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***Case No COMP/M.6924 - REFRESCO GROUP/ PRIDE
FOODS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) in conjunction with Art 6(2)
Date: 04/10/2013

***In electronic form on the EUR-Lex website under
document number 32013M6924***



In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]*. Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 04/10/2013
C(2013) 6633

PUBLIC VERSION

MERGER PROCEDURE

Dear Sir/Madam,

**Subject: Case No COMP/M.6924 - Refresco Group/ Pride Foods
Commission decision pursuant to Article 6(1)(b) in conjunction with
Article 6(2) of Council Regulation No 139/2004¹**

- (1) On 16 August 2013, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Refresco Group B.V. ("Refresco", the Netherlands) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of Pride Foods Ltd ("Pride Foods", UK), which trades under the name "Gerber Emig", by way of purchase of shares.² Pride Foods is hereinafter referred to as "the Target" or "Gerber Emig", Refresco and the Target are hereinafter referred to as "the Parties", and Refresco is hereinafter referred to as "the Notifying Party".

I. THE PARTIES

- (2) Refresco is a Dutch company with production facilities in the Netherlands, Belgium, Finland, France, Germany, Italy, Poland, Spain and the UK. It produces and bottles private label non-alcoholic beverages ("NABs") for retailers and contract manufactures NABs for brand owners. Refresco's range of NABs includes carbonated soft drinks ("CSDs"), fruit and vegetable juices, fruit drinks, sports drinks, sparkling and still mineral water, ready-to-drink ("RTD") teas, and energy drinks. Refresco also owns the children's drink brand "Wicky" as well as a number of private label equivalent brands.

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

² Publication in the Official Journal of the European Union No C 247, 28.08.2013, p.5.

- (3) Pride Foods is a UK company with production facilities in the UK, Germany, France and Poland. Pride Foods trades under the name Gerber Emig. It produces and bottles private label non-carbonated soft drinks ("NCSDs") for retailers and contract manufactures NCSDs for brand owners, mainly fruit juices and still drinks, flavoured water and RTD teas. Pride Foods also has limited activities in the production and sale of own brand juices and juice drinks.

II. THE OPERATION AND THE CONCENTRATION

- (4) On 15 April 2013, the Parties signed a merger agreement according to which Refresco will acquire the entire issued share capital of Pride Foods. In consideration for the Pride Food shares, Tamoia Ltd ("Tamoia"), the current 100% parent company of Pride Foods, will receive new shares in Refresco. Refresco will also issue new shares to its current majority shareholder Ferskur Holding 1 B.V. ("Ferskur").
- (5) Refresco is currently owned by the Icelandic consortium Ferskur, private equity house 3i and current and former management. Ferskur has a shareholding of [...]%, 3i has a shareholding of [...]%, and the management holds [...]*. [...]*, Ferskur has sole control over Refresco. [...]*. According to the Parties, Ferskur is controlled by Stodir Hf. ("Stodir") via its shareholding of [...]% in Ferskur. The other shareholders in Ferskur comprise Kaupthing Bank Hf. ([...]*%) and EAB 1 EHF ([...]*%). [...]*.³
- (6) Post transaction, Refresco's shareholding structure will change following the issuance of the new shares. The voting rights of the shareholders will be as follows: Ferskur [...]*%, 3i⁴ [...]*%, management [...]*% (comprising Okil Holding B.V. [...]*% and Godetia II B.V. [...]*%) and Tamoia [...]*%. According to the Parties, Ferskur will continue to have sole control over Refresco for the following reasons: [...]*.⁵[...]*. The Commission considers that given these facts, Ferskur will continue to solely control Refresco post-merger.
- (7) The notified operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

- (8) The Parties' combined worldwide turnover in 2012 was EUR 2.37 billion. Therefore the thresholds of Article 1 of the EU Merger Regulation are not met since the Parties' combined worldwide turnover does not exceed EUR 2,500 million.
- (9) However, on 22 May 2013, the Notifying Party informed the Commission in a reasoned submission that the concentration was capable of being reviewed under the national competition laws of five Member States (France, Germany, the Netherlands, Poland and the United Kingdom) and requested the Commission to examine the transaction. None of the Member States that were competent to examine the concentration indicated its disagreement with the request for referral within the period

³ Stodir owns a non-controlling 34% stake in Tryggingamidstodin, an Icelandic insurance company as well as a non-controlling 16% stake in Geysir Green energy EHF, an Icelandic energy company.

⁴ 3i comprises 3i GC Holding Ref 1 S.A.R.L. and 3i GH Holding Ref 2 S.A.R.L.

⁵ [...]*.

laid down by the Merger Regulation. The notified operation therefore has an EU dimension pursuant to Article 4(5) of the EC Merger Regulation.

IV. RELEVANT MARKETS

IV.1. Introduction

- (10) The proposed transaction primarily concerns the production and bottling of NCSDs, such as fruit juices, juice drinks & nectars, still drinks, ready-to-drink (RTD) teas and water. The Parties produce and bottle these NCSDs both for retailers (private label products) and for brand owners through contract manufacturing (branded products). As such, the Parties are active at the intermediary level, between on the one hand the drink ingredient suppliers and on the other hand retailers and brand owners (e.g. [...]*)). There is no Commission precedent assessing the bottling of NCSDs for third parties. Precedents exist only for the upstream markets of juice concentrates and packaging materials/equipment or the supply of branded NABs by brand owners to retailers.
- (11) NABs can be broadly divided into CSDs and NCSDs. NCSDs include (i) 100% fruit juices ("fruit juices"), including both from concentrate ("FC") and not from concentrate ("NFC") fruit juices, (ii) juice drinks and nectars, having a juice content of at least 25% ("juice drinks & nectars"), (iii) still drinks, which are non-carbonated RTD products with fruit or non-fruit flavour (in case of fruit flavour, with a fruit content of less than 25%), (iv) non-carbonated RTD teas, (v) packaged water and (vi) "others", including energy drinks, sports drinks, squashes and syrups, where the activities of the Parties do not overlap.
- (12) The market investigation focused on the differentiation between: (i) CSDs and NCSDs; (ii) production and bottling of private label NCSDs and contract manufacturing branded NCSDs; (iii) types of packaging, in particular carton and aseptic PET; and (iv) types of NCSDs, in particular whether a separate market exists for water and RTD tea. Other factors which may affect market definitions such as the differences between aseptic and non-aseptic or ambient and chilled production process or the sizes of packaging were also investigated.

IV.2. Product market definitions

IV.2.1. Carbonated soft drinks (CSDs) vs. non-carbonated soft drinks (NCSDs)

- (13) The Commission has previously considered a distinction between the supply to retailers of CSDs and NCSDs.⁶ The Commission indicated that NCSDs could be segmented into mineral waters, fruit juices, RTD teas and energy and sports drinks, although ultimately left it open,⁷ apart from the distinction between water and other NABs.⁸ CSDs are not relevant in the present case, as Gerber Emig is not active in this segment.

⁶ Case COMP/M.6522-*Groupe Lactalis/Skanemejerier*, COMP/M.2504-*Cadbury Schweppes/Pernod Ricard*, COMP/M.2276-*The Coca-Cola Company/Nestle/JV*.

⁷ Case COMP/M.5633-*Pepsico/The Pepsico Bottling Group*, COMP/M.1065-*Nestle/San Pellegrino*.

⁸ Case COMP/M.190-*Nestlé/Perrier*.

- (14) The market investigation confirms that CSDs and NCSDs belong to separate markets, both from a demand (differences in prices, taste, target groups and end-use)⁹ and a supply-side perspective (CSDs tend to be produced non-aseptically; they are not bottled in carton and tend to use different bottling lines from juices)¹⁰.
- (15) In view of the above and for the purpose of this Decision, CSDs and NCSDs are considered as belonging to separate markets.

IV.2.2. *Types of NCSDs*

- (16) The Commission, in previous decisions, indicated that NCSDs could be segmented into mineral waters, fruit juices, RTD teas and energy and sports drinks, although ultimately left it open,¹¹ apart from the distinction between water and other NABs.¹²
- (17) The market investigation focused on assessing the relevance of defining separate markets for some or all of the categories of NCSDs where the Parties' activities overlap (NFC/FC fruit juices, juice drinks and nectars, still drinks, RTD teas and water).
- (18) The Parties submit that a segmentation based on different types of NCSDs, including NFC and FC is not appropriate. The Parties also argue that RTD teas can be produced by the numerous bottlers of water on their non-aseptic PET lines if preservatives are added. Consumers would not see a sufficiently significant distinction between RTD tea with preservatives in non-aseptic PET and RTD tea without preservatives in aseptic PET for there to be a significant difference in price at consumer and at wholesale level. Therefore, a market for RTD tea would need to comprise water producers with non-aseptic PET lines.
- (19) As regards different types of NCSDs, the market investigation strongly suggests that water and RTD teas belong to separate markets.¹³ From a supply-side perspective, water is generally bottled on different lines than other NCSDs (with a smaller cap size similar to CSDs) and, as some competitors explained, "*a producer of RTD tea in aseptic PET can bottle fruit juices but only with an important investment in juice treatment machinery/blend units*". Fruit related products require different raw materials, know-how and special tanks.¹⁴
- (20) Regarding the precise market definition for RTD tea, an overwhelming majority of retailers consider RTD tea as different products from other NCSDs (different prices,

⁹ Replies to questions 13 and 14 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁰ Replies to question 8.1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

¹¹ Case COMP/M.5633-*Pepsico/The Pepsico Bottling Group*, COMP/M.1065-*Nestle/San Pellegrino*.

¹² Case COMP/M.190-*Nestlé/Perrier*.

¹³ Replies to questions 26, 27, 29 and 30 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁴ Replies to question 14 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

consumption habits, targeted consumer groups)¹⁵. With regards to supply-side substitutability [...]*, it should be noted that RTD tea requires aseptic filling while water requires non-aseptic filling. The Parties argue that RTD teas can be produced by the numerous bottlers of water on their non-aseptic PET lines if preservatives are added. However, based on the capacity data of the Parties and the competitors, all of the volumes of RTD tea in Germany, for example, are bottled on an aseptic line. It can therefore be concluded that RTD teas and water belong to separate markets.

- (21) Regarding still drinks, the evidence is mixed. Retailers consider them as different products from other NCSDs¹⁶ but it is unclear whether there is supply-side substitutability with juices and nectars since this may depend on the juice content of the still drink (which appears to be a broad category). Suppliers indicated that quality and know-how may affect the ability to produce a good quality product, especially for juice and juice drinks & nectars, thus making entry more difficult into these segments as opposed to still drinks.¹⁷
- (22) With respect to NFC and FC juices, most retailers indicated that these are considered potential alternatives by end-consumers since many of them do not distinguish between the two categories. Furthermore, NFC and FC juices are often tendered together and there are no significant differences in the production and bottling equipment.¹⁸ That being said, the majority of retailers indicated that they would be unlikely to switch from NFC to FC following a price increase of 5-10% since retailers want to offer the whole assortment to their customers.¹⁹
- (23) In view of the above and for the purpose of this Decision, water and RTD tea are considered as belonging to separate markets.

IV.2.3. Types of packaging and production processes

IV.2.3.1. Types of packaging

- (24) According to the Notifying Party, NABs can be packaged in different types of packaging: plastic bottles (including PET, PP and HDPE) and glass bottles, cartons and cans. Although bottling lines are intended for one specific type of packaging, the Notifying Party submits that due to the fact that most bottlers offer the full range of packaging, have different bottling lines and can easily add a new production line to their facilities, the relevant markets should not be further divided by types of packaging.

¹⁵ Replies to questions 26 and 27 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁶ Replies to question 23 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁷ Replies to question 14 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

¹⁸ Replies to questions 13 and 15 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

¹⁹ Replies to questions 16 and 17 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

- (25) Commission precedents²⁰ point to separate upstream markets for the procurement of carton and PET packaging, as well as for carton and PET filling machines, which constitute the main elements of the respective bottling lines.²¹ The Parties' activities only overlap as regards NCSDs bottled in carton and PET packaging.
- (26) The market investigation confirms that carton and aseptic PET belong to separate markets. From a supply-side perspective, the production lines for carton and aseptic PET are different and switching from one type of packaging line to another would involve cost, time and know-how. As regards demand-side substitutability, while there may be some limited demand-side substitution between carton and aseptic PET, it is likely to be from carton to PET rather than vice versa.²² Moreover, retailers tend to consider that different consumers prefer different formats and therefore each packaging format has its own particular demand and the retailers therefore require a varied assortment of packaging formats.
- (27) In view of the above and for the purpose of this Decision, carton and aseptic PET are considered as belonging to separate markets.

IV.2.3.2. Sizes of packaging

- (28) In respect of aseptic PET, there is clear supply-side substitutability in terms of sizes of bottles since aseptic PET lines can generally produce many different sizes without the need to incur high switching costs or time delays (this is done by changing the bottle mould used). Although from a demand-side perspective there is separate demand for different sizes, given the easy supply-side substitutability, it is not necessary to distinguish between different aseptic PET bottle sizes.
- (29) As regards carton packaging, there may be some supply-side substitutability between a number of sizes in that certain carton lines can produce different sizes. Again, from a demand-side perspective there seems to be separate demand for example between 1 litre cartons and e.g. 0.25 litre cartons. However, given that different carton lines may have different size capabilities, and that most carton manufacturers appear to be present across all sizes, it is not necessary to differentiate between sizes for the purposes of the competitive assessment.

IV.2.3.3. Aseptic vs. non-aseptic production processes

- (30) Aseptic bottling processes produce beverages by using a sterile filling process at ambient temperature (i.e. cold-aseptic, sterile or beverage-sterile processes, including hot-filled processes), resulting in a microbiologically sterile product (e.g. pasteurized organic products) with a shelf life of approximately 6-12 months (e.g. ambient juices, nectars and juice drinks, still drinks, RTD teas and sports drinks).

²⁰ Case COMP/M.2416-*Tetra Laval/Sidel*.

²¹ The Commission concluded that PET and carton belonged to distinct but closely neighbouring relevant product markets because they were technical substitutes and "weak economic substitutes", but that one could not rule out that in the future the markets could converge so as to belong to the same product market.

²² Replies to questions 31 and 32 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013 and replies to questions 31 and 32 addressed to retailers of 19 August 2013.

