

CHAPTER 8

Conclusions

The monopoly situation

8.1. Under the terms of our reference we are required to report whether there exists 'a monopoly situation in relation to the wholesale supply by manufacturers in the United Kingdom of Tampons'. We take the reference to include tampons supplied in the United Kingdom whether or not they were manufactured in the United Kingdom, and thus to include tampons manufactured by Tambrands at its factory in the Irish Republic and imported by the company for wholesale supply in the United Kingdom (see paragraph 3.4). Under section 6(1)(a) of the Fair Trading Act 1973 a monopoly situation exists if at least one-quarter of the relevant supply of tampons is by one and the same person. As we have shown in Table 2.4, in 1984 about 60 per cent of tampons were supplied by Tambrands Ltd and about 37 per cent by Southalls (Birmingham) Ltd.

8.2. We conclude that the market shares of these two companies constitute a monopoly situation under section 6(1)(a) of the Act in relation to the supply of tampons as specified in the reference.

Legal arguments

8.3. The only question concerning the public interest on which the reference requires us to report is whether any action or omission on the part of Tambrands and Southalls in respect of the prices charged, or proposed to be charged, for tampons operates, or may be expected to operate, against the public interest.

8.4. Before we consider the facts and the evidence relating to this question, it is necessary for us to deal with two points of law that were argued on behalf of Tambrands, the first of which would exclude the competence of the Secretary of State to make the reference and the jurisdiction of this Commission to determine the question.

8.5. It was put to us that as a matter of law the mere setting of prices by a company in a monopoly situation under section 6(1)(a) of the Fair Trading Act at one level rather than another (that is at a higher rather than a lower level) is not an 'action' within the meaning of section 49(2) and therefore cannot properly be the subject of a determination by the Commission. It was argued that an 'action' had to be accompanied by a positive purpose or intent to exploit a monopoly situation or that it must be wholly attributable to such a situation. The mere determination of prices in a competitive situation (as this was said to be) could not be an 'action' even when the company concerned had some discretion over prices.

8.6. We do not accept this argument. Section 49(2)(c) provides expressly that a monopoly reference may require the Commission to investigate and report on any action or omission in respect of matters specified in the reference.

Section 49(3)(a) states explicitly and without qualification that any matter may be so specified if it relates to 'prices charged, or proposed to be charged, for goods or services of the description specified in the reference'. These words are plain and clear; they are not qualified in any way by any reference to exploiting or maintaining a monopoly situation or to the prices charged being attributable to the existence of a monopoly situation. Hence, if a monopoly situation is found to exist in favour of any person or persons, the Commission can properly be asked to determine whether any action or omission by that person on a matter relating to the prices charged or proposed to be charged is against the public interest. This is a clear provision and we do not see any reason for interpreting the words in any other way.

8.7. Counsel sought to use the wording of the tailpiece to section 49(3) in aid of the construction for which he contended. He argued that the words '... of a kind such that ... that matter might reasonably be regarded as a step taken for the purpose of exploiting or maintaining that situation or as being attributable to the existence of that situation' equally qualified the preceding paragraphs (a) to (d) of the subsection, or should be construed to do so.

8.8. In our view this construction runs counter to the clear wording of the section. Section 49(3) is divided into two parts. The first part sets out four specific matters that may be specified in the reference, including prices charged. The second part, the tailpiece, provides that 'any matter not falling within any of the preceding paragraphs may be specified if it is of a kind such that ... that matter might reasonably be regarded as a step taken for the purpose of exploiting or maintaining that situation or as being attributable to the existence of that situation'. The repetition of the word 'matter' in the second part and the fact that the mention of the exploitation or maintenance of a monopoly situation refers in terms only to a matter not falling within paragraphs (a) to (d) make it clear in our opinion that the tailpiece is self-contained and, equally, demonstrate that paragraphs (a) to (d) are not to be qualified in a similar way.

8.9. It was also put to us as a matter of construction of section 84 of the Act that the objective 'of maintaining and promoting effective competition' between suppliers, at section 84(1)(a), was paramount; that it would not be open to us to recommend that prices should be reduced in the interests of consumers if it should appear that the price reductions would not also help to maintain and promote effective competition; and that we certainly could not recommend price reductions if they would tend to stifle competition by making new entry more difficult.

