(s). By way of example, this could be foreclosure of rival chilled juices/nectars if This Water is the brand tied to sales of Coca Cola and Innocent. Once the rival constraining brand has been foreclosed, TCCC may be able to raise the price of the tied brand (in this example, This Water).
64. However, in this example, TCCC is highly unlikely to benefit sufficiently from such behaviour to make it worthwhile since, as a result of the Transaction, it would receive only a minority of the additional profits generated from any additional profits from This Water. In theory, it might gain more from any foreclosure if it had its own chilled nectar product (which it does not), but any such potential gains would already be present pre-Transaction and thus would be unchanged by the Transaction. Overall, therefore, TCCC's incentive to engage in foreclosure behaviour is not likely to be significantly affected by the Transaction.
65. Fresh Trading, meanwhile, does not (and will not) have any shareholding in TCCC. Therefore, it will not have the incentive to tie or bundle its Innocent smoothies to the benefit of any TCCC beverage. Consequently, the Transaction is not expected to align the incentives of TCCC and Fresh Trading to a degree necessary for foreclosure to become a realistic prospect.

²⁴ Some customers told the OFT that Innocent smoothie bottles are not suited to storage in the Coca-Cola branded chillers since they are too small.

66. Another possible way for tying or bundling to be profit enhancing is simply if the strategy would increase the market share of the tied product. For example, if customers wanted to stock a particular type of product but no one brand was the 'must stock' brand, then tying or bundling could be an effective way to induce customers to select the tied/bundled brand over rival brands. However, the OFT will only consider such a scenario to be anti-competitive if such a strategy forecloses rivals to point that a substantial lessening of competition results in the foreclosed market(s).
67. The OFT examined the overall incentives between CCE/CCHBC and TCCC to tie or bundle together ambient and chilled products. The parties submitted that the incentives between TCCC and its bottlers will not be aligned since:
- CCE/CCHBC will have no interest in forgoing profits on carbonated soft drinks in order to help grow sales of Fresh Trading's products, and
 - Fresh Trading would not be willing to forgo profits on Innocent smoothies to help grow TCCC's secondary brands.
68. The parties also submitted that the Transaction will not materially change TCCC's incentives in that, adopting the OFT's cautious approach to product market definition, Fresh Trading's products do not directly overlap with TCCC's products and therefore the proposed Transaction does not enhance TCCC's market power in any one segment.²⁵ Therefore, the parties argued, before the Transaction TCCC had the same incentives as it would post Transaction to leverage its strong brands to the benefit of its weaker brands (for example, Five Alive, Schweppes juices and Minute Maid) but has not done so.
69. The OFT is mindful that the Transaction is one of a minority shareholding in Fresh Trading which further weakens the incentives between TCCC and Fresh Trading to be closer aligned since TCCC will only receive a minority of the benefit that accrues to Fresh Trading from a tying or bundling strategy.

²⁵ Any market power that TCCC possesses is likely to be in carbonated soft drinks where there is no overlap. Widening the product market definition to capture an overlap (as discussed in footnote 5) would not result in a share of supply great enough for the OFT to assume some market power (and the increment on that basis is very small).

70. The OFT examined whether the lack of evidence of previous tying and bundling behaviour by TCCC in the UK is due to the commitments that TCCC gave to the Commission. By way of comment, the parties told the OFT that some TCCC brands have been in decline since before the commitments were given to the Commission – for example, some flavoured carbonated soft drinks, Schweppes juice drinks and carbonated mixers. In addition, []²⁶ and [].
71. Finally, the parties submitted that, in addition to convincing customers to drop the well known and well established rival brands (for example, those listed in the annex to this decision), they must also convince retailers (for example, the multiple supermarkets and Boots) to stop selling their own label brands which account for a sizeable proportion of sales across various product categories. Retailers who spoke to the OFT about this said that they do not think that this is a likely outcome of the Transaction.
72. However, the OFT considers that a substantial lessening of competition may still arise, without the foreclosure of own label products, if TCCC and/or Fresh Trading can foreclose their next nearest rival in a product category.