- (31) Non-aseptic bottling processes produce beverages by using a non-aseptic filling process, which may include products with preservatives in order to ensure a longer shelf life (approximately 30-90 days), as well as carbonated products or products that do not contain perishable contents, such as bottled water. Some non-aseptic processes sometimes involve a degree of pasteurisation.
- (32) The Notifying Party submits that aseptic and non-aseptic productions belong to the same market since both types of processes use the same production and bottling lines.
- (33) Contrary to the Notifying Party' view, the Commission in *Tetra Laval/Sidel*²³ indicated that there is no supply-side substitutability, since aseptic and non-aseptic machines use very different technology with aseptic machines being much more expensive and complicated to operate. Commission precedents also indicate that shelf life and product taste may be affected by the production process chosen,²⁴ therefore limiting demand-side substitutability.
- (34) According to the market investigation, there is no supply-side substitutability between aseptic and non-aseptic PET. Although non-aseptic NCSDs can be manufactured on an aseptic line (but not vice-versa), this is irrelevant given that the vast majority of demand is focused on aseptic PET for NCSDs other than water and some RTD teas.²⁵ Moreover, retailers and brand owners both confirmed that they would not switch their purchases from aseptic to non-aseptic NCSDs because of the shelf-life implications and use of preservatives.
- (35) In view of the above and for the purpose of this Decision, aseptic and non-aseptic production processes are considered as belonging to separate markets.

IV.2.3.4. Ambient vs. chilled production processes

- (36) Ambient products are produced and bottled according to production processes ensuring their stability in ambient conditions (shelf life of more than 15 days). Ambient perishable products without preservatives therefore undergo a pasteurisation process to achieve microbiological sterility, and are filled/packed into aseptic finished packaging in sterile conditions eliminating any risk of contamination. Ambient products may also include products that may be marketed as chilled by retailers but which did not go through a chilled production line.
- (37) Chilled products, on the other hand, are often, but not necessarily pasteurised. When they are pasteurised, the pasteurisation duration and temperature is less intense such that the products are not microbiologically sterile but, if kept in chilled conditions, remain in a usable condition for their shelf life. The product is transferred from the pasteuriser and packed into finished packaging in conditions that do not need to be fully sterile, but which require refrigeration.
- (38) The Notifying Part submits that chilled and ambient products are substitutable, at least from a demand-side perspective.

²³ Case COMP/M.2416-*Tetra Laval/Sidel*.

²⁴ Case COMP/M.2416-*Tetra Laval/Sidel*.

²⁵ Replies to questions 47, 48, 49, 55 and 56 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

- (39) The market investigation was inconclusive as to whether ambient and chilled NCSDs could be considered as alternatives from a demand-side perspective.²⁶ However, supply-side substitutability appears to be minimal. First, although it is possible to bottle ambient products on a chilled production line, this would entail investing in aseptic filling. Second, chilled products tend to be more expensive and there is therefore a clear lack of incentives for those having chilled production lines to start producing ambient products on them. Finally, the management of a chilled supply chain requires specific know-how and entails significant costs.²⁷
- (40) In view of the above and for the purpose of this Decision, ambient and chilled NCSDs are to be considered as belonging to separate markets.

IV.2.4. Production and bottling of private label NCSDs vs. contract manufacturing of branded NCSDs

- (41) The Notifying Party submits that the relevant market consists of the supply of all NABs (branded and private label) to retailers (including supply by captive bottlers owned by the retailers and brand owners themselves).²⁸ According to the Notifying Party, this is in particular due to the fact that private label and branded products exert competitive pressure on each other both in terms of price²⁹ and shelf space.
- (42) The Notifying Party submits that an alternative possible market definition would encompass the bottling of NABs by independent bottlers (i.e. excluding captive bottling by brand owners and retailers), comprising both (i) the bottling of private label NABs for retailers and (ii) the bottling of NABs for brand owners (contract manufacturing or co-packing). The Notifying Party submits that these two activities should be considered as part of the same market, due to the fact that the production and packing processes are the same.
- (43) The market investigation indicates that although from a supply-side perspective the same machines can produce and bottle both private label and branded NCSDs³⁰, there is separate demand for the production and bottling of private label NCSDs from that of contract manufacturing branded NCSDs. Retailers require both on their shelves, but the two markets operate according to different dynamics with differences in sharing of

²⁶ Replies to question 51 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

²⁷ Replies to questions 63.1-66.1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

²⁸ Only the retail market is relevant in the present case, since the NABs bottled by the Parties for the out-of-home channel are different (Refresco only bottles CSDs for the out-of-home channel).

²⁹ From a supply-side perspective, the Notifying Party submits that manufacturing lines can be easily switched (and at low cost) between the production of private label and contract-manufactured branded NABs.

³⁰ Replies to questions 69.1 and 70.1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

risks and responsibilities, length of contract, prices per litre, sales and tender process, etc.³¹

- (44) Moreover, captive production must be excluded since those assets are not available for use for third party customers.
- (45) In view of the above and for the purpose of this Decision, the production and bottling of private label NCSDs for retailers and the contract manufacturing of branded NCSDs for brand-owners are considered as belonging to separate markets.

IV.2.5. Conclusion on the product market definition

- (46) On balance, therefore, the market investigation results strongly suggest the following relevant product markets: (i) independent production and bottling of private label ambient NCSDs in carton excluding water and RTD teas (ii) independent production and bottling of private label ambient NCSDs in aseptic PET excluding water and RTD teas; (iii) contract manufacturing branded ambient NCSDs in carton excluding water and RTD teas; (iv) contract manufacturing branded ambient NCSDs in aseptic PET excluding water and RTD teas. Similarly, separate markets for each of RTD teas and water should be identified.

IV.3. Geographic market definitions

- (47) According to the Notifying Party, the geographic scope for the production and bottling of beverages is EEA-wide, or at least cross-border regional, for the following reasons: (i) large European retailers tend to source internationally through price focused tenders; (ii) bottlers use their overcapacity in one country to compete in other countries; and (iii) the bottling of NABs is not significantly influenced by national consumer preferences or legislative requirements. The Notifying Party also notes that the importance of transport costs differs according to the type of NABs and that for some beverages the distances over which they are transported could be limited to 600 km.
- (48) The Commission, in previous decisions,³² has considered that the geographic scope of the supply of beverages to retailers is probably national in scope, but ultimately left it open. In *Cadbury Schweppes/Pernod Ricard*,³³ the Commission indicated that the relevant geographic market for NABs supplied to retailers is national i.e. on the basis of licensing and distribution agreements covering national territories as a rule, different consumer preferences, price differentials and high transport costs. The Notifying Party submits that these precedents do not relate to the bottling of NABs, but rather [...] to the downstream markets (wholesale or retail of NABs).
- (49) According to the market investigation, NCSDs production and bottling markets are not EEA-wide but rather national, although imports may constitute a competitive

³¹ Replies to questions 71.3, 71.4, 71.5, 71.6 and 71.7 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013 and replies to question 54 addressed to retailers of 19 August 2013.

³² Case COMP/M.5633-*Pepsico/The Pepsico Bottling Group*, Case COMP/M.5632- *PepsiCo/Pepsi Americas*.

³³ Case COMP/M.2504-*Cadbury Schweppes/Pernod Ricard*.

constraint (the level of this constraint varies country-by-country). When defining the limits of geographic markets, both demand and supply-side considerations were taken into account. The key findings are summarised below.

- (i) Transport costs are an important barrier to intra-EEA exports.³⁴ Competition takes place on the basis of euro cents per litre, therefore suppliers with a local footprint have price advantages. Furthermore, most competitors confirmed that they supply within the country of production or within 500km from the plant;³⁵
- (ii) Tenders usually cover national territories;³⁶ although a bottler from Germany or Spain might participate in a tender covering France, the fact remains that this cross-border participation in tenders is limited to a few players, is not systematic and most of the time the local bottlers win since they are not encumbered with high transport cost. In fact, it is worth noting that there is also an advantage in having multiple production plants within one Member State since this will enable the bottler to save on transport costs even within that one Member State;
- (iii) Only a handful of independent bottlers have substantial cross-border activities, the most important ones being the Parties and even the Parties still achieve the vast majority of their sales in the country of manufacture³⁷;
- (iv) While some retailers/buying groups may be active across Europe, most retailers only operate within one or two countries;
- (v) Prices, market shares, margins and levels of spare bottling capacity appear to vary significantly across Member States;³⁸
- (vi) Consumer preferences differ significantly per country;³⁹ for example, while aseptic PET is becoming the main format for juices in Germany and France, carton dominates in the Netherlands⁴⁰; and

³⁴ Replies to question 84 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013. This finding is also supported by the information on transport costs submitted by the Notifying Party in Annex 82 to the Form CO. In particular, transport depends on the distance covered, e.g. for production in Germany, transport cost for 1 litre aseptic PET products amount to [...] for a shipping distance of 300km, whereas transport costs for 1 litre aseptic PET products amount to [...] (assuming full truck load) for a distance of 1000 km. This amounts to [...] of gross margins of [...] for aseptic PET products in Germany (see Annex 156 to the Form CO), where [...] - Replies to question 1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 23 September 2013.

³⁵ In case of Germany, the transport costs of [...] of aseptic PET products on a distance of 500 km makes up [...] of the gross margin of [...] for aseptic PET products.

³⁶ Replies to questions 78 and 79 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

³⁷ [...] of Refresco's sales and [...] of Gerber Emig's sales take place in the country of manufacture.

³⁸ Replies to questions 81, 82 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

- (vii) Even contract manufacturing arrangements for multinational brand owners are normally negotiated to cover the brand owner's needs on a national basis.⁴¹
- (50) In view of the foregoing and for the purpose of this Decision, the Commission concludes that the geographic scope for the bottling of NCSDs is national, with imports exerting a competitive constraint. This constraint is taken into account in the competitive assessment.

V. COMPETITIVE ASSESMENT

V.1. Introduction

- (51) The proposed transaction leads to affected markets in a certain number of Member States in the following markets: (i) private label ambient NCSDs bottled in aseptic PET excluding water and RTD teas; (ii) private label ambient RTD teas bottled in aseptic PET in Germany; (iii) private label ambient NCSDs bottled in carton excluding water and RTD teas; (iv) contract manufacturing of ambient NCSDs for brand owners bottled in aseptic PET excluding water and RTD teas; and (v) contract manufacturing of ambient NCSDs for brand owners bottled in carton excluding water and RTD teas.
- (52) The proposed transaction raises serious doubts as to the compatibility with the internal market in respect of the following markets: (i) private label ambient NCSDs bottled in aseptic PET excluding water and RTD teas in France, Germany and Belgium; and (ii) private label ambient RTD teas bottled in aseptic PET in Germany.

V.2. General arguments of the Notifying Party

V.2.1. Market shares

- (53) The Notifying Party submits that the proposed transaction does not raise competition concerns since market shares should not be equated with market power. This is due to the fact that the Parties operate in a highly competitive tender market where losing or winning a small number of contracts can have a significant impact on the market shares.

V.2.2. Competitors are not capacity constrained

- (54) According to the Notifying Party, the market for the production and bottling of NCSDs is characterised by significant overcapacity with competitors willing to bid opportunistically for volume business across Europe, looking at whether incremental

³⁹ Replies to question 80 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

⁴⁰ Replies to question 80 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013. Replies to question 134 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁴¹ Replies to questions 84 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

revenues cover marginal costs rather than being concerned as to whether or not fully allocated costs are covered. The Notifying Party further argues that it is very easy for competitors to switch capacity between the production of different NABs and therefore competitors are able to react quickly to changes in demand.

V.2.3. *The Parties are not close competitors*

- (55) The Notifying Party submits that, based on a detailed analysis of tenders in a selection of Member States (Germany, France, the UK and the Benelux, together representing approximately [...] of the sales of Gerber Emig), Refresco and Gerber Emig are not particularly close competitors and that in all bids in which they face each other they also face a significant number of other bottlers. According to the Notifying Party, the tender data would show in all the above mentioned Member States that the number of instances where Refresco or Gerber Emig bid unsuccessfully in tenders won by third parties is greater than the number of instances where they bid unsuccessfully in tenders won by the other Party. Thus the tender analysis would indicate that other third party bottlers are more important competitors to the Parties than the Parties are to each other, and that sufficient competition would remain post-merger.

V.2.4. *Customers and suppliers have significant market power*

- (56) The Notifying Party notes that large retailers [...] account for [...] of the sales of Refresco and Gerber Emig and in many instances these customers either operate on a pan-European basis or, at the very least, have operations in a number of Member States. As such, these retailers respond to any attempt to increase prices by either switching to another supplier and/or encouraging an existing supplier to expand into a different geography or into the production of a different type of product.
- (57) Suppliers of raw materials (e.g. [...]) or packaging or packaging machinery (e.g. [...]) also exert a competitive constraint on independent bottlers. The competitive dynamics of the upstream and downstream market put permanent pressure on bottling companies to pursue economies of scale which, according to the Notifying Party, is one of the primary drivers for the proposed transaction.

V.3. **Preliminary findings of the Commission**

- (58) The Commission's Horizontal Guidelines⁴² state that "*market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.*" With regard to the Parties' arguments regarding market shares, the Commission points out that the Parties' market share levels were relatively stable during the last three years. Regarding market power of customers and suppliers, the Commission points out that for example [reference to the gross margin levels of the Parties]⁴³. In addition, as regards the argument that customers have buyer power, even customers which are present across a number of Member States depend on the suppliers available in each Member State given the national geographic scope of these markets. The remaining

⁴² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 8, (OJ C31, 5.2.2004, p.5).

⁴³ Annexes 55 and 56 to the Form CO.

arguments concerning capacity and closeness of competition are addressed in the sections dealing with each national market.

V.4. France

V.4.1. Introduction

(59) In France, the proposed transaction leads to affected markets in the supply of private label ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET.⁴⁴ While in this Member State Gerber Emig only has carton packaging lines, Refresco's bottling lines are all in aseptic PET. However, Gerber Emig supplies private label ambient NCSDs in aseptic PET in France [...]*.

V.4.2. Market structure

(60) In this Member State the Parties achieved combined sales of EUR [...]* million⁴⁵ in 2012.