8.10. We do not find any such limitation in section 84. The wording is clear and there is nothing in the language used in the section or in any other part of the Act that requires such a narrow construction. Indeed it would conflict directly with the wording of the section, which requires the Commission, in determining whether a particular matter operates or may be expected to operate against the public interest, to take into account all matters which appear to them in the particular circumstances to be relevant. The section goes on to indicate five considerations to which the Commission shall have regard. These are merely stated in sequence, without any indication that any one of them

should have greater weight than or priority over any other. We therefore do not believe that the argument put to us is correct.

Current competitive conditions

8.11. In some respects the competitive situation for tampons looks much the same as that described in our previous report. The two major suppliers of tampons, Tambrands and Southalls, still account for well over 90 per cent of all tampons supplied in the United Kingdom, and are still by far the largest suppliers of applicator and digital tampons respectively. Both companies are still making substantial returns on capital employed from their United Kingdom tampons business; and their prices have not declined in real terms (indeed they have increased) since 1980. The volume of imports remains small and no competing United Kingdom manufacturer yet has a substantial share of the market. In 1980 Playtex had recently entered the market; in our previous report we took the view (paragraph 8.35) that Playtex would be in direct competition with Tampax, that as a result Tampax could be expected to lose some market share at least temporarily, and that Southalls might also lose some market share to users who wanted to try a new product. In the event, various factors (including publicity surrounding toxic shock syndrome, which could not have been predicted) led Playtex to withdraw from the market.

8.12. Against this the companies claim that there have in fact been marked changes since our last report in the direction of greater competition, with further such changes to be expected in the near future. They instanced the extent and nature of competition to tampons from external forms of sanitary protection as well as competition in the supply of tampons themselves. It is clearly necessary for us to examine both of these aspects of competition.

Competition between tampons and external products

8.13. There have undoubtedly been major changes—some of them very recent—in the nature of external sanitary protection products. The marked contrast between bulky looped towels and tampons has been greatly reduced by the development of thin press-on towels. These have the advantages of greater convenience and discretion in use, and individually wrapped thin towels can easily be carried in a handbag. Thin press-on towels are also being used by some tampon users as secondary protection or as alternatives to tampons; some are indeed now specifically marketed as alternatives to tampons. The price of external products has declined in real terms and a thin towel now costs about the same as a tampon.

8.14. In spite of the advantages of the newer types of towels there does not appear to have been any erosion of the market share of tampons since the time of our last report; the shares of 43 per cent (by volume) for tampons and 57 per cent for towels are now virtually the same as they were in 1979 (see Table 2.3). Nor has competition from the newer types of towels prevented increases in tampon prices in real terms (see Tables 6.1, 6.2 and 6.5).

8.15. Until 1980 the market share of tampons had been growing at the expense of external products, and this trend (as recorded in paragraph 2.10 of

our 1980 report) was expected to continue. It has not in fact done so. There are now numerous brands of the new external products being marketed by powerful competitors, and there is strong competitive pressure on the prices of external products. It is already clear that the expected growth of the tampon share has been checked. It may well be that, since these developments have been recent, the full impact on tampons is yet to come, particularly if young girls starting with towels become less inclined than formerly to switch to tampons.

8.16. At the time of our 1980 report, the evidence appeared to show (see paragraphs 8.20 and 8.21) that there was little effective pressure on tampon prices from external products and that tampons would be likely to maintain their share of the market even if there were some increase in their price relative to those of external products. We concluded that, although tampons were in competition with the rest of the sanitary protection market in the sense that they were used for the same purpose, there was little effective price competition.

8.17. We believe that the new external products are now much closer substitutes for tampons than was the case in 1980. In our view they are likely to continue to check the growth of the tampon market share even if, as seems likely, they also stimulate improvements in tampons. Because of the nature of the product it is difficult to judge how far price plays a part in the choice between internal and external sanitary protection; but we believe that external products, being both improved and now comparable in price, are likely to act as a more effective constraint or ceiling on tampon prices than was previously the case.

Competition within the tampon market

8.18. At the time of our previous report Tambrands made only applicator tampons and Southalls only digital tampons (except for relatively small quantities of applicator tampons sold in vending machines and as an own-brand by Boots). Since then each company has entered the other's field—Tambrands with its digital brand, Tampets (though this has proved unsuccessful and is being phased out), and Southalls with its applicator brand, Dr White's Contour. Contour has not yet achieved a large share of the market (see paragraph 2.20), but is providing effective competition to Tambrands' applicator tampons. In addition Southalls is offering further competition in the applicator sector through its ability and intention to expand its business in retailers' own-brand applicator tampons. It is now supplying both applicator and digital own-brand tampons to Sainsbury's.