Conclusion on tying and bundling

73. The OFT has carefully considered the arguments made by all parties in this case. The OFT has concluded that the proposed Transaction (of a minority shareholding) does not materially change TCCC's or Fresh Trading's incentive to tie or bundle its weaker brands to its strong brands in order to foreclose other markets. Given the different incentives between TCCC's bottlers and TCCC (on the one hand) and between Fresh Trading and TCCC (on the other), the OFT does not believe that the proposed Transaction creates the incentive to undertake tying or bundling. Particularly, the OFT notes that TCCC would only receive a minority of Fresh Trading's benefit through tying and bundling and CCE/CCHBC and Fresh Trading are unlikely to forgo profits to benefit the other. Given this, the OFT considers that the question of whether the Transaction itself strengthens either parties' ability to foreclose (including the ability to leverage the presence of Coca-Cola branded chillers) can be left open.

²⁶ [].

Portfolio effects

74. The second conglomerate effects theory of harm that the OFT examined in this case was whether a substantial lessening of competition could arise through foreclosure of rivals via portfolio effects.²⁷ Draft guidance produced jointly by the OFT and the Competition Commission says that foreclosure through portfolio effects may arise if customers value variety (rather than only one or a few products). In such situations a conglomerate merger may give the merged firm a product range advantage that can lead to increased market power for its portfolio of products.²⁸
75. In theory, there are a range of customers for whom this theory of harm may apply: convenience store operators, on-trade customers, contractual catering/foodservice customers and large supermarket operators.
76. As with its assessment of tying/bundling above, the OFT has focused its examination on whether TCCC would have the ability and the incentive to foreclose competitors, and whether any likely foreclosure would represent a substantial lessening of competition in that market(s).

Ability to foreclose

77. The ability to foreclose depends on:
- there being substantial fixed costs associated with providing the variety that customers value, and
 - few, if any, other firms being capable of matching the merged firm's portfolio.
78. There may be substantial fixed costs in providing customers with a portfolio of products. The OFT investigation has identified these as: advertising and branding costs; the provision of chillers to some customers; and transactional costs of negotiating a range of beverages individually.
79. Some customers told the OFT that there were some transaction cost savings by negotiating with one supplier for a variety of products but these savings were not especially large and unlikely to have an impact on their buying behaviour. Indeed, most customers did not think that the cost savings to them in negotiating with one supplier rather than several would

²⁷ Which is closely related to tying and bundling, discussed above.

²⁸ Joint publication by the OFT and the Competition Commission, Merger Assessment Guidelines, Consultation Document April 2009, paragraph 4.156.

be significant. Smaller customers told the OFT that they deal with wholesalers (or cash and carry operators) and not with the beverage manufacturers, and therefore they are able to acquire a portfolio of products from one supplier currently. [].

80. It was put to the OFT that following the Transaction, TCCC will have an unrivalled portfolio of soft drinks and smoothies/juices/nectars.
81. While following the Transaction TCCC will have a portfolio of products, the annex to this decision shows that it is not unparalleled. Indeed, PepsiCo and its UK bottler and distributor Britvic both have extensive portfolios of beverages. For example, PepsiCo has strong brands in the categories of carbonated soft drinks (Pepsi), chilled 100 per cent fruit juices (Tropicana), other chilled juices and nectars (P&Js) and still drinks (Gatorade). Britvic, in addition to distributing PepsiCo's brands, has the brands Tango (carbonated soft drink), J20 (other juices), Robinsons (ambient juices) and Fruit Shoot (still drinks).
82. Further, if smoothies are considered to be in close competition with chilled 100 per cent fruit juices then the Innocent brand is not as strong (in terms of overall sales volumes) as PepsiCo's Tropicana brand. The strength of the Tropicana brand has been confirmed by retailers who spoke to the OFT. Indeed, retailers and other customers did not consider that the proposed Transaction would allow TCCC to gain a significant product range advantage over TCCC's main rivals (namely PepsiCo and its UK bottler and distributor Britvic).
83. The parties submitted a similar point, in that TCCC already has the opportunity (which it does not materially exercise) to leverage its strong brands in order to bundle, tie or full-line force its weaker brands. Therefore, the parties argued, that the Transaction does not materially add to TCCC's ability to foreclose rivals.
84. The OFT discussed with the parties' customers their purchasing strategy and willingness to accept product bundles and portfolios. All types of customers who spoke to the OFT (large and smaller retail customers, foodservice, catering and hospitality operators) told the OFT that their purchasing behaviour is driven by consumers' preferences and that they can purchase any individual products that they choose. This is either because they do not buy directly from beverage manufacturers but from wholesalers and cash and carry operators, or because they are large buyers with separate buying teams for different product categories. One cash and carry operator the OFT spoke to indicated that even though it does