(61) The retail market for private label ambient NCSDs (excluding RTD tea and water) bottled in aseptic PET is estimated to amount to [...]* million litres.⁴⁶ According to IRI data, the merged entity would have a strong presence in the market with a market share of [50-60]*% (Refresco: [40-50]*%; Gerber Emig: [10-20]*%).⁴⁷ The Commission's market reconstruction suggests that the combined market share would be higher, in the range of [70-80]*%. The main discrepancies between IRI data and the market reconstruction data may be explained by the fact that the latter does not take into account the volumes relating to Antartic and Niederrhein-Gold. Antartic is owned by the French retailer Intermarché and is reserved almost exclusively for that retailer, while it is of public knowledge that Niederrhein-Gold's volumes are mainly dedicated to Lidl.⁴⁸ For these reasons, these suppliers cannot be viewed as posing a competitive constraint to the merged entity in the supply of private label ambient NCSDs to retailers.

(62) According to the market reconstruction, post transaction the second supplier would be the French bottler LSDH, followed by another French company, Roxane. Orangina/Schweppes and the German bottler Stute have a much smaller presence, while other bottlers, most of them with plants located outside France, have only minimal volumes.

⁴⁴ There are no overlaps between the Parties regarding the supply of private label RTD tea or water. In contract manufacturing for brand owners there is also no overlap, since Refresco is only active in aseptic PET and Gerber Emig in carton.

⁴⁵ These sales incorporate also Refresco's sales of CSD products, an area where Gerber Emig is not active.

⁴⁶ IRI data.

⁴⁷ The Parties' market shares for 2012 are not significantly different from those regarding 2010 (Refresco: [40-50]*%; Gerber Emig: [10-20]*%) and 2011 (Refresco: [40-50]*%; Gerber Emig: [10-20]*%).

⁴⁸ Minutes of conference call with competitor of 1 July 2013.

- (63) Regarding the carton segment, the retail market is estimated to amount to [...] million litres.⁴⁹ The market investigation indicates that in France the demand for aseptic PET is increasing at the expense of carton due to consumer tastes and a switch from carton to aseptic PET by brand owners which is then followed by retailers for the private label segment.⁵⁰ IRI data for 2012 indicates that the Parties had a relatively small combined market share of [20-30]*% (Refresco: [0-5]*%; Gerber Emig: [10-20]*%),⁵¹ which is in line with the market reconstruction data. According to the latter, the Parties' main competitors are French-based bottlers LSDH and Britvic. In addition, bottlers from outside of France such as Stute and Casalasco have a smaller presence, while others have only minimal sales.⁵²
- (64) The table below shows the estimates of the Parties' market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in France, for both the carton and aseptic PET segments.

Table 1 – Parties' combined market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in France in 2012

	Carton	Aseptic PET
Refresco	[0-5]*%	[40-50]*%
Gerber Emig	[10-20]*%	[10-20]*%
Combined	[20-30]*%	[50-60]*%

Source: IRI data

V.4.3. Concerns raised during the market investigation

- (65) During the market investigation none of the competitors or customers raised substantiated concerns specifically regarding the carton segment, which is consistent with the Parties' modest combined market share and the existence of suppliers with higher and similar market volumes.
- (66) On the other hand, the vast majority of the respondents to the market investigation raised strong concerns relating to the aseptic PET segment.
- (67) Almost all customers raised concerns and most of them identified the Parties as close competitors.⁵³ In particular, the majority of customers stated that the proposed

⁴⁹ IRI data.

⁵⁰ Annex 93(f) of the Form CO, [...]*. Replies to question 110 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013. Replies to question 103 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

⁵¹ The Parties' market shares for 2012 are not significantly different from those regarding 2010 (Refresco: [5-10]*%; Gerber Emig: [20-30]*%) and 2011 (Refresco: [0-5]*%; Gerber Emig: [10-20]*%).

⁵² In addition, Antartic and Niederrhein-Gold are also active in this segment. However, as explained, Antartic is part of the Intermarché group and Niederrhein-Gold is mainly supplying Lidl. For these reasons, these suppliers cannot be viewed as posing a competitive constraint to the merged entity in the supply of private label ambient NCSDs to retailers.

⁵³ Replies to questions 114, 166 and 167 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

transaction would result in a reduction of competition and price increase. As explained by one customer, the transaction "*reinforces Refresco's leading position in the market.*"⁵⁴ Customers also pointed out that the proposed transaction merges two large competitors for juices, where there are already few competitors. Another customer also mentioned that Gerber Emig recently withdrew from a tender after the proposed transaction was announced invoking a situation of industrial reorganization. In this context, the fact that competitors confirmed that the aseptic PET segment is very concentrated⁵⁵ supports the concerns raised by the customers.

V.4.4. *The Notifying Party's arguments*

- (68) The Notifying Party claims that the merged entity would face competition from four significant suppliers located in France, notably Eckes-Granini, Roxane, Européenne d'embouteillage and LSDH. It estimates that Européenne d'embouteillage (which is part of the Orangina/Schweppes group) may have approximately [...] spare capacity while LSDH's recent aseptic PET lines would represent additional capacity of [...] litres. [Reference to Notifying Party's understanding of LSDH's business strategy]*.
- (69) Furthermore, the Notifying Party argues that Antartic is exerting competitive pressure on other bottlers in France since it would be supplying Leclerc and Netto (two retailers that are part of the same buying group as Intermarché) and would have participated in tenders for retailers outside the buying group, such as Metro and Casino. Moreover, the Notifying Party understands that Antartic would be in the process of recruiting individuals to enable participation in other tenders. This would indicate that Antartic has enough spare capacity to supply retailers other than Intermarché.
- (70) In addition to suppliers located in France, the merged entity would be constrained by imports from German producers such as Stute and Wesergold, as well as Conserve Italia (Italy) and Garcia Carrión (Spain), who would already be supplying aseptic PET in France. In particular, the Notifying Party argues that Gerber Emig does not have a superior ability to supply aseptic PET into France compared to Stute and Wesergold since the difference in distance to France between Gerber Emig's plants and Stute's and Wesergold's plants is not sufficiently significant to give Pride Foods any competitive advantage in relation to the supply of aseptic PET into France.⁵⁶ In addition to these suppliers, the new aseptic PET plant being built by Spanish bottler AMC in the Netherlands would become operational in 2014 and would be able to supply the French market.

⁵⁴ Replies to question 167 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013

⁵⁵ Replies to questions 134 and 138 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

⁵⁶ Gerber Emig supplies aseptic PET into France from Waibstadt ([...] litres) and Calvörde ([...] litres) in Germany. Waibstadt and Calvörde are respectively located approximately 572 km and 892 km from Paris, while Stute's and Wesergold's plants are respectively located approximately 657 km and 617 km from Paris. In addition, Wesergold's plants in Spain would make it better positioned to compete for the French market than Gerber Emig.

- (71) According to the Notifying Party, the analysis of the Parties' tender data would show that the Parties are not close competitors since [...]*.⁵⁷ [...]*
- (72) Finally, the Notifying Party argues that Gerber Emig's major aseptic customer in France, [...]* (which represented [...]* of Gerber Emig's sales volume in 2012), is capable of comparing prices and sourcing products across Europe.

V.4.5. Lack of sufficient alternative competitors with available spare capacity

- (73) The Notifying Party indicated that the merged entity would be constrained by a number of competitors located both in and outside France. However, the market investigation strongly indicates that the proposed transaction would in fact reduce from three to two the number of available suppliers of aseptic PET for the French market.
- (74) According to the market reconstruction data, in terms of volumes supplied to retailers, the only credible competitors in aseptic PET post-transaction would be LSDH and Roxane. However, the market investigation indicates that the competitive constraint brought by Roxane would be limited since this bottler is focused mainly on water. According to the market investigation, this is well-known to both competitors and customers.⁵⁸
- (75) The Notifying Party also mentioned Eckes-Granini and Orangina/Schweppes as alternative competitors. However, Eckes-Granini only bottles its own brands and therefore it is not a competitor in the private label segment. Similarly, Orangina/Schweppes' activities in the private label segment are very small and in any event cannot be viewed as a strong competitor in private label since it predominantly bottles its own brands. This is also acknowledged by Refresco in one internal document, [...]*.⁵⁹ In addition, customers also do not perceive Orangina/Schweppes as a potential supplier for fruit juice and juice drinks & nectars.⁶⁰
- (76) As regards competitors with plants located outside France, the market investigation indicates that such competitors would not constitute a sufficient competitive constraint to the merged entity. This is recognized by Refresco in an internal document [...]*.⁶¹ [...]*. Furthermore, Gerber Emig is the only supplier with an aseptic PET plant outside France which has a sizeable market share in the French market, since the presence of the other suppliers indicated by the Notifying Party is minimal. In addition, the replies to the market investigation questionnaire by both suppliers and

⁵⁷ The Parties' tender data does not distinguish between aseptic and non-aseptic PET. However, as the tender data does not include Refresco's CSD sales, the Notifying Party argues that the vast majority of the tenders will have been for aseptic PET.

⁵⁸ Replies to questions 111 to 113 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁵⁹ Annex 93(f) of the Form CO, [...]*

⁶⁰ Replies to questions 111 to 113 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁶¹ Annex 93(f) of the Form CO, [...]*

customers confirm that mainly suppliers based in France could be viewed as alternative competitors to the Parties.⁶²

- (77) Regarding the fact that [...] represents more than [...] of Gerber Emig's aseptic PET volumes in France, and the Notifying Parties' argument that [...] would have the capability of comparing prices and sourcing across Europe, the fact remains that such ability would still be limited by transport costs. None of the competitors located outside France has been able to win a share of the French market as large as Gerber Emig's, which indicates that they would be unlikely to be able to replace the competitive constraint brought by Gerber Emig in France.
- (78) In terms of capacity, the results of the market investigation indicate that the existent spare capacity in aseptic PET in France is not sufficient to constrain the Parties post transaction. The proposed transaction brings together an increment volume of [...] which is far above the existing levels of spare capacity. Notably, this is true for example regarding the spare capacity made available by LSDH's recent aseptic PET lines, as well as for the future plant of AMC in the Netherlands. Antartic has also recently invested in new aseptic PET capacity but such capacity is mainly reserved for Intermarché.
- (79) It should be further noted that [reference to the margin levels in France]. Against this background, it is unlikely that post-transaction any remaining competitor would have an incentive to compete on prices and utilise any of the limited existing spare capacity.

V.4.6. *Barriers to entry and expansion*

- (80) It is also significant that there are a number of barriers to entry and expansion in the market for the supply of private label ambient NCSDs in aseptic PET. Investing in new aseptic PET capacity is very costly since a new line involves an investment of around EUR 10-15 million, while installation takes around 6-12 months.⁶³
- (81) Given the significant costs, this type of investment therefore requires careful consideration and a solid business case over 4-6 years given that capacity utilisation is crucial in order to recoup the capital expenditure. This is reflected for example in the [...] Refresco internal document [...].
- (82) The fact that a strong business case constitutes a barrier to entry and expansion is all the more evident taking into account the fact that, for the private label segment, tenders usually cover only one year and retailers are unwilling to guarantee volumes for longer periods.⁶⁴

⁶² Replies to questions 111 and 115 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013. Replies to question 100 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013

⁶³ Replies to question 131 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

⁶⁴ Replies to question 104 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013. Minutes of the conference call with customer of 6 September 2013.

(83) Furthermore, transportation costs, established commercial relationships, regulatory rules and experienced personnel have also been identified as barriers to entry.⁶⁵

V.4.7. *Closeness of competition*

(84) The arguments of the Notifying Party concerning closeness of competition are mainly based on the Parties' tender data. As a preliminary point, the Commission considers that there are a number of factors which weaken the value of the tender data for France. Notably, [...]»;⁶⁶ [...]». In addition, the Commission notes that, in general, information concerning other tender participants and tender winners does not have the same level of reliability of the information strictly concerning the identification of the tenders in which the Parties participated or which were won by one of the Parties.

(85) Furthermore, while the number of tenders in which the Parties are identified as bidders suggests that the Parties might not be the closest competitors since [...]»;⁶⁷ [...]» indicate that the Parties are much closer competitors than indicated by the number of tenders lost to various competitors.⁶⁸ This is also consistent with the replies to the market investigation, given that a majority of the French customers have considered that the Parties are close competitors, even though they are aware that Gerber Emig imports from Germany.⁶⁹

V.4.8. *Conclusion regarding France*

(86) As regards the supply of private label ambient NCSDs (excluding RTD tea and water) in carton to retailers in France, the Commission considers that given that the Parties' combined market share remains modest at around [20-30]»% and there remain a number of active competitors, the proposed transaction does not raise serious doubts regarding this market.

(87) As regards the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET to retailers in France, the Commission considers that the Parties' high combined market share, the fact that the Parties are close competitors, the limited competitive constraint imposed by alternative competitors, their limited available spare capacity and the existing of barriers to entry and expansion raise serious doubts as to the compatibility of the transaction with the internal market in relation to this market.

⁶⁵ Replies to question 82 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁶⁶ This is particularly problematic because it indicates that the data submitted by the Notifying Party leaves aside at least 80% of the volumes they won in tenders (or supplied to retailers without a formal tender). A comprehensive analysis of closeness of competition should also analyse volumes sold through different channels than tendering.

⁶⁷ [...]».

⁶⁸ [...]».

⁶⁹ Replies to question 114 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

V.5. Germany

V.5.1. Introduction

(88) In Germany, the proposed transaction leads to affected markets in the supply of private label ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET, as well as in the supply of private label RTD tea bottled in aseptic PET.⁷⁰ However, while in carton the market is characterised by significant overcapacity and the combined market share of the merged entity would be below [40-50]*%, the same overcapacity is not present in aseptic PET and the transaction would strengthen Gerber Emig's leadership in the supply of NCSDs (excluding RTD tea and water) as well as its leadership in RTD teas in aseptic PET.