8.19. In 1982 Kimberly-Clark entered the market with its Fems digital tampon. Its share of the tampon market is still only about 3 per cent, but its share of the digital sector of the market is about 9 per cent and it must therefore be offering effective competition to Southalls in that sector, as Southalls now is to Tambrands in the applicator sector. In terms of price competition particularly, Kimberly-Clark's entry is likely to have greater effect than did that of Playtex in 1980. Playtex tampons were marketed as a premium product priced higher than existing tampons, but Kimberly-Clark's policy is to price

Fems so as to be directly competitive with Lil-lets. In addition, Kimberly-Clark, having successfully competed for the contract, is now supplying a digital tampon for sale as Boots' own brand.

8.20. The development of retailers' own brands of tampons is a significant feature of the market (see paragraph 2.22). We believe that it will increase in importance as other multiple retailers begin to market their own brands. Retail brands sell their own brands cheaper than manufacturers' brands. By offering the consumer a cheaper alternative, own brands will act as a constraint on the prices of the principal manufacturers. In the longer run the successful establishment of new brands under well-known and trusted retailers' names is likely to some extent to erode loyalty to existing manufacturers' brands. It may also facilitate new entry, particularly by imports.

8.21. Hitherto, imports of tampons have not been a significant competitive factor, but Southalls claimed that imports now posed an important threat. Retailers wishing to market their own brand of tampon would look overseas if they were unable to obtain tampons of the quality they required at acceptable prices in the United Kingdom. We accept that there is a real threat of competition from imports in this way; and we have recently become aware that one retailer is already selling own-brand tampons imported from West Germany. We are aware also of the development in Europe of new, lint-free tampons which are regarded as a significant product advance and are already on sale in some European countries. We understand that such a tampon has recently been test-marketed in Australia and we were told that it could be introduced into the United Kingdom. Looking further ahead, Johnson & Johnson will be able by 1988 to terminate the agreement between its subsidiary Carl Hahn and Southalls and thus become free to market tampons in the United Kingdom (see paragraph 4.3). There are also other substantial companies that might decide to enter the market.

8.22. The current developments in the tampons market described above (paragraphs 8.18 to 8.21), while not yet having any great impact on the market shares or prices of Tambrands and Southalls, suggest a greater likelihood of effective constraint on their market dominance than that which was expected in 1980. In addition to the prospects for new entry, including imports, which admittedly are not wholly predictable, there is now the effect of the development of retailers' own brands in widening consumers' options, exerting pressure on prices and loosening brand loyalties.

The current effects of the monopoly situation

8.23. In the light of the findings in the foregoing paragraphs (8.13 to 8.22) we have looked again at the effects of the monopoly situation. In our 1980 report we said (paragraph 8.29) that because of the dominant position Tambrands and Southalls occupied in the tampon market, they had in our view been able to determine their prices without having to take into account possible competitive pressure from tampons similar to their own, and that they had in fact adopted pricing policies which they could not have adopted, and charged prices which would not have prevailed, in conditions of keener competition.

8.24. Even though improved external products are now closer substitutes for tampons, we have little doubt that the two companies (particularly Tambrands) still have a degree of discretion in the pricing of tampons such that the prices of their main brands are higher than would be the case if their market power were less.

8.25. This finding is borne out by the fact, to which we have already referred, that the companies were able to increase their prices in real terms after our 1980 inquiry. Tambrands told us that, during the period of price restraint as a result of the activities of the Price Commission (see paragraph 7.17), its tampon prices fell behind those of external products. The company had therefore sought to redress the balance, and had been able to increase its tampon prices at a time when the prices of external products were falling both relatively and in real terms.

8.26. Compared with 1979 (the last year recorded in our 1980 report), Tambrands' return on capital employed was reduced in 1980 and 1981, recovered in 1982, rose sharply in 1983 when it reached 80 per cent (historical cost basis), and was back to the 1979 level in 1984 (see Table 3.3). Southalls' return increased substantially in 1980, but declined from 1980 to 1984 (see Table 4.3). Its rate of return is still above the average rate (as shown in Appendix 2) for large companies, but almost in line with the average for companies classified under health and household products. Tambrands' rate of return is well above both. Tambrands' higher return may reflect in part the marked difference in sales volumes per employee as shown in Tables 3.4 and 4.4.

Conditions of entry

8.27. In our 1980 report we found (paragraph 8.13) that although there were a number of factors which would make it difficult to enter the market and to compete successfully with Tambrands and Southalls, there were no insuperable barriers to entry, nor any barriers which could be said to have been deliberately erected by the two companies themselves. We make the same finding now.

