

Conclusions

I The monopoly situation

290. The terms of reference require us to report whether a monopoly situation exists in the supply in the United Kingdom of frozen foodstuffs for human consumption as defined in the terms of reference. As indicated in paragraph 9, frozen foodstuffs as so defined do not include the whole range of frozen foodstuffs; in particular, uncooked butchers' meat, whole uncooked birds and ice cream are excluded.

291. Birds Eye, speaking for itself and for other companies of the Unilever Ltd Group which supply reference goods in the United Kingdom, estimated the value of reference goods supplied by Birds Eye and these other companies in the United Kingdom (including in this context the Isle of Man) at £117 million in 1973 and £133.5 million in 1974. For reasons explained in Chapter 1 we have found it difficult to establish the total value of reference goods supplied in the United Kingdom in either of these years. Birds Eye has asserted to us its belief that, on the data available to it, it is not clearly established that Birds Eye or Unilever companies in the aggregate supply at least a quarter of the reference goods supplied in the United Kingdom. Birds Eye's arguments and our comments upon these arguments are set out in Appendix 1. We have not accepted Birds Eye's criticisms of our methods and, in particular, we have not accepted Birds Eye's contention that weight rather than value was the appropriate basis on which to measure Unilever's share of the total supply of reference goods. We estimate the total supply of reference goods to the United Kingdom market at £343 million in 1973 and £407 million in 1974 (see paragraph 12). We recognise that our estimates, as set out in Appendix 1, are subject to a margin of error, particularly in regard to the supply of frozen foods to caterers. But Unilever's share of the total supply of reference goods could have fallen below 25 per cent in 1973 and 1974 only if the total supply in the United Kingdom had exceeded £468 million in 1973 and £534 million in 1974 (being in each case four times Unilever's sales). Making every allowance for margins of error, the evidence is that the total market could not have amounted to as much as £468 million in 1973 or £534 million in 1974. On the basis of these figures we can, therefore, conclude that a monopoly situation exists in the supply in the United Kingdom of frozen foodstuffs for human consumption as defined in our terms of reference, and we so conclude.

292. The terms of reference require us, if we conclude that a monopoly situation exists, to report, *inter alia*, by virtue of which provisions of sections 6 to 8 of the Fair Trading Act 1973 that monopoly situation is to be taken to exist and in favour of what person or persons it exists. On the first question we conclude that the monopoly situation is to be taken to exist by virtue of section 6(1)(b) of the Act because at least one-quarter of all the reference goods which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, namely, Birds Eye Foods Ltd, MacFisheries Ltd, T Wall and Sons (Ice Cream) Ltd, The Walls Meat Company

Ltd, Mattessons Meat Ltd, J P Wood and Sons Ltd, and Marine Harvest Ltd; these seven companies are all subsidiaries of Unilever Ltd. On the second question we conclude that the monopoly situation exists in favour of Unilever Ltd.

II The public interest

293. Unilever is the only company which through its subsidiaries supplies more than one-quarter of the total reference goods supplied in the United Kingdom. About 95 per cent by value of Unilever's supply of reference goods was contributed by Birds Eye in 1974. There are two other large suppliers of reference goods: one is Imperial Foods which supplies reference goods chiefly through its subsidiaries Ross Foods and Young's; the other is Findus. In addition, there is a large number of smaller suppliers of reference goods, the activities of which are outlined in Chapter 2. Since the monopoly situation exists in favour of Unilever, but its supply of reference goods is principally through Birds Eye, our main concern is with Birds Eye.

294. Our conclusions regarding the public interest fall into two parts. The first considers certain general issues which arise concerning the monopoly situation, namely:

- (i) the effectiveness of competition in the supply of frozen foods both between the suppliers of reference frozen foods and also between the suppliers of reference frozen foods and the suppliers of other foodstuffs, including non-reference frozen foods;
- (ii) the general level of profits and prices of Birds Eye and its efficiency.

295. The second concerns a number of specific issues which arise from particular policies and practices of Birds Eye. The practices which we identified as of possible importance for the public interest may be classified under the following broad headings:

- (a) arrangements whereby Birds Eye procures raw materials for the manufacture of frozen foodstuffs;
- (b) arrangements made by Birds Eye with wholesalers for the distribution of its products;
- (c) differences in discounts granted by Birds Eye as between large and small customers;
- (d) payment by Birds Eye to retailers of retrospective discounts geared to specific sales targets;
- (e) payment by Birds Eye to retailers of an extra discount for devoting all, or part of, their cabinet space to Birds Eye products;
- (f) terms of the agreements under which Birds Eye provides refrigerated cabinets to some of its retail customers;
- (g) pricing policy of Birds Eye applied to different products, to different pack sizes and to different brand names, and the establishment of County Fair and its pricing policy.

We have also considered the question of Birds Eye's attitude to the sale of frozen foods loose.