V.5.2. Market structure

- (89) The Parties were unable to provide the Commission with granular data (similar for example to the IRI data provided for France) relating to the relevant product market of private label ambient NCSDs (excluding RTD tea and water). According to Canadean data,⁷¹ the Parties would for example have a combined market share of [10-20]*% in the supply of private label NCSDs in Germany (Refresco: [10-20]*%; Gerber Emig: [5-10]*%) including all types of NCSDs and all packaging types (carton, PET, glass and cans). However, this data does not provide estimates according to the relevant permutations which correspond to the relevant product market (e.g. private label, ambient, NCSDs excluding RTD teas and a split per packaging type). In light of this, the Commission has relied in its assessment more significantly on the market reconstruction, which includes data from the large majority of the suppliers.⁷² As explained in the section concerning the French markets, the market reconstruction data does not take into account the volumes relating to Niederrhein-Gold since these are mainly dedicated to Lidl and therefore this supplier cannot be viewed as bringing a competitive constraint to the merged entity in the supply of private label ambient NCSDs to other retailers. Similarly, Elro and MEG are suppliers which are vertically integrated with retailer groups and therefore the Commission does not view them as a competitive constraint to the merged entity.
- (90) According to the market reconstruction data, the Parties' combined market share for 2012 in the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET would be around [40-50]*% (Refresco: [10-20]*%; Gerber Emig: [30-40]*%). The combined entity would have a much higher market share than any of its competitors.

⁷⁰ The Parties also overlap in the supply of private label RTD tea packaged in carton, but Gerber Emig has a minimal presence (around [...] million litres in 2012, while for example Refresco's volume was [...] million litres in the same year). In addition, regarding the supply of private label water, Refresco supplies water in non-aseptic PET bottles while Gerber Emig is only active in the supply of water bottled in aseptic PET. Even if these two segments were to be assessed together, the Parties' combined market share would be below [30-40]*%. For these reasons, the markets for the supply of private label RTD tea in carton and water in PET are not addressed further in this Decision. Furthermore, while the Parties overlap in contract manufacturing for brand owners both for carton and aseptic PET, their combined market shares in both segments are significantly below [10-20]*%.

⁷¹ Canadean is a data provider.

⁷² Since the market reconstruction only covered one year (2012), there is no information concerning the Parties' market shares in the German market for the previous years.

- (91) Post-transaction the main competitors of the merged entity in relation to aseptic PET would be Stute and Hansa-Heemann. Competitors such as Hochwald Sprüdel, Valensina and Wesergold would have significantly lower market shares, while others have only a minimal presence.
- (92) In Germany, as in France, demand for aseptic PET has increased and is expected to continue increasing at the expense of carton.⁷³ The market reconstruction indicates that in 2012 the Parties' combined market share would be below [40-50]*% (Refresco: [20-30]*%; Gerber Emig: [10-20]*%).
- (93) Post-transaction the Parties' would be constrained by Stute, Wesergold, Pfanner, Rauch and Valensina, while others have much smaller volumes.
- (94) With respect to the supply of private label RTD tea bottled in aseptic PET, a market which would amount to around [...] million litres, the market reconstruction shows that the Parties' combined market share would be similar to the NCSD market in aseptic PET (Refresco: [20-30]*%; Gerber Emig: [20-30]*%). However, the number of competitors appears to be smaller, with Stute as the second competitor, followed by Pfanner, Wesergold and to a smaller extent Rauch.
- (95) The tables below show the estimates of the Parties' market shares in Germany for the supply of private label ambient NCSDs (excluding RTD tea and water) in both the carton and aseptic PET segments, as well as in the supply to retailers of private label ambient RTD tea bottled in aseptic PET.

Table 2 – Parties' combined market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in Germany in 2012

	Carton	Aseptic PET
Refresco	[10-20]*%	[10-20]*%
Gerber Emig	[20-30]*%	[30-40]*
Combined	[30-40]*%	[40-50]*%

Source: market investigation

Table 3 – Parties' combined market shares in the supply to retailers of private label ambient RTD tea in aseptic PET in Germany in 2012

	Aseptic PET
Refresco	[20-30]*%
Gerber Emig	[20-30]*%
Combined	[40-50]*%

Source: market investigation

⁷³ Replies to question 110 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013. Replies to question 103 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

V.5.3. Concerns raised during the market investigation

- (96) Overall, both retailers and competitors indicated that the proposed transaction raises concerns in Germany for both carton and aseptic PET and for all types of NCSDs (except for water).⁷⁴
- (97) The vast majority of customers indicated that the transaction would have a negative impact on competition and on prices since there would be very few alternatives to the Parties for large volume orders and therefore the merged entity would have the ability and incentive to raise prices.⁷⁵
- (98) For example, according to one customer this transaction leads to a concentration in the market for all product categories and all types of packaging, with Refresco expanding its strong market position.⁷⁶
- (99) Another customer argued that post-transaction *"there will be less competition in the segments fruit juices, nectars and fruit juice drinks which could lead to higher buying prices and higher selling prices to the consumer."*⁷⁷ In essence, in Germany *"[g]enerally there is a lack of big suppliers in the NCSD's private label business. There are only few suppliers who can supply [...] the full range of either categories or packaging types/formats. Refresco and Gerber Emig are among the strongest suppliers, if they merge together we assume that prices will go up."*⁷⁸
- (100) Most competitors also raised concerns that the proposed transaction would lead to an increase in prices in the long term. Some competitors also argued that the market power of the merged entity would result from advantages in the purchasing of raw materials.⁷⁹

V.5.4. The Notifying Party's arguments

- (101) The Notifying Party submits that no substantial concerns should arise regarding Germany since the market is competitive and there are a number of alternative current and potential competitors. Furthermore, according to the Notifying Party the Parties' tender data would show that the Parties are not each other's closest competitors.

⁷⁴ Replies to questions 168 and 169 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013. Replies to questions 132 and 134 addressed to competitors of 16 August 2013

⁷⁵ Replies to question 169 and 184 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013 and minutes of the conference call with retailer of 29 August 2013.

⁷⁶ Replies to questions 184 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁷⁷ Replies to questions 168 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013

⁷⁸ Replies to questions 184 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁷⁹ Replies to questions 132 and 134 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013. Minutes of conference calls with competitors of 4 September and 12 September 2013.

(102) In addition, the Notifying Party submits that there is available spare capacity which would be sufficient to constrain the Parties post transaction. In particular, at a late stage of the market investigation the Notifying Party argued that [...]*.⁸⁰ [Reference to Notifying Party's understanding regarding capacity expansion of a competitor]*.⁸¹

V.5.5. The Commission's assessment

V.5.5.1. NCSDs (excluding RTD tea and water) bottled in aseptic PET

V.5.5.1.a. Closeness of competition

(103) Contrary to the Notifying Party's assertion, the market investigation indicates that the Parties are close competitors in the market for the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET to retailers in Germany.

(104) First, all retailers who replied to the market investigation saw the Parties as close competitors for all private label ambient NCSDs (apart from water) bottled in aseptic PET in Germany.⁸² Second, the tender data provided by the Parties and analysed by the Commission also indicates that in Germany the Parties can be viewed as close competitors for the supply of private label ambient NCSDs (excluding water) in aseptic PET. In particular, the Gerber Emig database⁸³ suggests that [...]*.⁸⁴ [...]*.⁸⁵

V.5.5.1.b. Lack of sufficient alternative competitors with available spare capacity

(105) The Notifying Party also indicated that in Germany the merged entity would be constrained by a number of competitors. According to the market reconstruction, the merged entity's main competitors for the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET would be Stute and Hansa-Heemann, followed by Hochwald Sprüdel, Valensina and Wesergold. However, the market investigation indicates that post-transaction the merged entity would be the leading supplier in Germany with a much higher market share than its competitors, which would not have sufficient spare capacity in order to significantly constrain the merged entity.

(106) Indeed, according to the market reconstruction and further data provided by competitors, the constraint to the merged entity imposed by competitors' spare capacity for aseptic PET bottling in Germany is limited by a number of factors.

⁸⁰ [...]*.

⁸¹ The Notifying Party indicated at this late stage that contrary to what was stated in the Form CO [...]*. However, the Commission was already aware of this fact and had taken it into account in its competitive assessment prior to the Notifying Party informing the Commission of this.

⁸² Replies to question 120 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

⁸³ [...]*.

⁸⁴ Without tea drinks, the corresponding figures are: Gerber Emig submitted bids in [...]*.

⁸⁵ In case where a tender or a fraction of it was marked to be won by multiple suppliers (Refresco excluded as Refresco volumes could be double checked with the volumes provided in the Refresco database) with no split of the tendered volume, the Commission assumed that the tender volume was split equally across suppliers. Without tea drinks, the corresponding figures are: [...]*.

- (107) First, the use of the spare capacity volume would also be further limited by the need of other competitors to reserve some spare capacity to satisfy the companies' current customers during demand peaks.⁸⁶
- (108) Second, the profile of some competitors indicates that they focus more on contract manufacturing for brand owners rather than private label and therefore any spare capacity of such suppliers would be constrained by this factor. Furthermore, some of the spare capacity may also be used for CSDs. In addition, the market investigation indicates that the competitive constraint brought by Hansa-Heemann would be limited since this bottler is focused mainly on low juice content drinks such as still drinks. The company divested its juice business (Emig) to Gerber (leading to the creation of Gerber Emig) while keeping the still drinks and CSDs business. While afterwards Hansa-Heemann started developing its activities in the juice drinks & nectars category, it is not its core business.
- (109) Third, the market investigation shows that customers and competitors expect aseptic PET demand to grow in the future at the expense of carton, thus any current spare capacity levels (which are already limited in volume) would be further eroded.⁸⁷
- (110) Overall therefore, while there may be some spare capacity in the market for the relevant NCSDs, the Commission considers that the current available capacity volume would not be sufficient to discipline the merged entity.
- (111) As regards potential capacity expansion, the considerations supporting the existence of a number of barriers to entry and expansion regarding the French market are also valid for the German market. Competitors in Germany have stressed that it is difficult to implement aggressive expansion strategies even in the context of growing demand given the competitors' financial constraints and the high investment required for new aseptic PET lines.⁸⁸ The market investigation also indicates that in the last three years only one large juice bottling supplier (Elro) entered the market for private label ambient NCSDs in Germany. However, Elro is part of the retailing group Edeka, so this supplier was brought in by a retailer for the purpose of manufacturing the retailer's own brands. Against this background, customers and competitors do not expect any entry or expansion in Germany during the next 2 years.⁸⁹
- (112) Regarding the alleged capacity expansion of [...]*, despite this fact appearing at a very late stage of the proceedings, the Commission was able to verify that the Parties' understanding of this capacity expansion was inaccurate. First, [...]* is not increasing its aseptic PET capacity nor has any plans to do so. Whilst it is true that [...]* is increasing its capacity in non-aseptic PET lines and moving some volumes of "*apfelsaftschorle*" (carbonated apple juice) production to these non-aseptic PET lines from the aseptic PET lines, the capacity which would be freed up on the aseptic PET lines is not of the magnitude indicated by the Notifying Party. Moreover, [...]* has

⁸⁶ Minutes of the conference call with competitor of 4 September 2013.

⁸⁷ Replies to question 184 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁸⁸ Minutes of the conference call with competitor of 2 September 2013.

⁸⁹ Replies to questions 83 and 84 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

confirmed that (i) this freed up capacity on the aseptic PET lines will be used for the bottling of water, aromatised water, RTD teas and a few other products; and (ii) the volumes dedicated to RTD teas (which is a relevant product for this case) are relatively limited. Finally, according to [...]*, it is not able, at any of its facilities, to produce juices or juice drinks & nectars. It is only able to produce carbonated "schorle" drinks with low juice content.⁹⁰ Overall therefore, [...]*'s capacity expansion does not affect the Commission's competitive assessment in a way that would allow it to dispel concerns. It should also be noted that according to public information, Lidl itself is expanding its chain of supermarkets in Germany and abroad as well as its NCSD product range⁹¹, which means that despite potentially moving some RTD tea volumes to captive production, its overall market demand for the relevant NCSDs is unlikely to reduce.

(113) Finally, regarding the constraint potentially brought by competitors with plants located outside Germany, the market investigation indicates that such competitors would not constitute a significant competitive constraint to the merged entity. Competitors with plants located outside Germany have a very limited presence in the German market, they are not perceived by customers as having the same ability as German suppliers to serve this market and would not be capable of supplying the required volumes in order to constrain the merged entity.⁹²

V.5.5.2. RTD tea bottled in aseptic PET

(114) As regards closeness of substitution, the market investigation indicates that the Parties are close competitors in the market for the supply of private label ambient RTD tea in aseptic PET to retailers in Germany. First, all retailers who replied to the market investigation saw the Parties as close competitors for RTD tea bottled in aseptic PET in Germany.⁹³ Second, the tender data provided by the Parties supports this conclusion. In particular, [...]* the tendered volumes indicate that Gerber Emig lost most volumes [...]* to Refresco [...]*. This is also consistent with the Parties' combined market share, which is relatively high.

(115) As regards the constraint faced by the Parties post transaction, while the overall volumes of the RTD tea market are smaller than those involved in the market for NCSDs (excluding RTD tea and water), the assessment whether the existing spare capacity is sufficient to constrain the merger entity needs to take into account the fact that this spare capacity may be used for other NCSDs. The Commission considers therefore that the RTD tea market cannot be considered in isolation and that post-transaction the available spare capacity volumes are not sufficient to offset the merged entity's market power in the supply of RTD tea in aseptic PET for the same reasoning presented in section V.5.5.1.

⁹⁰ Replies by [...]* to the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 of 1 October 2013.

⁹¹ See for example [...]* Lidl's own website <http://www.lidl.de/de/Neueroeffnungen>.

⁹² Replies to questions 117 and 118 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

⁹³ Replies to question 120 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

V.5.5.3. NCSDs (excluding RTD tea and water) packaged in carton

(116) The Commission considers that despite the Parties' overlap in the supply to retailers of private label ambient NCSDs (excluding RTD tea and water) in carton, as well as some concerns voiced during the market investigation, the proposed transaction would be unlikely to raise competition concerns in this market.

(117) First, the Parties' combined market share in this market is below [40-50]*%. Second, the market investigation has shown that in Germany there is significant overcapacity in carton, which is not limited to a particular type of carton packaging.⁹⁴ This is the result from the shift in demand from carton to aseptic PET. Suppliers would thus have the ability to expand their output to defeat a potential price increase by the merged entity. The significant existing mothballed carton capacity further strengthens this argument and means that any capacity expansion would entail relatively modest costs and delays. Third, the trend of decreasing carton consumption in Germany is expected to continue in the future⁹⁵ and therefore existing carton capacity will likely remain at a low level of utilization.

V.5.6. Conclusion

(118) Overall, the Commission considers that in light of the Parties' high combined market share, the fact that the Parties are close competitors, the limited competitive constraint imposed by alternative competitors, their insufficient available spare capacity for the relevant NCSDs and the existence of barriers to entry and expansion, the proposed transaction raises serious doubts as to its compatibility with the internal market in relation to the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET to retailers in Germany, as well as the supply of private label ambient RTD tea in aseptic PET to retailers in Germany.

