

## **International aspects**

1. In their 1979 report (paragraph 24, footnote 2) our predecessors remarked that

the practice whereby the ice cream manufacturer provides refrigerated cabinets to retail outlets on favourable terms is widespread in many European countries and in other parts of the world. The requirement that the cabinet may only be used for the products of the supplier is also widespread but it is apparently operated with varying effectiveness and in some countries the use of a cabinet for additional suppliers' products is not unknown. We have been informed that the system does not generally apply in the USA and has ceased to apply in Australia by virtue of the 1974 Trade Practices Act. Trade and climatic conditions differ of course from country to country. In the USA, for instance, where consumption of ice cream per head is much higher than in any other country, the main outlets are supermarkets and ice cream parlours frequently operating under franchise agreements. In Australia, where consumption per head is also much higher than in the United Kingdom, it has been reported to us that the ending of the tied cabinet system<sup>1</sup> has taken place at about the same time as a major switch in the ice cream trade from small stores to chain stores and supermarkets which is continuing.

2. We have not instituted special enquiries overseas but none of the evidence we have received suggests that a different view would be appropriate today.

## **Republic of Ireland**

3. We are aware of proceedings in the Republic of Ireland, where HB Ice Cream Ltd (HB), a Unilever subsidiary (with a market share there at least as high as BEW's in the UK), sought and obtained an interlocutory injunction to restrain Mars from inducing breach of contract by persuading retailers to put Mars products in HB's freezers. As a result of the interlocutory injunction Mars' market access fell from just over 40 per cent of retail outlets to about 20 per cent; and its market share also halved from under 4 per cent to under 2 per cent. Mars sought to have HB's freezer exclusivity agreements declared void as contrary to EC law, in particular Articles 85 and 86 of the EEC Treaty, and to regulations made under the (Irish) Restrictive Trade Practices Act 1972. It was acknowledged in evidence that Unilever subsidiaries (in common with other companies) operated exclusivity agreements in the UK, Denmark, the Netherlands, Germany, Spain and Greece.

4. In its judgment on 28 May 1992 the Irish High Court held that Mars had not established that (a) the agreements in question were prohibited by Article 85(1) and hence void under Article 85(2), and (b) that freezer exclusivity and price 'bundling' constituted an abuse of HB's dominant position under Article 86. The Court further held that the right claimed by Mars to store and display its products in cabinets owned and supplied by HB constituted an infringement of HB's right of property in the cabinets which was so radical in nature as to violate Article 222 of the EEC Treaty. An appeal against this judgment has been made to the Irish Supreme Court.

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<sup>1</sup>We [the 1993 Group] have noted that decisions of the Australian Trade Practices Commission of 9 March 1977, in respect of the Streets and Peters cases, denied authorization of exclusivity agreements under the Trade Practices Act.

## **European Commission**

5. The European Commission's decisions of 23 December 1992 in the *Schöller* and *Langnese-Iglo* cases in Germany (Cases IV/31.353 and IV/34.072) held, in respect of outlet exclusivity, in the case of Schöller that an individual exemption under Article 85(3) should be refused and in the case of Langnese that the benefit of the block exemption should be withdrawn. While not making any decision in respect of freezer exclusivity, the Commission mentioned 'the insulating effect on the relevant market as a whole' of this practice. One of the parties to the present inquiry cited the *Tetra Pak II* decision and the judgment of the European Court in *Delimitis v Henninger Bräu* in support of the view that freezer exclusivity was in breach of Article 85 and Article 86 of the EEC Treaty. We understand also that the European Commission has delivered a Statement of Objections which has been contested by the recipient, Van den Bergh Foods, the Unilever subsidiary with which HB was merged early in 1993.

## **United States of America**

6. The results of market research carried out in the USA on behalf of Mars were communicated to us in the form of a paper by Lexecon, the economic consultancy. They showed that in the USA, the top four manufacturers accounted for less than 60 per cent of total sales (compared with over 90 per cent in the UK). 86 per cent of freezers were retailer-owned, 9 per cent distributor-owned and only 5 per cent manufacturer-owned. A relatively high number of different manufacturers' products were stocked by retailers-on average, five per outlet, with only 11 per cent of retailers stocking the products of a single manufacturer. Distribution tended to be in independent hands; on average, the distributors interviewed carried the products of six different manufacturers and distributed to 1,500 outlets. Competition between brands was strong, the 20 best-selling products being made by ten different manufacturers. There was a high level of product innovation and new products could quickly establish themselves in the market. In short, Lexecon said, there was vigorous competition in an environment in which freezer exclusivity was uncommon.

7. The sources for this survey were Nielsen data; a questionnaire to distributors in the Boston and New England area; a survey of 465 convenience stores and petrol outlets in 25 US cities; and a headquarters survey of 13 leading convenience and petrol national retail accounts.