Competition from other foods

296. Birds Eye has contended that reference goods do not comprise a market because frozen foods compete with other foods. It has argued (paragraph 271) that the most narrowly defined market within which all reference goods compete is the total food market, and that the extent of the competition between reference and other foods means that Birds Eye's share of the market for frozen foods is irrelevant as far as the possession of market power is concerned.

297. We agree that to some extent all foods compete with one another and that consumers can and do choose between the fresh, frozen and other processed alternatives according to their relative price, convenience and other factors. The pricing and marketing policies of the suppliers of frozen foods are influenced in some degree by the price and availability of such alternatives. At the same time, for many frozen fruits and vegetables close competition from fresh alternatives is often restricted to particular months and a few frozen foods such as certain complete dishes have no close fresh, canned or other processed alternatives. Moreover, frozen foods are distinguished from fresh foods by the small amount of preparation which is necessary by the consumer and the small proportion of the product which constitutes waste. The convenience of frozen foods is strongly emphasised by the suppliers in marketing their products. While we acknowledge that frozen foods comprise a wide variety of products and that individual frozen products (such as mousse and brussels sprouts) may not be regarded by the consumer as close substitutes for one another, we consider that there are certain further characteristics which distinguish frozen foods and the suppliers of frozen foods from other foods and their suppliers.

298. In the first place, there would seem to be scope for product substitution by the suppliers of frozen foods. Cold storage space, refrigerated transport vehicles and much freezing equipment can be used for a variety of frozen foods. This suggests that the suppliers of frozen foods can switch their production between particular frozen food products. Product substitution on the supply side suggests that a frozen foods industry can be identified as such. The existence of the United Kingdom Association of Frozen Food Producers implies that producers of frozen foods have similar interests distinguishing them from other food producers.

299. Secondly, in the supply of reference goods to the retail trade frozen foods are distinguished from other foods by the requirement that frozen foods must be stored in and sold from refrigerated cabinets. At any given time the amount of refrigerated cabinet space in retail stores is fixed, and in the short run it can be increased only marginally. As a result, suppliers of frozen food products which are not close substitutes for one another, nevertheless compete for space in retailers' refrigerated cabinets. All three of the major suppliers of frozen foods to the retail trade have referred to the influence on their marketing strategy of the need to secure a satisfactory share of the limited capacity of refrigerated cabinets in retail stores. In retail trade, therefore, the refrigerated cabinet clearly distinguishes frozen from other food.

Competition between the suppliers of frozen foods

300. In recent years Birds Eye has met increasing competition from other suppliers of frozen foods largely because of improved opportunities for newcomers to enter the frozen foods industry profitably. These opportunities have

arisen particularly from the growth in demand for frozen foods and from such developments in the retailing of frozen foods as the growth of home-freezer centres (see paragraph 32) and the increase in 'own label' sales by the large retailers (see paragraph 29); also significant has been the development of services such as cold storage facilities (see paragraph 33) which have helped the smaller suppliers of frozen foods. This increased competition is reflected in the decline in Birds Eye's share of the total supply of frozen foods.

301. Because of the degree of competition between goods within and goods outside the reference and because the market for reference goods is divided both by product and by type of outlet, we agree with Birds Eye that a company's share of the total supply of the reference goods is not an accurate indicator of that company's 'market power', namely its ability to sell its products at prices above those of its competitors or otherwise to influence the market for its goods. A company with only a small share of the total supply of frozen foods could nevertheless enjoy an effective monopoly over the supply of a particular product, while a company supplying a wide range of products to a large number of different types of outlets could exercise no effective market power although it might be processing a large share of the total supply. Although Birds Eye is the largest supplier of frozen foods, it is far from being the major supplier in a number of product groups (such as shellfish, poultry parts and potato products). There are also important differences between Birds Eye's position in the supply of frozen foods to retail stores and its position in relation to the catering trade and to home freezer centres (the 'bulk pack' trade).

Supply of frozen foods to retail stores

302. In the supply of frozen foods to the retail trade (excluding home freezer centres), Birds Eye is by far the largest supplier even though in recent years a number of new suppliers have entered this part of the trade. Birds Eye's major competitors are Findus and Ross Foods, each supplying a product range comparable to that of Birds Eye, and a number of smaller companies supplying retailers' own brands. Entry into the retail sector of the market would seem difficult for small companies supplying a substantial range of frozen foods under their own brands because of the high costs of small scale distribution over a wide area and the disinclination of retailers to buy a range of frozen foods from more than one or two suppliers.