(119) Furthermore, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to the supply of private label ambient NCSDs (excluding RTD tea and water) in carton to retailers in Germany.

V.6. Belgium

V.6.1. Introduction

(120) In Belgium, the proposed transaction leads to affected markets in the supply of private label ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET. The merged entity would achieve high market shares in both segments. [...]*. Gerber Emig supplies the Belgian market from its French and German plants located close to the border.

⁹⁴ See for instance minutes of conference call with competitor of 4 September: "*None of the carton lines produce old format carton (which the market has replaced with slim format carton).*"

⁹⁵ Replies to question 116 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

V.6.2. Market structure

- (121) According to Nielsen data, the Parties would have a combined market share of [40-50]*% (Refresco: [20-30]*%; Gerber Emig: [10-20]*%) in the supply of private label ambient NCSDs (excluding RTD tea and water) in Belgium for all packaging types (carton, aseptic PET, glass and cans). The market size according to this database would be around [...] million litres (again comprising all types of packaging).⁹⁶ However, since this data does not provide separate estimates for carton and aseptic PET, the Commission has relied in its assessment more significantly on the market reconstruction, which includes data from the large majority of the suppliers.⁹⁷ As explained in the sections concerning the French and German markets, the market reconstruction data does not take into account the volumes relating to Niederrhein-Gold since these are mainly dedicated to Lidl and therefore this supplier cannot be viewed as bringing a competitive constraint to the merged entity in the supply of private label ambient NCSDs to other retailers.
- (122) The market for the supply of private label ambient NCSDs (excluding RTD tea and water) bottled in aseptic PET to retailers is estimated to be around 45 million litres.⁹⁸
- (123) According to the market reconstruction data, the Parties' combined market share for 2012 in the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET would be around [50-60]% (Refresco: [40-50]*%; Gerber Emig: [10-20]*%). The combined entity would have a much higher market share than any of its competitors.
- (124) Post-transaction the main competitors of the merged entity in relation to aseptic PET would be Roxane and Stute. Competitors such as LSDH, Sunnyland and Valensina would have significantly lower market shares, while others have only a minimal presence.
- (125) Regarding the supply of private label ambient NCSDs (excluding RTD tea and water) in carton, the total volume is estimated around 67 million litres.⁹⁹
- (126) The market reconstruction indicates that in 2012 the Parties' combined market share would be around [50-60]*% (Refresco: [30-40]*%; Gerber Emig: [20-30]*%).
- (127) Post-transaction the Parties' would face competition from Stute, Valensina and LSDH, while Wesergold, Rauch, Casalasco, Antarctic and Sunnyland have a smaller market presence.
- (128) The table below shows the estimates of the Parties' market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in Belgium.

⁹⁶ The Parties' market shares for 2012 are not significantly different from those regarding 2010 (Refresco: [20-30]*%; Gerber Emig: [10-20]*%) and 2011 (Refresco: [30-40]*%; Gerber Emig: [10-20]*%).

⁹⁷ Since the market reconstruction only covered one year (2012), there is no information concerning the Parties' market shares in the German market for the previous years.

⁹⁸ Market reconstruction data.

⁹⁹ Market reconstruction data.

Table 4 – Parties' combined market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in Belgium in 2012

	Carton	Aseptic PET
Refresco	[30-40]*%	[40-50]*%
Gerber Emig	[20-30]*%	[10-20]*%
Combined	[50-60]*%	[50-60]*%

Source: market investigation

V.6.3. Concerns raised during the market investigation

(129) Three out of the four Belgian retailers who replied have raised concerns regarding the merger.¹⁰⁰ According to one retailer, Refresco and Gerber Emig are important suppliers of NCSDs. Another retailer points to the fact that the merger would lead to one less available supplier on the market that could offer the same quality and price as the Parties currently provide.¹⁰¹

V.6.4. The Commission's assessment

V.6.4.1. NCSDs (excluding RTD tea and water) bottled in aseptic PET

(130) The market investigation and the analysis of the tender data provided by the Parties are inconclusive with respect to the closeness of competition between Refresco and Gerber Emig.¹⁰² One of the four Belgian retailers however notices that "*Refresco and Emig are close competitors in terms of service and price positioning. The prices and overall sales conditions are similar, and sometimes they are the closest amongst all suppliers.*"¹⁰³

(131) The Notifying Party indicated that the merged entity would be constrained by a number of competitors located both in and outside Belgium. According to the market reconstruction, the Parties' main competitors are Stute and Roxane, while other competitors have a smaller presence. However, as explained in the assessment of the French market, Roxane is a supplier mainly focusing on water. As regards LSDH, its business in Belgium is simply derived from its supply relationship with its French customer based.

(132) In terms of available spare capacity, as explained in the assessment regarding the German market the market investigation indicates that there is limited spare capacity for aseptic PET and overcapacity for carton.¹⁰⁴ Therefore, the Commission considers that the German suppliers' available aseptic PET capacity would first be allocated to the German market.

¹⁰⁰ Replies to question 160 and 161 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013. Minutes of the conference calls with retailers of 29 August 2013, 2 September 2013 and 6 September 2013.

¹⁰¹ Minutes of the conference call with retailer of 6 September 2013.

¹⁰² Note that the tender data has some limitations in case of Belgium. [...]*

¹⁰³ Minutes of the conference call with a retailer of 2 September 2013.

¹⁰⁴ Replies to question 115 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013

(133) As regards potential capacity expansion, the considerations supporting the existence of a number of barriers to entry and expansion regarding the French and German markets are also valid for the Belgian market. In addition, transportation costs, established commercial relationships, regulatory rules and experienced personnel have also been identified as barriers to entry.¹⁰⁵ Furthermore, the market investigation also indicates that in the last three years no new supplier has entered the market for private label ambient NCSDs in Belgium and that no competitor is expected to enter in the next two years.¹⁰⁶

V.6.4.2. NCSDs (excluding RTD tea and water) packaged in carton

(134) The Commission considers that in spite of the merged entity's relatively high market share, the proposed transaction would be unlikely to raise competition concerns in the market for the supply of private label ambient NCSDs in carton packaging to retailers in Belgium.

(135) First, the market investigation has shown that German-based suppliers are already today seen as alternatives to Refresco and Gerber Emig by retailers.¹⁰⁷

(136) Second, these German-based suppliers have significant overcapacity on their carton production lines. This capacity is not limited to a particular type of carton packaging.¹⁰⁸ Furthermore, capacity utilisation is a key driver for profitability, which means that competitors have the incentive to utilise spare capacity. The Commission therefore considers that German-based suppliers would have the ability and incentive to expand their output in Belgium to defeat a potential price increase by the merged entity.

(137) Third, the competitors' ability and incentive to counter possible price increases by the merged entity will likely increase in the future since the trend of decreasing carton consumption in Germany is expected to continue,¹⁰⁹ implying that the existing carton spare capacity in Germany will likely remain.

V.6.4.3. Conclusion

(138) Overall, the Commission considers that the Parties' high combined market share, the limited competitive constraint imposed by alternative competitors, their limited available spare capacity of aseptic PET and the existing barriers to entry and expansion, the proposed transaction raise serious doubts as to its compatibility with the internal market in relation to the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET to retailers in Belgium.

¹⁰⁵ Replies to question 82 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁰⁶ Replies to questions 83 and 84 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹⁰⁷ Minutes of the conference call with a retailer of 6 September 2013.

¹⁰⁸ See for instance minutes of conference call with competitor of 4 September: "*None of the carton lines produce old format carton (which the market has replaced with slim format carton).*"

¹⁰⁹ Replies to question 116 of Questionnaire Q2. For instance, Rewe stated in this respect "*Packaging trends: carton generally decreases and Pet increases (more convenience for consumers).*"

(139) Furthermore, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to the supply of private label ambient NCSDs (excluding RTD tea and water) in carton to retailers in Belgium.

V.7. Netherlands

V.7.1. Introduction

(140) In the Netherlands, the proposed transaction leads to affected markets in the supply of private label ambient NCSDs (excluding RTD tea and water) both in carton packaging and in aseptic PET.¹¹⁰ Refresco is the only Party with a production facility in the Netherlands. Gerber Emig thus supplies its Dutch retailer customers from its German facilities.¹¹¹ In addition, the Notifying Parties do not have any aseptic PET production line in this Member State.

V.7.2. Market structure

(141) The market for private label ambient NCSDs (excluding RTD tea and water) bottled in aseptic PET is estimated to have a total volume of [...] million litres.¹¹² According to IRI data, the combined market share of the Parties for 2012 would be [30-40]*% (Refresco: [5-10]*%; Gerber Emig: [30-40]*%).¹¹³ The market reconstruction suggests that the combined market share would be higher, in the range of 70-80%. As discussed in the section concerning the French markets, the main discrepancies between IRI data and the market reconstruction data may be explained by the fact that the latter does not take into account the volumes of Niederrhein-Gold.

(142) Regarding the carton segment, the Dutch retail market is estimated to be worth around EUR 275 million¹¹⁴ for a total volume of [...] million litres.¹¹⁵ IRI data for 2012 indicates that the Parties had a large combined market share of [70-80]*% (Refresco: [60-70]*%; Gerber Emig: [5-10]*%).¹¹⁶ The market reconstruction data points at higher combined market shares, stemming from the exclusion of Niederrhein-Gold.¹¹⁷ Remaining competitors include German-based Stute, Valensina, Riha Wesergold, as well as Casalasco.

¹¹⁰ There are no overlaps between the Parties regarding the supply of private label RTD tea or water. In contract manufacturing there is also no overlap, since Refresco is only active in aseptic PET and Gerber Emig in carton.

¹¹¹ Gerber Emig also supplies its brand owner customers from the UK (less than [...] litres in 2012).

¹¹² IRI data.

¹¹³ The Parties' market shares for 2012 are not significantly different from those regarding 2011 (Refresco: [30-40]*%; Gerber Emig: [0-5]*%) and 2010 (Refresco: [20-30]*%; Gerber Emig: [0-5]*%).

¹¹⁴ Commission calculations based on Canadian data submitted by the Notifying Party.

¹¹⁵ IRI data.

¹¹⁶ The Parties' market shares for 2012 are not significantly different from those regarding 2011 (Refresco: [50-60]*%; Gerber Emig: [5-10]*%) and 2010 (Refresco: [50-60]*%; Gerber Emig: [5-10]*%).

¹¹⁷ See paragraph 61 above.

(143) The table below shows the estimates of the Parties' market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in the Netherlands, for both the carton and aseptic PET segments.

Table 5 – Parties' combined market shares in the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers in the Netherlands in 2012

	Carton	Aseptic PET
Refresco	[60-70]*%	[0-5]*%
Gerber Emig	[5-10]*%	[30-40]*%
Combined	[70-80]*%	[30-40]*%

Source: IRI data

V.7.3. Concerns raised during the market investigation

(144) During the course of the market investigation, some customers stated that the proposed transaction would result in a reduction of competition and that the proposed transaction would have an effect on prices.¹¹⁸

V.7.4. The Notifying Party's arguments

(145) The Parties argue that the majority of Refresco's sales of private label carton in the Netherlands are to three large retailers capable of comparing prices and sourcing products on a pan-European level: [...] ([...] of total sales), [...] ([...]%) and [...] ([...]%). Similarly, the majority of Gerber Emig' sales of private label carton in the Netherlands are to [...] ([...] of total sales). Other large private label customers of Gerber Emig are [...], each representing [...] respectively of Gerber Emig's total private label carton sales in the Netherlands.

(146) The Notifying Party claims that the merged entity would face competition from three significant suppliers of private label NCSDs in carton packaging located in the Netherlands, namely Vrumona, Spa and United Soft Drinks. Additionally, the new plant of Antonio Munoz in Vlissingen, the Netherlands will supply NCSDs in both carton and aseptic PET packaging and will become operational as of 2014. Imports from German (Stute, RIHA Wesergold, Niederrhein-Gold) and Belgian producers (Sunnyland and Dr Siemer/Sportfit) would also exert a competitive constraint on the merged entity.

(147) According to the Notifying Party, the analysis of the Parties' tender data would show that the Parties are not close competitors since [...].¹¹⁹

¹¹⁸ Replies to questions 174 and 175 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013.

¹¹⁹ The Commission considers that one cannot draw meaningful conclusions from the tender data in case of the Netherlands because the [...].

V.7.5. The Commission's assessment

V.7.5.1. Aseptic PET

- (148) As regards the supply of private label ambient NCSDs excluding water and RTD tea in aseptic PET to retailers in the Netherlands, according to IRI data submitted by the Parties, the combined market share of the Parties in 2012 was [30-40]*%, with a [5-10]*% increment by Refresco. Even discounting the volumes attributed to suppliers which cannot be viewed as posing a competitive constraint to the merged entity in the supply of private label NCSDs to retailers such as Antartic and Niederrhein-Gold,¹²⁰ the parties' combined market share would amount to less than [40-50]*%.
- (149) The market reconstruction shows that the combined entity would continue to face competition from other strong players, such as Hansa Heemann and Sunnyland, which already enjoy substantial market positions in the Netherlands. Moreover, the Commission notes that inside the relevant market, Refresco is only active in the still drinks segment, where the main competitor to the Parties after the transaction, Hansa Heemann, is particularly active¹²¹ and enjoys a strong market position.
- (150) In addition, all Dutch retailers have indicated that they also source from neighbouring countries.¹²² Considering that all substantial market participants, including the Parties, import their aseptic PET volumes delivered to the Dutch market from neighbouring countries, the Commission concludes that the competitive importance of imports is, in the particular case of the Dutch market for NCSDs bottled in aseptic PET, particularly strong.
- (151) Finally, the Commission notes that the overall market size is minimal, with only [...] million litres sold at retail level in 2012.¹²³ The Commission's market investigation has indeed revealed that consumer preferences are heavily skewed towards carton packaging in the Netherlands.¹²⁴ Against this backdrop, the Commission notes that the increment of Refresco to Gerber Emig's existing position represents [...] million litres, which is less than [...] of the annual output of an aseptic PET production line ([...] million litres).¹²⁵
- (152) In light of the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply of private label ambient NCSDs in aseptic PET to retailers in the Netherlands.