8.28. Machinery and raw materials are available from several sources. The importance which users attach to a safe and satisfactory product has led them to develop strong brand loyalty to Tambrands and Southalls, but there are other actual and potential manufacturers and retailers who seem to be capable of inspiring the requisite degree of trust.

8.29. We have no evidence of any restrictive or anti-competitive practices on the part of Tambrands or Southalls designed to exclude or eliminate new entrants. The evidence before us indicates that determined new potential entrants may be found among substantial companies with sufficient experience and resources not to be deterred from entry. The recent decision by the IBA to allow television advertising of sanitary protection (though only on an experimental basis) will facilitate the establishment of new brands and thus favour new entry. It will also facilitate the marketing of the new external products in more direct competition with tampons.

The public interest

8.30. In paragraphs 8.5 to 8.8 above, we have rejected the argument that as a matter of law the mere determination of prices by a monopoly supplier is not an 'action' within the meaning of section 49(2) of the Fair Trading Act. It was also put to us that on the facts of the present case any degree of discretion that Tambrands might have in relation to prices could not be said to amount to market power and could not therefore operate against the public interest. In our view no distinction can usefully be drawn between discretion over prices and market power. Discretion to set prices at one level rather than another is a manifestation of market power and is always a matter of degree. In the present case we have found (paragraphs 8.24 and 8.25 above) that market power exists, and we are obliged to consider whether any action in respect of the prices charged for tampons operates or may be expected to operate against the public interest.

8.31. In submissions to us on the facts it was also strongly emphasised that there was no evidence in this case of natural or artificially created barriers to entry or of anti-competitive practices on the part of the dominant suppliers designed to exclude or eliminate new entrants or to weaken competitors. Our finding on conditions of entry (paragraphs 8.27 to 8.29 above) endorses this submission. We accept that in these circumstances high profits may be attributable to superior entrepreneurial ability, successful innovation, and more efficient techniques of production and organisation. These are the very characteristics of competition which the Fair Trading Act seeks to promote, and it would be counter-productive to penalise their success. As was said in a famous American antitrust case 'Finis coronat opus. The successful competitor, having been urged to compete, must not be turned upon when he wins.'¹

8.32. This is not to say that, in the absence of anti-competitive practices and barriers to entry, high returns necessarily indicate a high level of efficiency, or that adequate conditions for competition can always be expected. Regulatory or other measures may need to be considered. Each case requires an assessment of the economic circumstances and their probable future development.

8.33. In deciding where the balance of public interest lies it is necessary to take full account of the longer-term consequences as well as the more immediate ones. Regulation of prices in the immediate interests of consumers may be justified where the prospects of promoting a more competitive environment are remote; on the other hand it may discourage investment, innovation and new entry that would otherwise be expected both to reduce future prices and to improve the range of goods and services available to the public. This distinction has been a significant factor in our deliberations in this particular case.

¹Judge Hand: United States v Aluminum Company of America (1945).

Conclusions

8.34. We therefore sum up our findings as follows:

- (a) Tambrands' return on capital employed has remained higher than it would be if the company had less market power. Southalls' return has declined.
- (b) We have not found any natural or artificially created barriers to entry or any anti-competitive practices designed to exclude competitors.
- (c) Since our last inquiry various changes in actual and prospective competitive conditions have occurred, notably the marked improvement and reduction in prices (both relative to tampon prices and in real terms) of external sanitary protection products, the increasing importance of retailers' own brands of tampons, and the increased probability of effective competition from new entrants to the tampon market.

8.35. In seeking to weigh in the balance all the factors relevant to the public interest, including in particular the interests of consumers and the desirability of promoting effective competition, we judge it more beneficial in this case that currently rewarding profit levels should act as a magnet to attract new suppliers to the market than that the risk should be taken through measures of price regulation of harming existing smaller competitors and inhibiting new entry.

8.36. We conclude that:

- (a) The market shares of Tambrands Ltd and Southalls (Birmingham) Ltd constitute a monopoly situation under section 6(1)(a) of the Act in relation to the supply of tampons as specified in the reference.
- (b) No action or omission on the part of those companies in respect of the prices charged, or proposed to be charged, for tampons operates, or may be expected to operate, against the public interest.

ALAN NEALE (*Chairman*)

C C BAILLIEU

L KELLY

M S LIPWORTH

S C LITTLECHILD

P K R MANN

N E D BURTON (*Secretary*)

25 November 1985