303. Although the three major suppliers compete in product quality, in discounts, promotions and advertising, and in new product development as well as in price, the situation, as far as prices are concerned, has been characterised in the past as one of price leadership on the part of Birds Eye, with Findus and Ross Foods generally following its lead (see paragraph 219). Birds Eye's larger sales and long-established position in the retail trade give it important advantages over both Findus and Ross Foods. Among these advantages are, we believe, economies of scale principally in the distribution of frozen foods and also in production, advertising, sales promotion and product development. Because the products of the three major suppliers are broadly similar in quality, Findus and Ross Foods have until recently been unwilling to sell at prices above those of Birds Eye for fear of losing sales, yet have felt unable to undercut Birds Eye's prices to any significant extent because of Birds Eye's cost advantages and of

uncertainties as to the likely response by Birds Eye to such a price cut. As a result Findus and Ross Foods have tended to increase their prices when Birds Eye has increased its prices. This tendency has been reinforced by the fact that changes in the prices of raw materials for frozen food manufacture affect all three suppliers. We observe that the pattern of price leadership has become somewhat less pronounced in the last two years or so, partly due to the operation of price control; in these years the pressures on the liquidity and profitability of Findus and Ross Foods have become considerable, and they have both raised their prices above those of Birds Eye on a number of products and Findus, in particular, has sought to emphasise the quality of its products.

Supply of frozen foods to home freezer centres and caterers

304. In supplying frozen foods to caterers and to home freezer centres no single company has a large share and it is likely that Ross Foods' supplies to these customers exceed in value those of Birds Eye. Over the past three years, however, Birds Eye's sales to home freezer centres have expanded rapidly. In aggregate, small suppliers have a larger share of the supply of frozen foods to caterers and home freezer centres than of that to retail stores; this is a reflection of the relative unimportance of brand identity in selling to these outlets, of the ability of smaller suppliers to undercut the prices offered by the three major suppliers and of the greater ease of distributing to caterers and home freezer centres. We consider the supply of frozen foods to these outlets as highly competitive and there seems to be no evidence that price leadership is exercised by any one supplier.

The general level of profits and prices of Birds Eye

305. As can be seen from Appendix 11, Birds Eye's rate of return on capital employed on an historic cost basis has averaged 18.0 per cent for the years 1971 to 1974; its rate of return fell from 19.1 per cent in 1971 to 15.9 per cent in 1974. The rate of return on capital employed on an historic cost basis for the same years has averaged 15.4 per cent in the food industry and 15.6 per cent in United Kingdom manufacturing industry. On a current purchasing power basis Birds Eye's rate of return for 1974 was 4.2 per cent, significantly below the average for United Kingdom manufacturing industry of 5.8 per cent.¹

306. Birds Eye's profit performance needs to be interpreted in the context of its pricing policy, of its competitive position in the industry and of Government price control. Birds Eye described the aim of its pricing policy to us as one of maximising the growth in its profits, consistent with a satisfactory return on capital employed, and of holding its prices stable, with improvements in efficiency and productivity covering cost increases (see paragraph 110). It submitted evidence to us that its prices had fallen in relation to the prices for fresh foods largely as a result of improvements in efficiency (see paragraph 220). Birds Eye claimed (see paragraph 289) that it had contributed more to the development of products, processes and equipment in the United Kingdom frozen foods industry than any other company, and that nearly all the developments introduced by it had become available to its competitors. Birds Eye claimed to be well above average among food manufacturing companies in

¹ See paragraph 225 regarding the treatment of borrowings.

operating efficiency and in the productivity of its employees and capital. We regard all these claims as generally justified. We consider that Birds Eye's profits have not been excessive and that its efficiency and innovative record have been above average. We, therefore, further conclude that the average level of Birds Eye's prices has not been excessive and that its position as price leader for the industry, at least in the retail market, has not been exploited in a manner which calls for any adverse comment from us. We attribute Birds Eye's relatively modest level of profits partly to the competition to which it has become increasingly exposed, partly to its own price policy and partly to the impact of Government price controls. We consider that in earlier years when Birds Eye held a more dominant position in the supply of reference goods than now and was not subject to close Government price control, its prices and profits were limited mainly by its policy of seeking to expand its sales consistently with a satisfactory return on capital employed. In more recent years the competition from other suppliers has increased and Government price controls have also acted as a further constraint on Birds Eye's profits. Whether competition will restrain prices and profits in the future (apart from the effects of any continuance of Government price control) will depend principally upon how the industry develops in future years. While we note the efforts of Birds Eye to expand its sales to home freezer centres and its sales under distributors' own brands, we do not foresee any significant reduction in the effectiveness of competition in reference goods in the near future.

307. We now examine the specific issues set out in paragraph 295.

(a) Procurement of raw materials

308. The major raw materials required by Birds Eye fall into the three categories, vegetables, meat and fish. As regards vegetables, the Processed Vegetables Growers Association Ltd expressed general satisfaction to us about the arrangements under which growers contracted with processors, competing with one another, for the sale of crops. The Association said that, whereas fifteen years ago most of the harvesting equipment had been owned by the processors, now they were estimated to own not more than 5 or 6 per cent of it. The Association was satisfied with the pricing arrangements and provided no evidence of Birds Eye obtaining a price advantage over the other major processors of frozen vegetables (see paragraphs 39 and 251). We therefore conclude that there is nothing objectionable in the arrangements whereby Birds Eye obtains supplies of vegetables.