¹²⁰ See paragraph 61 above.

¹²¹ See minutes of the conference call with Hansa Heemann: "*Currently Hansa-Heemann does not produce any juice with a fruit concentrate above 30%*".

¹²² Replies to questions 59 and 61 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013.

¹²³ Source: IRI data submitted by the Parties.

¹²⁴ Replies to question 134 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013. For instance [...] declared that "*carton [is] the most important packaging*".

¹²⁵ Annex 93(f) of the Form CO, [...]*.

V.7.5.2. Carton packaging

- (153) The Commission considers that in spite of Refresco's strong existing position, the proposed transaction would be unlikely to raise competition concerns in the market for the supply of private label ambient NCSDs in carton packaging to retailers in the Netherlands.
- (154) First, the competitive constraint from imports is, in the particular case of the Dutch market for NCSDs bottled in carton packaging, particularly strong. Indeed, as discussed above, all Dutch retailers have indicated that they source from neighbouring countries,¹²⁶ and the market investigation has shown that several German suppliers such as Stute, Valensina and Riha Wesergold are already present in this market.
- (155) Second, the Commission considers that German-based suppliers would have the ability and incentive to expand their output in the Netherlands to defeat a potential price increase by the merged entity.
- (156) Indeed, as discussed in paragraph 118 above, the market investigation has shown that German-based suppliers have significant overcapacity on their carton production lines. This capacity is not limited to a particular type of carton packaging.¹²⁷ German suppliers thus have the ability to expand their output to defeat a potential price increase by the merged entity.
- (157) Given that capacity utilisation is a key driver for profitability in light of the fixed costs of maintaining and amortizing packaging lines and production facilities,¹²⁸ the Commission considers that German-based suppliers would also have the incentive to expand their output in the Netherlands to defeat a potential price increase by the merged entity. In this respect, the market investigation has shown that while Gerber Emig supplies the Netherlands from its plants in Waibstadt (above [...]*) of volumes) and Calvörde, and that other German competitors, such as Stute, have production facilities with carton packaging lines closer to the Dutch market than Gerber Emig's Waibstadt and Calvörde plants.
- (158) Third, the Commission notes that the ability and incentive of competitors to counter possible price increases by the merged entity will likely increase in the future.
- (159) Indeed, the trend of decreasing carton consumption in Germany is expected to continue in the future.¹²⁹ This trend will imply that the existing carton packaging capacity for ambient NCSDs will likely remain at a low level of utilization in Germany, thus preserving existing incentives to counter any price increase by the merged entity in the Netherlands. In this respect, the Commission also notes that while Antonio Munoz' new plant in Vlissingen, the Netherlands, will be mostly dedicated to

¹²⁶ Replies to questions 59 and 61 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013.

¹²⁷ See for instance minutes of conference call with competitor of 4 September: "*None of the carton lines produce old format carton (which the market has replaced with slim format carton).*"

¹²⁸ For example, according to Annex 144, fixed and depreciation costs account for [...]*) and [...]*) % of total production costs on the carton packaging lines of the Parties' [...]*)*, [...]*)* and [...]*)* plants.

¹²⁹ Replies to question 116 of Questionnaire Q2. For instance, [...]*)* stated in this respect "*Packaging trends : carton generally decreases and Pet increases (more convenience for consumers).*"

chilled products, it will also supply ambient NCSDs in carton packaging, thus contributing to the global overcapacity observed in this market.

- (160) In addition, the market investigation has also confirmed the presence of significant mothballed carton capacity at most German production facilities. The Commission therefore notes that any capacity expansion in the future would entail relatively modest costs and delays.¹³⁰
- (161) Fourth, the market investigation has also shown that German suppliers are already today seen as alternatives to Refresco and Gerber Emig by retailers. [...] has for instance stated that "*Gerber participates in some of [...] tenders [...]. Other participants in these tenders are Refresco, Wesergold, Valensina and Sunnyland. (...) Stute (Germany) has also participated in tenders but at this stage it is not able to get any business since its prices are not competitive*".¹³¹
- (162) Fifth, whilst Refresco already enjoys a strong position in the Dutch market for the supply of private label ambient NCSDs in carton packaging to retailers, the market investigation has indicated that Gerber Emig is not the main competitive constraint on Refresco today. [...] stated with respect to the Dutch market that "[m]aybe they are not the closest competitors". Similarly, [...] stated "*I think the closest competitor, for both, is Wesergold*".¹³² Only one of the Dutch retailers, [...], has indicated that Gerber Emig enjoys a specific advantage, without substantiating this claim.¹³³
- (163) The Commission therefore considers that it is unlikely that the addition of Gerber Emig's volumes to Refresco's existing strong position would substantially affect the competitive dynamics in the market for the supply of private label ambient NCSDs in carton packaging to retailers in the Netherlands.
- (164) The Commission therefore concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply of private label ambient NCSDs in carton packaging to retailers in the Netherlands.

V.7.6. Conclusion

- (165) In light of the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply to retailers of private label ambient NCSDs in carton packaging and in aseptic PET in the Netherlands.

¹³⁰ In this respect, the Notifying Party submitted that for carton lines mothballed *in situ*, reactivation of a mothballed line may take [...], with costs varying between EUR [...] depending on the maintenance status and depending on the size / type of the machine.

¹³¹ See minutes of conference call with [...]. The market investigation has also shown that Stute already enjoys a substantial position in the Dutch market for the supply of ambient private label NCSDs in carton packaging to retailers.

¹³² Replies to question 139 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013. [...] listed Dr Siemer (part of Valensina) as the Parties' closest competitor.

¹³³ [...] stated in this respect that "[i]t is hard for us to see [where Gerber Emig has a specific advantage], because we are not fully aware of the possibilities of Emig", see reply of [...] to question 68.2 of Questionnaire Q2.

V.8. United Kingdom

V.8.1. Introduction

- (166) The UK is the only Member State where chilled markets for juices have a significant size (almost as large as ambient markets). It should be noted in this respect that Refresco does not have any chilled production lines in the UK, therefore there is no overlap in the supply of chilled juices. Therefore, the UK section will analyse only the ambient markets. In addition, juices are predominantly bottled in carton.
- (167) In the UK, the proposed transaction leads to affected markets in the supply of private label ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET and to affected markets in the supply of contract manufacturing ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET.¹³⁴
- (168) In the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET the increment brought by Gerber Emig is *de minimis*, therefore the proposed transaction does not raise serious doubts regarding the supply of private label ambient NCSDs (excluding RTD tea and water) in aseptic PET in the UK.

V.8.2. Market structure

- (169) The retail market value for private label ambient NCSDs (excluding RTD tea and water) bottled in carton is estimated to amount for [...] million litres.¹³⁵ According to IRI data,¹³⁶ the merged entity would have a strong presence in the market for carton with a market share of [70-80]*% (Refresco: [10-20]*%; Gerber Emig: [50-60]*%). The market reconstruction suggests that the combined market share would be significantly lower, in the range of [50-60]*%. According to the market reconstruction, post transaction the second supplier would be Princes, followed by Mulrines and Casalasco, while other bottlers have only minimal volumes.
- (170) Regarding the contract manufacturing markets, IRI data did not provide any information. According to the market reconstruction, the Parties had a combined market share of [60-70]*% in carton, and [30-40]*% in aseptic PET. The Parties' main competitors for contract manufacturing in carton are UK-based bottlers Framptons and Princes. In addition, bottlers from outside of the UK, such as Wesergold and Mulrines, have some sales. The Parties' main competitor for contract manufacturing in aseptic PET is UK-based bottler Cott. In addition, bottlers from outside of the UK, such as Stute, Mulrines and Wesergold have a smaller presence.
- (171) The table below shows the Parties' market shares (according to IRI) in the supply of private label ambient FC, NFC and still drinks to retailers in the UK for carton.

¹³⁴ There are no overlaps between the Parties regarding the supply of private label and contract manufacturing RTD teas or water.

¹³⁵ IRI data.

¹³⁶ The IRI data the Commission refers to for the UK includes still drinks, NFC and FC segments (sales to [...] have been estimated by the Notifying Party and have been submitted only for 2012).

Table 6 – Parties' combined market shares in the supply of private label ambient FC, NFC and still drinks carton to retailers in the UK in 2012

	Carton
Refresco	[10-20]*%
Gerber Emig	[50-60]*%
Combined	[70-80]*%

Source: IRI data

V.8.3. *Concerns raised during the market investigation*

(172) During the market investigation almost none of the competitors and customers¹³⁷ raised substantiated concerns regarding private label ambient NCSDs bottled in carton. Regarding the private label market, the vast majority of the customers who replied stated that the proposed transaction would not result in a reduction of competition and that the proposed transaction would not lead to price increases.¹³⁸

(173) A few competitors raised concerns regarding the contract manufacturing markets. Some customers stated that the proposed transaction would result in a reduction of competition and that the proposed transaction would have an effect on prices.¹³⁹

V.8.4. *The Notifying Party's arguments*

(174) The Notifying Party claims that the merged entity would face significant competition from Princes, Mulrines, Garcia Carrion, Antonio Munoz, Framptons, and Fruitapeel, with the majority of suppliers having spare capacity in carton, totalling over [...] million litres according to the Parties' estimates (excluding the Parties' own spare capacity).¹⁴⁰

(175) The Notifying Party claims that the combined market share of the merged entity in private label ambient NCSDs bottled in carton is [50-60]*%.¹⁴¹

(176) The Notifying Party also argues that the majority of Refresco's private label carton sales in the UK are [...]*

¹³⁷ See minutes of the conference calls with [...] (retailer) of 31 July 2013 and with [...] (retailer) of 29 August 2013.

¹³⁸ Replies to questions 180 and 181 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

¹³⁹ Replies to questions 118 and 119 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to brand owners of 19 August 2013. During the course of the market investigation, one customer raised concerns in respect of possible foreclosure effects in the contract manufacturing market. However, given the fact that Gerber Emig already bottles for brand owners who are competing with Gerber Emig' own brands, it is unlikely that the merged entity will lack the incentive to contract manufacture for a competing brand owner. Furthermore, contract manufacturing for brand owners yields [...]*

¹⁴⁰ See Fact Sheet Paper submitted by the Notifying Party on 5 September 2013, the estimate was the following: [...]*

¹⁴¹ See Fact Sheet Paper submitted by the Notifying Party on 5 September 2013.

- (177) According to the Notifying Party, the tender analysis also shows that the Parties are not particularly close competitors, and that in all bids in which they face each other they also face a significant number of other strong players.
- (178) For contract manufacturing markets the Notifying Party claims that the combined entity will never lack an incentive to contract manufacture for other brand owners. This is illustrated by the fact that Gerber Emig currently contract manufacturers for brands owners alongside some of its own brands. Brand owners' products manufactured by Gerber Emig fill a particular gap on the retail shelf or out of home product offer.

V.8.5. *The Commission's assessment*

- (179) The Notifying Party indicated that the merged entity would be constrained by a number of competitors located both in and outside the UK. The market investigation confirmed that the merged entity for private label ambient NCSDs (excluding RTD tea and water) bottled in carton would face competition from Princes, Mulrines, Garcia Carrion, Antonio Munoz and Casalasco.
- (180) In terms of volumes supplied to retailers, the market investigation confirmed that post-transaction Princes and Mulrines would be particularly strong competitors. In addition, the market investigation indicates that the competitive constraint brought by Garcia Carrion and Antonio Munoz is increasing due to the fact that these Spanish bottlers (already significantly present in the chilled markets) are expected to also enter the ambient markets, especially in some high-value product categories.
- (181) In addition, almost all UK retailers have indicated that they also source some volumes from continental Europe.¹⁴² Therefore the Commission concludes that the competitive constraint imposed by imports is, in the particular case of the UK market for the supply of private label ambient NCSDs (excluding RTD tea and water) bottled in carton, particularly strong.
- (182) In terms of volumes supplied for contract manufacturing the market investigation confirmed that the strong competitors post-transaction would be Framptons for carton and Cott for aseptic PET. In addition, Mulrines and Wesergold would be able to contract manufacture both in carton and in aseptic PET.
- (183) In terms of capacity, the results of the market investigation indicate that the existing spare capacity in the UK in carton for both private label and contract manufacturing and in aseptic PET for contract manufacturing is sufficient to constrain the Parties post-transaction. The proposed transaction brings together an increment volume which is below the existing levels of spare capacity both in carton and aseptic PET.
- (184) It is also significant that the barriers to entry and expansion in the market for the supply of private label ambient NCSDs in carton are relatively low compared to aseptic PET. According to the Notifying Party, a high speed carton line costs [...] (speed 12,000-24,000 carton per hour) compared to [...] for aseptic PET line (speed

¹⁴² Replies to question 59 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013.

20,000-40,000 bottles per hour). According to market participants, investing in a new aseptic PET line costs around EUR 10-15 million.¹⁴³

(185) In addition, the market investigation confirmed the arguments of the Notifying Party concerning closeness of competition based on the Parties' tender data. In particular, [...]*.

(186) Regarding tenders lost to competitors, the Refresco data indicates that Refresco lost most often [...]*. ¹⁴⁴

V.8.6. *Conclusion*

(187) In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in the UK with respect to the supply of private label ambient NCSDs (excluding RTD tea and water) to retailers or with respect to contract manufacturing ambient NCSDs (excluding RTD tea and water) both in carton and aseptic PET.

V.9. **Other affected Member States**

V.9.1. *Introduction*

(188) The market share estimates provided by the Notifying Party for other Member States are based on Canadean data. This data is not as granular as IRI or Nielsen data, but in these Member States the Parties' overlap is not as significant as for example in France or the Netherlands. The data set includes not only retailers but also the out-of-home ("OOH") channel, and while the Notifying Party was able to estimate market shares splitting ambient private label/ambient contract manufacturing and carton/PET, it was not able to provide a combination of neither these permutations nor separate data for ambient NCSDs.

(189) Based on the available data, the other Member States where the proposed transaction leads to affected markets in the supply of NCSDs are Finland, Ireland, Italy, Poland and Sweden.

V.9.2. *Market structure*

(190) The tables below show the estimates of the Parties' market shares in the supply of NCSDs in the relevant Member States, either split according to the packaging type or between the private label and contract manufacturing segments.

¹⁴³ Replies to question 131 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

¹⁴⁴ The corresponding figures for private label ambient carton sales are: [...]*.