purchase TCCC products from CCE as a bundle (or portfolio of products), it is for the reason of convenience not because it is forced to do so. This cash and carry operator also confirmed that its customers were not subject to any onward bundling. The customers who spoke to the OFT did not believe that their purchasing arrangements would change after the proposed Transaction.

85. Moreover, large retailer and foodservice/catering customers considered that some of the parties' rivals had brands which are 'must stock' items (in that consumers expected to find these products in their outlets) and that they would not delist these products because TCCC's product range has been expanded by the addition of Innocent smoothies and This Water.
86. For the parties' foreclosure strategy to be successful they would need to foreclose large successful brands (for example, Tropicana or Ribena, Ocean Spray, J2O). In the event that TCCC succeeded in persuading retailers and caterers not to stock products that their customers value, it is likely that these brands (owned by well established suppliers) would be able to re-enter the market at a later stage, for instance when catering contracts come up for renewal.
87. The OFT investigated the nature of the negotiations that take place between the parties and their various customers, including in particular large and smaller retail customers and foodservice, catering and hospitality customers.
88. It found that with respect to TCCC's products, large retail customers have [], but that individual supplies, prices and promotions are negotiated on a product line basis. All large retailers who spoke to the OFT have separate buyers for separate product lines and they did not expect that this would change after the Transaction.
89. The foodservice, catering and hospitality business operators the OFT spoke to also indicated that they sourced their products from a variety of sources and were unlikely to change this strategy after the proposed Transaction. Some of them told us that they were taking bundles of products from CCE, but that this was for convenience and not because they were being obliged to purchase additional products from CCE/CCHBC.

Incentive to foreclose

90. The incentive to foreclose will depend on whether leveraging strong TCCC brands to sell additional (weaker) products is profit enhancing (given that if

a substantial proportion of customers strongly prefer to buy some of the portfolio of products in isolation than sales of these might fall).

91. The incentives to foreclose for a portfolio effects theory of harm are, in this case, the same as for the tying and bundling theory of harm (paragraphs 62 to 72).

Conclusion on portfolio effects

92. The OFT has carefully considered the likelihood of the proposed Transaction resulting in a substantial lessening of competition through portfolio effects. As with the analysis for tying and bundling, the OFT considers that the proposed (minority shareholding) Transaction does not materially affect the parties' incentives to foreclose through portfolio effects. Therefore, the OFT has not found it necessary to conclude on the parties' ability to do so after the Transaction.
93. The OFT does note, however, that TCCC will not be uniquely placed to offer customers a wide range of products since, on the evidence available to the OFT, PepsiCo and Britvic (with the distribution of PepsiCo's carbonated soft drinks) can offer a portfolio of products to some degree. Furthermore, OFT questioning of the parties and third parties has revealed that, although a range of products is valued by customers, they may not value sufficiently highly the ability to acquire their range of products from any one beverage manufacturer (either directly or indirectly) to ensure that foreclosure would be successful; either currently or after the Transaction. Customers told the OFT that they would probably not delist strong rival brands (like Tropicana) simply because TCCC has expanded its product portfolio to include Fresh Trading's products.

Countervailing buyer power

94. The OFT recognises that any potential anti-competitive effect of foreclosure can be defeated by countervailing buyer power.
95. The parties told the OFT that large retailers possess countervailing buyer power and that, in addition to being customers, these retailers are also competitors through their own label products. However, all retailers who spoke to the OFT disagreed as they did not consider that they had countervailing buyer power. Two large retailers told the OFT that they were concerned about the proposed Transaction's affect on their buyer power/negotiating strength.