309. Nor do we see anything objectionable in the arrangements whereby the company obtains meat. Here again Birds Eye obtains no price advantage in its purchases. Birds Eye's arrangements for buying meat have been outlined in paragraph 98.

310. Because of the importance of Birds Eye as a purchaser of cod and certain other types of fish, we looked particularly at the arrangements for procuring fish, especially the agreements between Birds Eye and the Fish Producers Organisation Ltd, whereby the latter allows rebates to Birds Eye on purchases of fish at auction. These agreements are discussed in paragraphs 94 to 97. Under the agreements Birds Eye, in the case of the Humber, receives a graduated discount rising with the proportion of the catch of codstuffs from distant water vessels bought by the company at auction in the open market; in

the case of Fleetwood, in addition to a graduated discount rising with the actual number of kits purchased, Birds Eye has a commitment to buy, and the trawler owners an obligation to supply, a certain proportion of the catch prior to auction provided that the catch exceeds a certain figure; in respect of such pre-auction purchases Birds Eye receives a fixed allowance per kit provided that certain conditions are fulfilled. The arrangements at Lowestoft do not involve any discounts for purchases made on the open market; Birds Eye has a commitment to buy, and the trawler owners an obligation to supply, a certain proportion of the catch of chat small plaice and of the catch of large cod and codling from plaice-fishing vessels.

311. Birds Eye explained to us that it was able to obtain a discount on its purchases of cod because its cold storage and filleting capacity enabled it to buy heavily on days of heavy landings and lightly on days of light landings (see paragraphs 274 to 276). It pointed out that these arrangements were advantageous to both sides and that there was nothing in the arrangements to preclude its competitors from making similar contracts; contracts had been made in the past with them by the distant water fishing industry but had not been renewed.

312. The Fish Producers Organisation Ltd told us (see paragraph 253) that it negotiated the arrangements with Birds Eye because it needed a more remunerative outlet for excess supplies of fish at times of heavy landings than conversion into fishmeal. By encouraging Birds Eye to buy fish at the coastal ports instead of relying upon imports of frozen fish blocks the arrangements had increased the demand for fresh fish, and Birds Eye by the flexibility of its purchases had reduced the problem of fish surpluses at the trading ports.

313. Birds Eye told us that the average rebate per kit allowed to it in respect of codstuffs bought at the Humber in 1974 had fallen to only 1.8 per cent. The company expected this average rebate to rise to 4.7 per cent in 1975 but this latter figure would still represent less than 1 per cent of the normal sales value of cod-using products sold by the company.

314. In the freely negotiated arrangements between Birds Eye and the Fish Producers Organisation Ltd there is no evidence of oppression by Birds Eye of the fishing interests. Birds Eye has, however, in the particular matter of purchases of fish at the Humber and at Fleetwood an advantage over its competitors. The advantage results partly from its position as the largest single buyer of fish on the Humber and at Fleetwood but we do not consider that it has used its position to exert any undue bargaining pressure upon the trawler owners. We accept the arguments of Birds Eye, endorsed by the Fish Producers Organisation Ltd, that the discounts reflect the benefits accruing to the fishing industry from Birds Eye's large and flexible purchases. The arrangements would seem to operate to the benefit of both Birds Eye and the fishing industry. Birds Eye does obtain a cost advantage over its competitors in the purchase of fish but, as the arrangements appear not to preclude other processors from making similar arrangements with the Fish Producers Organisation Ltd, if they can offer it similar advantages, we conclude that the arrangements do not operate against the public interest.

(b) Arrangements with wholesalers

315. We have set out in paragraphs 105 to 109 details of the arrangements made by Birds Eye with wholesalers for the distribution of its products. Birds Eye told us that it considered it necessary for wholesale distributors serving the

retail trade to coordinate their selling and distribution arrangements with its own. Therefore Birds Eye was prepared to appoint as wholesale distributors serving the retail trade only those willing to distribute Birds Eye brands exclusively, subject to certain exceptions which we set out in the following paragraph.