Table 7 - Parties' combined market shares in the market for the supply of ambient NCSDs split per type of packaging in 2012

Member State	PET			Carton		
	Refresco	Gerber Emig	Combined	Refresco	Gerber Emig	Combined
Finland	[20-30]*%	[0-5]*%	[20-30]*%	[80-90]*%	[0-5]*%	[80-90]*%
Italy	[30-40]*%	[0-5]*%	[30-40]*%	NA	NA	NA
Ireland	NA	NA	NA	[0-5]*%	[50-60]*%	[50-60]*%
Poland	[10-20]*%	[0-5]*%	[10-20]*%	NA	NA	NA
Sweden	NA	NA	NA	[5-10]*%	[5-10]*%	[10-20]*%

Source: Canadean data and Notifying Party's estimates

Table 8- Parties' combined market shares in the market for the supply of NCSDs split per the private label and branded segments in 2012

Member State	Private label			Contract manufacturing		
	Refresco	Gerber Emig	Combined	Refresco	Gerber Emig	Combined
Finland	[70-80]*%	[0-5]*%	[70-80]*%	NA	NA	NA
Ireland	[0-5]*%	[10-20]*%	[10-20]*%	[0-5]*%	[10-20]*%	[10-20]*%
Italy	[30-40]*%	[0-5]*%	[30-40]*%	NA	NA	NA
Poland	[10-20]*%	[5-10]*%	[10-20]*%	NA	NA	NA

Source: Canadean data and Notifying Party's estimates

(191) As can be seen from the tables above, the increments are relatively small (less than [0-5]*%) for the supply of NCSDs split per type of packaging (carton and PET), with the exception of Sweden ([5-10]*%), though in this case the combined market share is just above [10-20]*%. Similarly, the increments for the supply of NCSDs split by the private label and contract manufacturing segments are less than [0-5]*%, with the exception of Poland ([5-10]*%), though also in this case the combined market share is just above [10-20]*%.

V.9.3. The Commission's assessment

V.9.3.1. Finland

(192) The Commission notes that although the Parties have a relatively high combined market share ([70-80]*% in private label and [80-90]*% in carton), the increment resulting from the addition of Gerber Emig's market position is relatively small (less than [0-5]*%). As such, the proposed transaction will not bring about a significant change in the structure of the market for the bottling of private label ambient NCSDs by third parties in carton and PET in Finland.

(193) Furthermore, the Notifying Party points out that the total market size estimated for Finland by Canadean is smaller than Refresco's sales figure in this Member State and therefore these estimates, even if attenuated by the Parties' own estimates, likely overstate the Parties' combined market share.¹⁴⁵ In any event, the total volume of

¹⁴⁵ According to the Notifying Party, most data sources rely on publicly available information from the three main branded players, resulting in a severe underestimate of private label in general and juices in particular.

NCSDs sold by Gerber Emig in Finland is extremely small ([...]* million litres in 2012) and [...]* accounts for [...]* of these volumes.

- (194) The Parties have not been able to provide competitors' market shares for the supply of NCSDs to retailers split by type of packaging or by the private label and branded segments. However, the market investigation indicated that there are a number of other competitors present in the supply of private label ambient NCSDs for both PET and carton in Finland, including Swed-jam, Finnspring, Scandicfood, Eircfood, Valensina, Eckes Grannini and Wesergold.¹⁴⁶
- (195) Finally, during the market investigation none of the competitors or customers raised substantiated concerns with regard to effects of the proposed transaction in Finland.¹⁴⁷

V.9.3.2. Ireland

- (196) The Commission notes that although the Parties have a relatively high combined market share ([50-60]*% in ambient carton NCSDs) the increment resulting from the addition of Refresco's market position is relatively small ([0-5]*%). For private label and contract manufacturing, the combined market shares are even smaller ([10-20]*% and [10-20]*% respectively) with very small increments of [0-5]*% and [0-5]*% respectively. As such, the proposed transaction will not bring about a significant change in the structure of the markets in Ireland.
- (197) According to the Notifying Party, there are a number of other suppliers in Ireland such as Mulrines, Gleeson Group, Clada Group, J Donohoe and Glenpatrick. In addition, there are also a number of other suppliers present, such as Rauch, Sokpol and Casalasco.
- (198) No substantiated concerns were raised during the market investigation with regard to effects of the proposed transaction in Ireland.¹⁴⁸

V.9.3.3. Italy

- (199) The Commission notes that the Parties' combined market shares are below [30-40]*% (either for PET or private label) and the increments resulting from the addition of Gerber Emig's market position is negligible (less than [0-5]*%). Gerber Emig does not have a plant in, or close to, Italy. As such, the proposed transaction will not bring about a significant change in the structure of the bottling of NCSDs by third parties in Italy for private label on one hand and PET on the other hand.
- (200) The Notifying Party submits that in Italy, [...]* of Gerber Emig' sales of NCSDs were to [...]* ([...]* of [...]* million litres). It further notes that new private label suppliers

¹⁴⁶ Replies to question 105.1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013.

¹⁴⁷ Replies to questions 164 and 165 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013 and replies to questions 132 and 134 addressed retailers of 16 August 2013.

¹⁴⁸ Replies to questions 170 and 171 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to retailers of 19 August 2013 and replies to questions 120 and 121 addressed to brand owners of 19 August 2013.

with aseptic line capabilities (e.g. Fonte Ilaria, NORDA and Fonte Paradiso) are emerging in Italy.

(201) In addition, according to the market investigation there are a number of other active competitors in private label ambient NCSDs for aseptic PET in Italy, such as Casalasco, Conserve Italia, La Doria, San Benedetto and Rauch.¹⁴⁹

(202) During the market investigation none of the customers raised substantiated concerns with regard to effects of the proposed transaction in Italy.¹⁵⁰

V.9.3.4. Poland

(203) The Commission notes that the Parties have a combined market share of [10-20]*% for the supply of NCSDs bottled in PET and [10-20]*% for the supply of private label NCSDs. While the increment resulting from Gerber Emig's market position for ambient NCSDs bottled in PET is negligible ([0-5]*%), the increment is slightly higher ([5-10]*%) for private label NCSDs. Both Refresco and Gerber Emig have plants in Poland.

(204) Respondents to the market investigation indicated Maspex, Agros, Zbyszko, Bewa, Hoop and Sokpol as alternative competitors for the supply of private label NCSDs to retailers. Furthermore, the Parties' internal documents indicate that there might be some available spare capacity in aseptic PET in Poland.¹⁵¹

(205) During the market investigation none of the competitors or customers raised substantiated concerns with regard to effects of the proposed transaction in Poland.¹⁵²

V.9.3.5. Sweden

(206) In Sweden, the Parties' combined market share for the supply of ambient NCSDs for carton is relatively small ([10-20]*%) while the increment resulting from Refresco's market position is [5-10]*%. According to the market investigation, there are a number of alternative competitors in the market for the supply of private label NCSDs to retailers in Sweden, such as Glockengold, Guttsta Kalla, Kivik, Rynkeby, Swedjam, Kildevand, and Harboe.¹⁵³

¹⁴⁹ Replies to question 129.1 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013.

¹⁵⁰ Replies to questions 172 and 173 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013 and replies to question 132-134 addressed to competitors of 16 August 2013.

¹⁵¹ Annex 44.

¹⁵² Replies to questions 184 and 185 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed retailers of 19 August 2013 and replies to question 132-134 addressed to competitors of 16 August 2013.

¹⁵³ Replies to question 100 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to competitors of 16 August 2013.

(207) During the market investigation none of the competitors and customers raised substantiated concerns with regard to effects of the proposed transaction in Sweden.¹⁵⁴

V.9.4. *Conclusion*

(208) In light of the limited increment in market share, the presence of alternative suppliers, the limited combined footprint of the Parties in these Member States and in the absence of substantiated concerns voiced during the market investigation, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply of NCSDs or any of its potential segments in Finland, Ireland, Italy, Poland and Sweden.

VI. PROPOSED COMMITMENTS

VI.1. Procedure

(209) Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the Parties to a transaction may seek to modify the concentration so as to address the serious doubts identified by the Commission with a view to having the merger cleared.

(210) In order to address the concerns identified following the first phase market investigation and therefore render the concentration compatible with the internal market, the Notifying Party submitted commitments pursuant to Article 6(2) of the Merger Regulation on 13 September 2013 (the "13 September 2013 Commitments").

(211) Following the Commission's preliminary assessment of the 13 September 2013 Commitments, the Notifying Party submitted revised commitments on 16 September 2013 (the "16 September 2013 Commitments"). The Commission launched a market test of this set of commitments on 17 September 2013 to gather the views of relevant market participants on their effectiveness and their ability to restore effective competition in the markets where competition concerns were identified (the "market test").

(212) In light of the results of the market test, the Notifying Party submitted a revised set of commitments on 26 September 2013 (the "Final Commitments").

(213) The Commission assessed these commitments and their ability to eliminate the competition concerns in line with its Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice").¹⁵⁵

VI.2. Description of the 13 September 2013 Commitments

(214) On 13 September 2013 the Notifying Party submitted a first commitment package offering two alternative remedies, namely divestment of: (i) Refresco's Grünsfeld plant in Germany; or (ii) Gerber Emig's Waibstadt plant in Germany. The Grünsfeld

¹⁵⁴ Replies to questions 132-136 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed competitors of 16 August 2013 and replies to questions 178 and 179 addressed to retailers of 19 August 2013.

¹⁵⁵ OJ C 267, 22.10.2008, p.1.

remedy was not market tested because the Commission considered that it fell short of remedying the competition concerns.

(215) The reasons the Commission considered Grünsfeld not to be suitable to remove competition concerns for aseptic PET in France, Germany and Belgium can be summarised as follows:

- (i) Capacity: the aseptic PET capacity in Grünsfeld is not sufficient to cover the overlap (increment) resulting from the merger in aseptic PET in Germany, France and Belgium. The plant would roughly cover (a) at most [60-70]*% of the overlap according to the capacity figures that the Parties provided on Thursday 12 September (assuming that the plant would produce at full capacity after the divestment), and (b) [70-80]*% of the overlap according to the capacity figures they provided in the commitments. It should be noted that the latter was the third set of capacity figures that the Parties have provided for Grünsfeld. Moreover, Grünsfeld's actual 2012 sales in aseptic PET to France, Belgium and Germany amounted to [...] million litres whereas the combined increment for the three countries amounted to [...] million litres thus representing only [20-30]*% of the increment.
- (ii) Efficiency: [comparison of production costs]*.
- (iii) [Reference to incentives to sell to France]*.

(216) On the other hand, the Commission considered that, subject to the results of the market test, the divestiture of the Waibstadt plant could prima facie remove the serious doubts in all the markets concerned for the following reasons:

- (i) Capacity: Waibstadt's capacity in aseptic PET [...] seems to be sufficient to allow any purchaser to replicate the volume increment resulting from the proposed transaction in France, Germany and Belgium.
- (ii) Current supply from Waibstadt: Waibstadt is the plant from which Gerber Emig currently supplies [...] of its aseptic PET sales to France and [...] of its aseptic PET sales to Belgium, in addition to supplying the German market;
- (iii) Incentive to sell to France: the margins on Waibstadt's sales to France are currently higher than the margins on sales to Germany thus incentivising sales to France;
- (iv) Efficiency: the aseptic PET production costs at Waibstadt are lower than the equivalent production costs [...]*.

(217) Accordingly, on 16 September 2013 the Notifying Party submitted a new commitment text which included only the Waibstadt remedy. The Notifying Party considers that the proposed divestment would remove any significant impediment to effective competition.

VI.3. Description of the 16 September 2013 Commitments

(218) Refresco committed to divest Gerber Emig's Waibstadt plant located in Waibstadt, near Heidelberg in Southwest Germany (the "Divestment Business"). This plant has [...] aseptic PET production lines and [...] carton lines [...]. The total production

capacity of the plant is around [...] million litres per year, of which [...] million litres is aseptic PET and [...] million litres is carton.

(219) The Divestment Business consists of:

- (i) All tangible assets which contribute to the current operation or are necessary to ensure the viability of the Divestment Business, including the aseptic PET and carton production lines, a site area of [...] square meters, a total plant floor area (production and warehousing) comprising [...] square meters and a total warehousing capacity on site comprising [...] Euro pallets;
- (ii) All licences, permits and authorisations issued by any governmental organization exclusively for the benefit of the Divestment Business as well as other plant certificates;
- (iii) The [...] contract, the [...] contracts [...], the contracts with customers (with the exception of any contract manufacturing contracts with brand owners) to the extent [...];
- (iv) All personnel currently employed by the Divestment Business, including the personnel deemed key by Refresco for maintaining the viability and competitiveness of the Divestment Business, staff seconded to the Divestment Business and shared personnel; and
- (v) The arrangement for the supply with the following products or services by Refresco for a transitional period of up to [...] after Closing: purchasing, R&D, master planning, purchasing, sales and financial accounting and IT support.

(220) The Divestment Business does not include:

- (i) [...];
- (ii) IT, R&D, master planning, purchasing, sales and financial accounting support after the [...] period post-closing; and
- (iii) The contract manufacturing contracts as well as the private label contracts in which [...].

(221) In addition, the undertakings concerned have entered into related commitments, *inter alia* regarding the separation of the divested businesses from their retained businesses, the preservation of the viability, marketability and competitiveness of the divested businesses, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.

VI.4. The results of the market test

(222) The response rate to the market test was relatively good. The customers and competitors noted certain shortcomings, which could negatively impact the viability of the Divestment Business to compete effectively on a lasting basis.