96. Given the outcome of the OFT's assessment on the likelihood of the Transaction leading to foreclosure through tying and bundling, or through portfolio effects, the OFT has not found it necessary to conclude on the presence of countervailing buyer power.

Barriers to entry and expansion

97. The parties submitted that barriers to entry are relatively low. They told the OFT that more than twenty new brands of chilled juice beverages were introduced in 2006 and around 10 in each of 2007 and 2008. Major suppliers who have entered include Unilever (Slim Fast smoothies and Adez) and Nestlé (Boost). Other recent entrants include MySmoothie and Pomegreat (which supplies ambient products). According to figures supplied by the market research firm Canadean, Pomegreat accounts for over seven per cent of ambient nectars and around six per cent of all nectars sold in the UK.
98. A summary of Fresh Trading's own experience of entry into the supply of smoothies is as follows. Fresh Trading was founded in 1999 with a capital of £[]. It outsources the production of its beverages. Since 2005, it started to invest more heavily in advertising than it had previously (between £[] 2005 and £[] in 2007). The OFT also found that Fresh Trading increased its sales volumes significantly from 2006 (from [] litres in 2005 to [] litres in 2006). This might suggest that Fresh Trading only started to become a significant market player once it started to invest heavily in advertising.
99. Indeed, in some instances brand strength is viewed as a strategic barrier to entry (in that advertising is a 'sunk cost' but nevertheless the new entrant needs to overcome the goodwill, customer loyalty, brand recognition and customer relationships that the incumbent brand has built up).
100. Not all recent entry has been successful. Nestlé has withdrawn its Boost product from the market and Gerber Juice Company has withdrawn some of its products.
101. Retail customers have told the OFT of the difficulties in building a successful brand. They have told the OFT of two unsuccessful attempts to enter the supply of smoothies. First by, Tropicana, which entered about 18 month ago but has so far failed to gain a significant market share, and the second by Nestlé which attempted to enter in 2008 but was forced to exit after a very short time. Given that both Tropicana and Nestlé products

were backed by large organisations, it would seem that even access to capital does not guarantee a successful entry.

102. TCCC discusses [] in an internal document, submitted to the OFT, which says [].

103. The overall available evidence on entry into the supply of smoothies is mixed. However, given the outcome of the OFT's assessment on the likelihood of the Transaction leading to foreclosure through tying and bundling, or through portfolio effects, the OFT has not found it necessary to conclude on whether barriers to entry and expansion to the supply of beverages in any of the relevant drink categories are high.

THIRD PARTY VIEWS

104. During the course of the investigation the OFT received comments and evidence from a wide range of third parties including major supermarket operators, foodservice companies, small independent retailers, retailers operating in the on-trade channel, wholesalers and competitors. Some of these retailers had a Coca Cola chiller from which they sell TCCC products while others did not.

105. Almost all of the third parties were not concerned about the proposed Transaction. Two were concerned about the possibility of foreclosure following the Transaction, which has been discussed in some depth above.

106. Two retailers were concerned about the possible loss of negotiating strength when dealing with Fresh Trading after the Transaction, although one told the OFT that this was unlikely at a minority shareholding level. On this point, the OFT does not consider that the proposed Transaction materially increases TCCC's or Fresh Trading's market power in any beverage category, and the expansion of TCCC's product portfolio following the Transaction has been discussed above.

ASSESSMENT

107. The Transaction which the OFT has investigated is an acquisition of a minority shareholding (of [15–20] per cent) by TCCC in Fresh Trading. The OFT considers that the Transaction will give TCCC material influence over Fresh Trading and that a relevant merger situation will arise as a result.