316. The franchise distribution arrangements which Birds Eye has made limit the number of wholesalers willing to distribute the products of new (or existing small) suppliers of frozen foods. The arrangements are likely, however, to limit competition in the retail sector of the frozen food market only to a small degree. Since Imperial Foods and Findus both distribute their products through their own distribution networks and their own franchised wholesalers, the franchise arrangements of Birds Eye do not impair the ability of its main competitors to compete in supplying the retailers. It is small processors wishing to supply retail outlets which are likely to be inconvenienced by the franchise distribution arrangements, not only of Birds Eye but of Imperial Foods and Findus as well, but not to a major degree for the following reasons. First, other barriers confronting would-be entrants to the frozen foods industry such as economies of scale in distribution and consumer resistance to unknown brands are more significant. Secondly, distribution through wholesalers is not the only means of access to retail stores for small processors; the easiest means of access is by co-packing for retailers and distributors under their own labels. Thirdly, the franchise distribution arrangements of Birds Eye are not completely exclusive. Birds Eye told us that the exclusivity undertakings did not cover large sized packs (2lbs and over) and that it did not object in practice to its franchised wholesalers distributing the products of other suppliers which did not compete with Birds Eye products or competed with only a small number of them. We received no complaints from smaller processors or from wholesalers or retailers about the franchise arrangements and such arrangements are common in the wholesale trade. We think that, if the franchise arrangements now made by Birds Eye with wholesalers were prohibited and Birds Eye, in consequence, distributed all its products through SPD, the cost of Birds Eye's distribution might well be raised and its efficiency lowered.

Birds Eye's retail discount policy: the general issues

317. The major criticisms of Birds Eye which were made to us in the course of our inquiry concerned its discount practices in supplying retail shops (see paragraphs 259 to 264). Criticisms were directed at:

- (i) the larger discounts given to large as opposed to small retailers;
- (ii) the special discounts given by Birds Eye
 - (a) retrospectively for the attainment of turnover targets by retailers during specified time periods, and
 - (b) for the allocation of cabinet space by retailers for the exclusive stocking of Birds Eye products;
- (iii) the absence, with minor exceptions, of published scales of discounts.

318. The aspects of Birds Eye's discount policies which we considered most important for the public interest were:

- (i) the impact of discounts upon the prices of frozen foods to the consumer;

- (ii) how far discount policies limited competition between the suppliers of frozen foods and impeded entry of new suppliers of frozen foods to the retail trade;
- (iii) how far the size of discounts paid by Birds Eye to retailers of different sizes in relation to cost savings in distribution might be unfair and lead to an inefficient allocation of resources within the retailing sector;
- (iv) how far the discounts paid by Birds Eye to retailers promoted efficiency in the distribution of frozen foods by encouraging retailers to order in the most economic manner and to invest in the refrigeration equipment necessary for an efficient system of distribution.

(c) Differences in the discounts granted by Birds Eye as between large and small customers

319. In general we consider it desirable that discounts should largely reflect savings in costs of distribution to individual customers. Hence there can be no objection to the principle of payment of higher discounts for large than for small orders or for large than for small deliveries. We also accept that it is in practice difficult to calculate cost savings and thus to achieve exact equivalence of discounts with cost savings. The relations between order and delivery size and costs can rarely be identified with precision, particularly when a manufacturer deals with as many products and customers as a national food company does. We further acknowledge that discount policy may in some circumstances be an important field of competition between suppliers. In this case, however, the average discounts given by Birds Eye to large retailers 'on terms' and the differences between different retailers 'on terms' are admitted by Birds Eye to bear little relation to the differential costs of supplying different retailers. We consider that this is the outcome more of the bargaining power of retailers than of competition in discounts between the frozen food producers. Discounts are negotiated annually and individually with those retailers large enough to demand to be 'on terms'. Birds Eye's evidence showed that the disparity between retail discounts and cost savings has tended to grow, partly because inflation has resulted in customers achieving higher levels of turnover, in money terms, on which they expect larger percentage discounts, and partly because the proportion of the grocery trade accounted for by large retail customers has increased. Birds Eye was concerned about this trend and told us that it had depressed its profitability to a serious degree. The Scottish Grocers' Federation considered that the larger discounts received by the larger customers were unfair to the smaller, independent retailers in so far as they did not reflect genuine cost savings (see paragraph 259). The Federation also claimed that the margins which its members were able to obtain from Birds Eye were inadequate, compared with average margins on other grocery products, particularly when the higher costs of retailing frozen foods were taken into account.

320. We accept that the major reason for the differences in Birds Eye's discounts is the differing bargaining power of retailers, and that this also largely explains why the discounts bear only a tenuous relation to cost savings. We do not think that the discounts can be wholly attributed to Birds Eye's monopoly position or fairly described as steps taken to exploit or maintain that position. However, the granting of such discounts by Birds Eye is obviously intended to