- (223) With respect to customer contracts, the majority of respondents to the market test stressed that it is essential that customer contracts and relationships are transferred to the purchaser of the divested plant.¹⁵⁶ This will enable the purchaser to operate the capacity of the plant and therefore increase chances to win tenders. In addition, it is important that Refresco commits its best efforts to ensure that customers stay with the purchaser at Waibstadt to build customer relationships.
- (224) With respect to purchaser criteria, the vast majority of respondents stressed that it is important that [...]*.¹⁵⁷
- (225) As regards other concerns raised during the market test, these are not related to the competition concerns identified by the Commission and which the Divestment Business is designed to remedy, i.e. reduction of competition in private label ambient NCSDs in aseptic PET in France, Germany and Belgium and the concern that Refresco would have the ability to raise prices post-merger in these markets where the number of competitors able to supply large orders is limited and capacity constraints make switching more difficult.
- (226) However, many market participants recognize that Waibstadt is a good plant.
- (227) On the basis of the market test and based on its own analysis, the Commission found the following shortcomings in the Divestment Business of 16 September 2013:
- (i) Customer records related to the customer contracts of the Divested Business were excluded from the commitments;
 - (ii) Private label contracts in which [...] were excluded from the commitments;
 - (iii) Purchaser criteria were not enough to ensure that the buyer will be able to operate as a viable competitor able to put competitive pressure on the Parties;
 - (iv) The duration of the non-solicitation clause for the Key Personnel for [...] was not sufficient.
- (228) Based on the above, the Commission considered that the commitments of 16 September 2013 needed to be improved in order to ensure that the Divestment Business will remove the competition concerns in private label aseptic PET in France, Germany and Belgium. The assessment was communicated to the Notifying Party.

VI.5. Final Commitments

- (229) The Commission informed the Notifying Party of the results of the market test and of its own views on 23 September 2013. To address the shortcomings identified by the Commission, the Notifying Party offered a revised set of commitments on 26 September 2013.
- (230) The main amended features of the Final Commitments include the following:

¹⁵⁶ Replies to question 7 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 – "Questionnaire market test remedies" of 17 September 2013.

¹⁵⁷ Replies to questions 16- 20 of the Commission's request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 – "Questionnaire market test remedies" of 17 September 2013

- (i) Refresco will use best efforts (subject to the customer's consent) to transfer private label contracts where [...] to the purchaser of Waibstadt;
- (ii) [...];
- (iii) Additional restrictions in relation to purchaser criteria have been added in order to ensure that the Divestment Business will attract a suitable purchaser and as such will effectively compete on a lasting basis with the merged entity;
- (iv) Customer orders have been added to the commitments and the non-solicitation clause for the Key Personnel has been changed from [...] to [...];
- (v) Transitional services are now provided up to [...].

VI.6. Commission's assessment of the Final Commitments

VI.6.1. Legal test for acceptability of commitments offered in Phase I

(231) Under the Merger Regulation, the Commission has the power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition.

(232) As indicated in point 9 of the Remedies Notice,¹⁵⁸ the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. The Commission considers, inter alia, the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

(233) In merger cases, divestment commitments having a structural effect on the market are typically preferable.¹⁵⁹ In the case of a divestment, it is important that the divested activities consist of a viable business which, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis.

(234) In Phase I, commitments must clearly dispel all serious doubts.¹⁶⁰ It is also settled case law that in assessing whether the remedies constitute a direct and sufficient response capable of dispelling serious doubts, the Commission enjoys a broad discretion.¹⁶¹ In its analysis the Commission relies on responses to the market test of remedies, submission of the Parties as well as additional evidence on the file.

VI.6.2. Suitability of the proposed commitments to remedy serious doubts in this case

(235) In the present case, the Commission considers that the Final Commitments are suitable to remove the serious doubts raised in respect of private label ambient NCSDs (excluding water and RTD teas) in aseptic PET in France, Germany and Belgium as well as in relation to private label ambient RTD teas in aseptic PET in Germany.

¹⁵⁸ OJ C 267, 22.10.2008, p.1.

¹⁵⁹ Remedies Notice, paragraph 15.

¹⁶⁰ Remedies Notice, paragraph 81.

¹⁶¹ Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 128 ff.

- (236) The Final Commitments would remove the entire overlap arising from the proposed transaction in relation to private label ambient NCSDs (excluding water and RTD teas) in aseptic PET in France and Belgium given the Divestment Business is the plant from where Gerber Emig currently serves France and Belgium with aseptic PET. Although it does not directly remove the entire overlap in relation to private label ambient NCSDs (excluding water and RTD teas) in aseptic PET and to private label ambient RTD teas in aseptic PET in Germany (since Gerber Emig also supplies some volumes of these products in Germany from other plants), the Divestment Business has the capacity to do so. Thus the scale and scope of the Final Commitments will be sufficient to remove the serious doubts.
- (237) As regards the viability of the Divestment Business and its ability to compete effectively with the merged entity on a lasting basis, the Commission considers that, given the current capacity supply margins, volumes and efficiency, the Divestment Business is viable if acquired by a suitable purchaser.
- (238) For the reasons outlined above, the revised commitments entered into by the undertakings concerned are sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market.

VI.6.3. Purchaser criteria

- (239) As regards the purchaser criteria, the market test indicated that it was important for the purchaser to have experience [...]*.
- (240) The Final Commitments address this point in that they highlight that [...]*.
- (241) Any purchaser complying with this more specific requirement will in addition have to comply with the general requirements, such as (i) to be independent from the merged entity, (ii) to have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the merged entity and other competitors, and (iii) neither to be likely to create *prima facie* competition concerns nor to give rise to a risk that the implementation of the Commitments will be delayed, and it must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
- (242) Furthermore, if a purchaser has a significant captive use the Commission may consider that the transfer of the Divestment Business to such a purchaser may not ensure the immediate restoration of effective competition because this might limit the quantities available for the private label retail market and therefore the competitive force of the purchaser.

VII. CONDITIONS AND OBLIGATIONS

- (243) Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (244) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the

Commission's decision declaring the concentration compatible with the internal market and the EEA Agreement no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6)(b) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

(245) In accordance with the basic distinction between conditions and obligations, the decision in this case is conditional on full compliance with the requirements set out in Section B of the Final Commitments, which constitute conditions, whereas Sections C to F of the Final Commitments constitute obligations on the Notifying Party.

(246) The full text of the Final Commitments is annexed to this Decision as Annex I and forms an integral part thereof.

VIII. CONCLUSION

(247) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B of the commitments annexed to the present Decision and with the obligations contained in the other sections of the said commitments. This Decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President

By email and by fax: 00 32 2 296 4301
European Commission
DG Competition
1, Place Madou
B-1000 BRUSSELS

Case M.COMP/M.6924 – Refresco Group/Pride Foods

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 as amended (the **Merger Regulation**), Refresco Group B.V. (**Refresco**) hereby provides the following Commitments (the **Commitments**) in order to enable the European Commission (the **Commission**) to declare the acquisition of sole control by Refresco Group B.V. (**Refresco**) of Pride Foods Limited (**Pride Foods**, together with Refresco, the **Parties**) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the **Decision**).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EEC) No 139/2004.

Closing: the transfer of the legal title of the Divestment Business to the Purchaser.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Refresco and who has received from Refresco the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Divestment Business: the business or businesses as defined in Section B and the Schedule that the Parties commit to divest.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [...] from the Effective Date.

Hold Separate Manager: the person appointed by Refresco for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Refresco, and who has the duty to monitor Refresco's compliance with the conditions and obligations attached to the Decision.

Personnel: all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel listed in the Schedule.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of [...] from the end of the First Divestiture Period.

Section B. The Divestment Business

Commitment to divest

1. In order to restore effective competition, Refresco commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 14. To carry out the divestiture, Refresco commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If Refresco has not entered into such an agreement at the end of the First Divestiture Period, Refresco shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 23 in the Trustee Divestiture Period.
2. Refresco shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, Refresco has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 14 and if the closing of the sale of the Divestment Business takes place within a period not exceeding three months after the approval of the purchaser and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, Refresco shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the Divestment Business

4. The Divestment Business consists of the production plant of Pride Foods in Waibstadt, Germany. The Divestment Business, which is described in more detail in Schedule 1, includes:

- (a) all tangible assets which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;
- (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
- (c) the contracts, leases and other rights and commitments and all records of the Divestment Business described in Schedule 1 (items referred to under (a) to (c) hereinafter collectively referred to as **Assets**); and
- (d) the Personnel.

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, Refresco shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular Refresco undertakes:
- (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
 - (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans; and
 - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

Hold-separate obligations of Parties

6. Refresco commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa unless this is necessary for the operation of the Divestment Business and the preservation of its economic viability, marketability and competitiveness. Refresco shall also ensure that the Personnel does not report to any individual outside the Divestment Business.
7. Until Closing, Refresco shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained by the Parties. Refresco shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

Ring-fencing

8. Refresco shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business unless this is necessary for the operation of the Divestment Business and the preservation of its economic viability, marketability and competitiveness. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. Refresco may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to Refresco is required by law.

Non-solicitation clause

9. Refresco undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of three years after Closing.

Due Diligence

10. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Refresco shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
 - (a) provide to potential purchasers sufficient information as regards the Divestment Business; and
 - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

11. Refresco shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
12. Refresco shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

13. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
 - (a) be independent of and unconnected to the Parties;

- (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors; [...]*;
- (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the purchaser hereafter the **Purchaser Requirements**).

14. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When Refresco has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. Refresco must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

Section E. Trustee

I. Appointment Procedure

15. Refresco shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If Refresco has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Refresco at that time or thereafter, Refresco shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.
16. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by Refresco in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

17. No later than one week after the Effective Date, Refresco shall submit a list of one or more persons whom Refresco proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, Refresco shall submit a list of one or more persons whom

Refresco proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 16 and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and
- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

18. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Refresco shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Refresco shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

19. If all the proposed Trustees are rejected, Refresco shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 15 through 18.

Trustee nominated by the Commission

20. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Refresco shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

21. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Refresco, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

22. The Monitoring Trustee shall:
 - (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

- (ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Refresco with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;
 - (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
 - (c)
 - (i) in consultation with Refresco, determine all necessary measures to ensure that Refresco does not after the effective date obtain any business secrets, knowhow, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business; and
 - (ii) decide whether such information may be disclosed to Refresco as the disclosure is reasonably necessary to allow Refresco to carry out the divestiture or as the disclosure is required by law;
 - (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and Refresco or Affiliated Undertakings;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to Refresco such measures as the Monitoring Trustee considers necessary to ensure Refresco's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- (v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;
- (vi) provide to the Commission, sending Refresco a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business

so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending Refresco a non-confidential copy at the same time, if it concludes on reasonable grounds that Refresco is failing to comply with these Commitments;

- (vii) within one week after receipt of the documented proposal referred to in paragraph 14, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

- 23. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 14. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Refresco, subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 24. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of Refresco

- 25. Refresco shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Refresco or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Refresco and the Divestment Business shall provide the Trustee upon request with copies of any document. Refresco and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
- 26. Refresco shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions

relating to the Divestment Business which are currently carried out at headquarters level. Refresco shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. Refresco shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

27. Refresco shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Refresco shall cause the documents required for effecting the sale and the Closing to be duly executed.
28. Refresco shall indemnify the Trustee and its employees and agents (each an **Indemnified Party**) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Refresco for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
29. At the expense of Refresco, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Refresco's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Refresco refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Refresco. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 28 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Refresco during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

30. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
 - (a) the Commission may, after hearing the Trustee, require Refresco to replace the Trustee; or
 - (b) Refresco, with the prior approval of the Commission, may replace the Trustee.
31. If the Trustee is removed according to paragraph 30, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 15 to 20.

32. Beside the removal according to paragraph 30, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

33. The Commission may, where appropriate, in response to a request from Refresco showing good cause and accompanied by a report from the Monitoring Trustee:
- (i) Grant an extension of the time periods foreseen in the Commitments, or
 - (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where Refresco seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall Refresco be entitled to request an extension within the last month of any period.

[...]*
duly authorised for and on behalf of Refresco

SCHEDULE 1– THE WAIBSTADT PLANT

1. The Waibstadt Plant is located at the following address: KG Werk Waibstadt Neidensteiner Straße 51 74915 Waibstadt. Legal title to the plant is held by EMIG GmbH.
2. Following paragraph 4 of these Commitments, the Divestment Business includes all assets, tangible and intangible, currently owned or used by Emig GmbH in relation to the Waibstadt plant (other than the Excluded Contracts), but is not limited to the tangible and intangible assets, personnel and contracts identified below:

2.1 Tangible Assets

The Divestment Business includes all tangible assets owned or used by EMIG GmbH in relation to the Waibstadt plant including the following main tangible assets:

- (i) The freehold title to the site area of approximately [...] square meters.
- (ii) The properties on the site area including the production plant and warehousing. The total floor area of the plant including production and warehousing comprises [...] square metres. The total warehousing capacity on site (measured in terms of Euro pallets) comprises [...] pallets. ([...].*)
- (iii) [...] APET bottling lines [...]*: [...].*
- (iv) [...] bottling carton lines ([...].*): [...].*

2.2 Licences, permits and authorisations

The Divestment Business includes all licences, permits and authorisations awarded to the Waibstadt plant and necessary for the operation of the Divestment Business, including the following: [...].*

2.3 Contracts

The Divestment Business includes the following main contracts, agreements, leases, commitments and understandings:

- (i) the [...] contract;
- (ii) the [...] for the [...].*
- (iii) the Transfer Contracts, being customer contracts as defined below (with the exception of any co-packing contracts (the "Excluded Contracts")):
 - a) the contracts with customers to the extent [...] (the "A Contracts");
 - b) [...] (the "B Contracts");
 - c) the Additional Contract as set out in Annex 1 to this Schedule 1 (the "C Contract"); and

- d) any other contracts, agreements, leases, commitments and understandings that are relevant to the operation of the Waibstadt plant.

Where the transfer of the Transfer Contracts would require the consent of the customer, Refresco will use best efforts to:

- i. In respect of the A and C Contracts, transfer the contracts to the Purchaser; or
- ii. In respect of the B Contracts, agree with the customer the establishment of a new contract between the Purchaser and the customer [...]*.

[...]*.

2.4 Records and Personnel

The Divestment Business includes:

- (i) the following records: the customer records relating to the customer contracts divested in accordance with paragraph 2.3(iii) of Schedule 1, the production records and the quality control records;
- (ii) the following Personnel: [...]*.
- (iii) the following Key Personnel: [...]*

2.5 Products and Services

The Divestment Business will include arrangements for the supply of the purchaser with the following products or services by Refresco or Affiliated Undertakings for a transitional period of up to [...]* after Closing:

- (i) IT
- (ii) R&D
- (iii) Master planning
- (iv) Purchasing ([...]*)
- (v) Sales
- (vi) Financial accounting

3. The Divestment Business shall not include:

- (i) [...]*.
- (ii) [...]*.

ANNEX 1

[...]*.