108. The parties supply non-alcoholic beverages. Both supply fruit-based beverages (Innocent smoothies and This Water for Fresh Trading and Minute Maid and Five Alive for TCCC) and, in addition, TCCC supplies carbonated soft drinks and still drinks. The OFT has not found it necessary to conclude on the market definition in this case. It has examine the merger on a variety of narrow product markets including smoothies, chilled 100 per cent fruit juices and chilled 100 per cent fruit juices and nectars. It has also, where appropriate, used the categories carbonated soft drinks and still drinks. All products have been examined on the UK-wide geographic scope.
109. The possibilities of unilateral effects or vertical issues do not arise as a result of the Transaction (given that there are no or little overlaps between the parties in each beverage segment) and no third parties were concerned about these. Following third party complaints, the focus of the OFT's investigation in this case has been whether there is a realistic prospect of a substantial lessening of competition arising through conglomerate effects – either as a result of tying and bundling or as a result of portfolio effects.
110. The OFT does not consider that the Transaction (which is one of a minority shareholding) will materially affect TCCC's incentive to tie or bundle either its own less popular brands or Fresh Trading's brands to its strong brands (in carbonated soft drinks, for example). The OFT especially considers that the incentives between the parties are not closely enough aligned for them to undertake a tying or bundling strategy since:
- the Transaction is one of a minority shareholding and therefore TCCC would only receive a minority fraction of the benefit which accrues to Fresh Trading through the strategy
 - Fresh Trading does not (and will not) have any shareholding in TCCC and therefore will not have the incentive to engage in foreclosure behaviour to the benefit of any TCCC brand, and
 - TCCC's products are distributed by CCE/CCHBC who would not wish to forgo profits to increase Fresh Trading's profits (and vice versa).
111. Given this finding on the parties' incentive to foreclose, the OFT has not found it necessary in this case to conclude on either parties' ability to do so (including the ability to leverage the presence of Coca-Cola branded chillers).

112. Similarly for portfolio effects, the OFT has found that the Transaction will not materially strengthen TCCC's portfolio advantage. As with the case for tying and bundling, the OFT does not consider that the incentives that the parties' will face after the Transaction will be sufficiently aligned for them to foreclose rivals. Therefore, the OFT has not found it necessary to conclude on either party's ability to engage in foreclosing behaviour after the Transaction.
113. The OFT does note, however, that other suppliers, namely PepsiCo and its distributor Britvic, also have a portfolio of strong brands and that a significant proportion of different beverages relevant to this case are not purchased together indicating that customers may not value the ability to purchase a wide portfolio of products from a single supplier sufficiently highly to enable foreclosure through portfolio effects to be successful. This is unlikely to change after the Transaction.
114. 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

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

ENDNOTE

1. On seeing the text of the OFT's decision the parties told the OFT that CCE and CCHBC are more accurately described as bottlers and distributors, not wholesalers. However, the key point for this decision is that it is CCE and CCHBC who contract with and sell to downstream retailers, wholesalers and distributors and not TCCC.

ANNEX EXAMPLES OF BRANDS BY BEVERAGE TYPE

<i>Brand owner</i>	<i>Carbonated soft drinks</i>	<i>Smoothies</i>	<i>Chilled 100% fruit juices</i>	<i>Other chilled juices & nectars</i>	<i>Ambient juices</i>	<i>Still drinks</i>
TCCC	Coca Cola Sprite Fanta Dr Pepper	-	-	-	Minute Maid Five Alive Schweppes	Oasis Vitamin Water Powerade
Fresh Trading	-	Innocent	-	This Water	-	-
PepsiCo	Pepsi Pepsi Max Diet Pepsi	Tropicana Naked	Tropicana	Copella P&Js		Gatorade V Water
Britvic*	Tango			J20	Really Wild	Fruit Shoot Robinsons
Del Monte					Del Monte	Fruit Burst
GlaxoSmithKline					Ribena	
Princes Soft Drinks					Princes	
Ocean Spray				Ocean Spray		
MySmoothie		MySmoothie				
Own label	✓	✓	✓	✓	✓	✓

* Britvic is licensed to produce, market and distribute some of PepsiCo's products (mostly carbonated soft drinks) in the UK.

Note: Brands in bold are the best sellers in their category.

Source: The parties, third parties and Canadean Limited.