secure the continuing business of its more important customers and we have to consider whether the practice operates against the public interest. The major changes in recent years in the structure of the retail trade, particularly in the grocery sector, as evidenced by the relative growth of larger-scale units and the widespread adoption of self-service and supermarket operations, have operated in the public interest in various ways. The public has benefited from a more efficient use of resources in retailing, and in so far as any economies reflected in larger discounts obtained from manufacturers are passed on in lower prices, the public also benefits from lower prices obtainable in retail outlets. Smaller retailers have responded to these developments in various ways, for example, by the formation of voluntary wholesale groups, in an effort to obtain some of the benefits of larger-scale operation. Although they may not be able fully to match the economies of larger, more integrated organisations, smaller retailers may be able to compete successfully by offering better service, a more convenient location and so on. While, therefore, we think that the public interest has, in general, been promoted by the changes in recent years in the structure of retail trade, it is indisputable that increasing concentration in retailing has been accompanied by a significant increase in the bargaining power of the larger retailers. The discounts given by Birds Eye to larger retailers exceed by a considerable margin any attributable cost savings and it appears that some of the retailers benefiting from such discounts may not pass on all or perhaps any of the benefit to their customers. Even if the grocery chains which receive the large discounts were to pass them on in full to their customers, there would still be the problem of different treatment of different retailers. The Scottish Grocers' Federation is opposed to any attempt to introduce legislation designed to prohibit discounts which cannot be shown to be related to cost savings as was the Bolton Committee which reported in 1971 on the problems of small businesses¹. We are also conscious that the problem we are here discussing is not peculiar to frozen foods; indeed the Federation told us that the problem was less severe for frozen foods than for many other grocery products.

321. Birds Eye intends to introduce (paragraphs 128 to 131) a graduated scale of discounts related to the size of orders. These discounts will be available to all retail customers and will be published with the price list. We note that quantity discounts will be only one part of Birds Eye's discount payments and will do little to reduce the disparity in the discounts received by large and small retailers since negotiated discounts will still, in the first instance, continue to represent the major part of Birds Eye's payments of discount to retailers. Nevertheless, the new system goes some way towards meeting our dissatisfaction with the weak relationship between Birds Eye's discounts and the cost savings of making larger deliveries. By specifically relating discounts to order sizes the new discount structure of Birds Eye is likely to encourage a more economical ordering by retailers, and, by making quantity discounts available to all retailers, to introduce a more equitable treatment of large and small retailers.

322. Given the bargaining power of the major retail chains and the competition between Birds Eye and the other main processors of frozen foods in supplying these customers, we do not consider it appropriate to recommend that further steps should be taken to deal with the question of the large discounts obtained by large retailers. However, in view of the strength of Birds Eye's

¹*Report of the Committee of Inquiry on Small Firms*, Cmnd. 4811, 1971.

position in the supply of frozen foods to the retail market we hope that the other major suppliers will find it possible to adopt discount policies similar to that about to be introduced by Birds Eye. We have some confidence that they may do so since both Findus and Imperial Foods have told us that they have felt obliged in the past to follow many of Birds Eye's discount practices.

(d) Retrospective discounts

323. Birds Eye informed us that the retrospective discounts geared to specific sales targets which it paid to retailers in 1974 amounted on average to only 0.58 per cent of the gross sales value of sales to retailers on discount terms (see paragraph 122). It explained, however, that a figure of this kind could mislead since overall basic discounts were often agreed in the light of expectations about turnover though these discounts might not be paid specifically by reference to the attainment of turnover targets. Birds Eye pointed out that it was simplistic to suppose that the fact that certain discounts were paid retrospectively prevented them from being taken into account by retailers in their pricing policy. On the other hand, their desire to receive discount as soon as possible limited the proportion of total discount which they were prepared to accept retrospectively. As these discounts were part of an overall bargain negotiated between the processors and the retailers, they would be likely, if banned, to continue in another form (paragraph 283).

324. Retrospective discounts geared to specific sales targets are open to objection on various grounds. First, they encourage retailers to concentrate their purchases on a single supplier. This operates to the disadvantage of a supplier with only a narrow range of products. It also places Birds Eye in a strong position relative to Ross Foods and Findus, as a result of the greater strength which it derives from having a larger share of the market. While in principle there is nothing to stop Ross Foods and Findus from offering discounts on the same terms as Birds Eye, for them to offer a discount equal in money terms to that offered by Birds Eye would mean that the discount offered by Ross Foods or Findus must be higher as a percentage of the value of the purchases by the retailer; this is because the sales by Birds Eye to most outlets exceed those of either of its main competitors. Secondly, discounts related to turnover, whether paid retrospectively or in advance, are not directly related to cost savings in supplying customers. As a result they may not encourage retailers to order in such a manner as to minimise the costs of distributing to them.

325. We consider that retrospective discounts geared to specific sales targets are steps taken for exploiting or maintaining the monopoly situation. However, they are insignificant in relation to Birds Eye's total sales and such discounts are common throughout the grocery trade. Under Birds Eye's contemplated new discount structure, it proposes to reduce the importance of negotiated discounts, including retrospective discounts geared to specific sales targets. At the same time discounts related to a retailer's total purchases in the previous year will be a major factor determining discount under the proposed system. While these turnover-related discounts are not to be related to the attainment of sales targets and are not to be paid retrospectively, they are not necessarily cost-related and they will have the effect of giving an advantage to Birds Eye over smaller sup-

pliers of frozen foods. Nevertheless, we do not consider the adverse effects of turnover-related discounts to be as serious as the effects of the retrospective discounts geared to specific sales targets. We conclude that, as the anti-competitive effects of these discounts granted by Birds Eye are not substantial and as Birds Eye proposes to phase out these payments under its proposed new discount scheme, there is no case for interfering with them.

(e) Discounts for reserving cabinet space for Birds Eye products

326. Birds Eye explained to us (paragraph 284) that the amount of frozen food display space allocated by a retailer to Birds Eye affected the amount of business which the retailer would do with Birds Eye and the average size of drop which he would take. The amount of frozen food display space allocated by a retailer to Birds Eye, whether or not undertaken to be so allocated, was, therefore, usually an important consideration in the mind of Birds Eye and of the retailer in negotiations about discounts. Alternatively, if the negotiations turned on levels of turnover and size of drop, their outcome would in practice generally affect allocation of frozen food display space just as much as if the negotiations had turned on allocation of space. Birds Eye pointed out further that whether or not discount was expressed to be given by reference to allocation of display space was often largely fortuitous; the overall level of discount might be struck on the basis of expectations about size of turnover and size of drop rather than on the basis of precise conditions about allocation of display space. Birds Eye argued that, if commitments about the allocation of display space were outlawed, the average size of its deliveries to retailers would fall.

327. Ross Foods pointed out to us that it could not overcome the obstacle to its trade created by discounts given by Birds Eye for the exclusive use of cabinet space. If Birds Eye held 100 per cent of a retailer's account for frozen foods in return for an exclusivity discount of 1 per cent, and Ross Foods wished to quote for terms on a volume which was likely to represent about 20 per cent of the retailer's frozen food sales, Ross Foods had to be prepared to offer extra discount not of 1 per cent but of 5 per cent if it was to compensate the retailer for the loss of his exclusivity discount from Birds Eye on all 100 per cent of his turnover. Findus advanced the same argument to us.

328. We consider that discounts for allocation of cabinet space are more reprehensible than retrospective discounts geared to specific sales targets. The former type of discount has the effect of putting at a disadvantage the smaller supplier seeking to introduce his products into the retail market. The reservation of space in retail frozen food cabinets also has the effect of restricting competition between the three major suppliers. Both these effects are adverse to the public interest.

329. Discounts for the allocation of cabinet space are not directly related to cost savings in supplying customers. Although such discounts may indirectly encourage larger sizes of delivery, we do not consider that the discounts provide adequate incentive to the retailer to invest in additional cold storage which may be needed for large deliveries and so, in the longer run, to place larger and less frequent orders for frozen foods.

330. We note that Birds Eye has argued that the discounts for the allocation of cabinet space which it negotiates with its larger customers result from their bargaining power and not from any monopoly situation. We do not, however, regard Birds Eye as powerless to resist demands for such discounts. The smaller suppliers of frozen foods to the retail sector are in a weaker bargaining position *vis à vis* the large retailers than is Birds Eye, but do not, in general, agree to offer discounts related to the allocation of cabinet space.

331. We note that, in contrast to retrospective discounts linked to the attainment of target levels of turnover which are general throughout the grocery trade, discounts for allocation of cabinet space are peculiar to frozen foods.

332. We regard the discounts offered by Birds Eye for the allocation of cabinet space in retail stores as a step taken for the purpose of exploiting or maintaining the monopoly situation, and we consider that the practice operates against the public interest because it has the effects set out in paragraph 328. We do not consider that it would be satisfactory if Birds Eye were debarred from giving discounts for the allocation of cabinet space while other processors, particularly its two main competitors, remained free to give such discounts. The strength of Birds Eye in the market is not so great that it would be reasonable to deprive it alone of a means of protecting its trade and, in effect, to strengthen its rivals at its expense. We, therefore, recommend that Birds Eye should be debarred from giving discounts for the allocation of cabinet space (other than space in cabinets which have been provided for the retailer by the processor) but only if other important processors of reference frozen foods who give these discounts undertake to discontinue this practice.

(f) Cabinets on loan

333. The arrangements under which Birds Eye lends refrigerated display cabinets to some of its retail customers have been outlined in paragraph 132. While we acknowledge that the purpose of such loans in the past was to expand the amount of refrigerated cabinet space available in the retail trade rather than to maintain Birds Eye's monopoly situation, we consider such arrangements restrictive of competition since the terms of the loan require the retailer to stock the cabinet exclusively with Birds Eye products. In practice the restriction on competition is trivial since only about 130 cabinets, having an original capital cost of £25,000, were on loan by Birds Eye to retailers at the end of 1974. Ross Foods and Findus both lend cabinets to retailers under somewhat similar conditions and in greater numbers (see paragraphs 176 and 207).

334. Birds Eye has told us that it is its policy not to make further loans of refrigerated cabinets to retailers. If it had been otherwise, we should have found any continuing policy by Birds Eye of lending cabinets to retailers on restrictive terms to be contrary to the public interest and have recommended prohibition of further such loans.

(g) The pricing policy of Birds Eye, with particular reference to County Fair

335. In our view, no objection can be made to the practice, common in many trades, in particular the grocery trade, of offering large packs at lower prices per unit of weight than small packs and at a lower margin of profit to the supplier. This seems to us an effective method of reducing the cost of distribution.

336. In view of Birds Eye's wide product range and the relative frequency with which new products are added to the range, the pricing of the different products is a matter of some importance, even when, as in this case, we have no criticisms to make of the general level of Birds Eye's prices. Birds Eye gave us a full account of its pricing policy (see paragraphs 110 to 115). The company agreed that the prices of different products were such that they earned different margins, and claimed that this was 'entirely normal' and not against the public interest (see paragraph 280). From our analysis of the extent of competition faced by Birds Eye, both from other frozen food suppliers and from suppliers of other foods, we accept that in this case there are no grounds for criticising Birds Eye's product pricing policy.

337. We accept the explanation offered by Birds Eye as to why County Fair products appear to be priced below those of Birds Eye products (see paragraph 217). It would be a matter of serious concern if Birds Eye were to attempt to build up its business in the home freezer sector of the market by running County Fair at a significant loss over an extended period. However, because the County Fair operation is so new and relatively small and because Birds Eye told us that it was expected to break even in the near future, we find no reason to conclude that there is anything against the public interest in the pricing policy of County Fair.

Sale of frozen foods loose

338. As has been explained in paragraph 133, Birds Eye considers that the sale of frozen foods loose involves certain risks, in particular quality deterioration and unhygienic handling, and that the retention of the wrapper or carton to the point where the product is handled in the kitchen is the only certain way of avoiding the latter risk. Birds Eye explained to us that, though it was opposed to the sale of frozen foods loose, it could not prevent its products from being sold loose and could only make its views known; it was retailers who decided whether or not frozen foods were sold loose.

339. The sale of frozen foods loose has the merit of enabling the customer to buy the precise quantity which he needs at any time. But the views of Birds Eye about risks to hygiene are widely held. The precautions necessary to obviate these risks are costly in terms of staff. The attitude of Birds Eye seems to us not unreasonable but it is of limited influence in a matter in which the practices of retailers are decisive.

Views reported by the Trades Union Congress

340. In paragraph 268 we reported views which the Trades Union Congress had received from affiliated organisations with membership in the frozen foods industry and had reported to us. These views included a suggestion (see paragraph 268 (iii)) that we should recommend the introduction by the Government of a system for compulsory labelling of products with the name of the ultimate parent company of the producing company. We did not pursue this suggestion as it did not seem appropriate to do so in the context of an inquiry which was limited to the supply of frozen foods and in which we found a monopoly situation existing only in relation to one group of companies processing frozen food. The views reported to us by the Trades Union Congress also included

a suggestion (see paragraph 268(iv)) that we should investigate the effect on the frozen foods industry of the charges made by cold storage companies. We did not consider that we could properly widen our task to deal with this as we were concerned only with one group of companies supplying frozen food where a monopoly situation existed. Moreover, we received no complaints about the charges made by cold stores.

III Conclusions and recommendations

341. We conclude:

- (1) that a monopoly situation exists in the supply in the United Kingdom of frozen foodstuffs for human consumption as defined in our terms of reference;
- (2) that this monopoly situation is to be taken to exist by virtue of section 6(1)(b) of the Fair Trading Act 1973 because at least one-quarter of all the reference goods which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, namely Birds Eye Foods Ltd, MacFisheries Ltd, T Wall and Sons (Ice Cream) Ltd, The Walls Meat Company Ltd, Mattessons Meat Ltd, JP Wood and Sons Ltd and Marine Harvest Ltd, all seven companies being subsidiaries of Unilever Ltd;
- (3) that this monopoly situation exists in favour of Unilever Ltd;
- (4) that the granting by Birds Eye to retailers of retrospective discounts geared to specific sales targets and of discounts for reserving space in freezer cabinets for Birds Eye products is a step taken by Birds Eye for the purpose of exploiting or maintaining the monopoly situation;
- (5) that the granting by Birds Eye of discounts for reserving space in freezer cabinets operates, or may be expected to operate, against the public interest in that it has the effect of:
 - (a) putting at a disadvantage the smaller supplier of frozen foodstuffs seeking to introduce his product into the retail market; and
 - (b) restricting competition between the three major suppliers of frozen foodstuffs.

342. In view of our conclusion (5), we recommend that Birds Eye should be required to abandon its practice of granting discounts to retailers for the allocation by the latter of space in their freezer cabinets provided that the other important processors of frozen foodstuffs falling within the reference who give these discounts undertake to abandon this practice.

ALEXANDER JOHNSTON

D E BERNARD

F E JONES

MARGARET HALL

LEWIS ROBERTSON

RITA STEPHEN

Y LOVAT WILLIAMS (*Secretary*)

14 January 1976