

List of issues put to BEW

A. Whether courses of conduct have been carried out

(a) The refusal to supply wrapped ice cream to wholesalers who are not dedicated distributors.

Issue A(a)(i) Whether BEW has pursued a course of conduct of refusal to supply distributors who also manufacture ice cream.

Issue A(a)(ii) Whether BEW could be regarded as having refused to supply franchisees¹ (who received preferential terms for supply to mobile outlets) or their customers with products for sale to retail outlets, and thereby pursuing a course of conduct under the terms of reference.

(b) The refusal to supply wrapped ice cream to wholesalers who are not dedicated distributors except on contractual terms less favourable than those on which BEW supplies wrapped ice cream to dedicated distributors (but excluding the refusal to supply wrapped ice cream for resale to mobiler retailers).

Issue A(b) Whether the granting of terms to some wholesalers (including franchisees for sales to retail outlets) less favourable than those to dedicated distributors is capable of amounting to a course of conduct as defined in section (b) of our terms of reference.

(c) The refusal to supply wrapped ice cream to wholesalers who are not dedicated distributors except with other benefits less favourable than those which BEW confers upon dedicated distributors, but excluding the refusal to supply wrapped ice cream for resale to mobiler retailers.

Issue A(c)(i) Whether the benefits which BEW confers upon dedicated distributors from the marketing activities of BEW, from their continuing involvement in maintenance and movement of freezers, from any financial support provided by BEW and from preference in supply at peak periods, are capable of constituting a course of conduct under the terms of reference.

Issue A(c)(ii) Whether the terms available to dedicated distributors for delivery as agents to BEW's direct accounts also confer a benefit on dedicated distributors and represent a course of conduct under the terms of reference.

Issues A(c)(iii) Whether dedicated distributors are also conferred a benefit from the availability of BEW's discounts or other inducements to retailers (including leisure outlets), conditional upon or linked to use of dedicated distributors rather than other wholesalers for delivery purchases, or other benefits available from BEW to retailers, and whether that is or are capable of constituting a course of conduct under the terms of reference.

(d) The granting of discounts to retailers who purchase BEW wrapped ice cream from dedicated distributors but not to retailers who purchase BEW wrapped ice cream from other suppliers. (BEW accepted that the granting of the retrospective annual bonuses and seasonal bonuses during 1997 represented a course of conduct under the terms of reference.)

Issue A(d) Whether the availability of other discounts to retailers, whether given to direct or indirect accounts, is also capable of constituting a course of conduct under the terms of reference.

¹The term 'franchisee', rather than 'mobiler wholesaler', is retained here because it was the term used in the document put to BEW.

B. Whether any of the courses of conduct identified in section A above amounts to an anti-competitive practice

Issue B(i) Whether the course of conduct reflects the most efficient or economic means of sale or distribution

Issue B(ii) What effect those courses of conduct have on competition in the supply of wrapped ice cream in the UK, particularly on the prospects for competition in distribution between BEW's dedicated distributors and independent wholesalers.

Issue B(iii) Similarly, the effects of the course of conduct on competition in supply of wrapped ice cream between manufacturers.

Issue B(iv) Hence, the effect of any such courses of conduct on competition in supply of wrapped ice cream to consumers.

C. Effect on the public interest

Issue C(i) Whether [any] anti-competitive practice [identified] adversely affects the choice of wrapped ice cream available to consumers.

Issue C(ii) Whether the anti-competitive practice limits the availability to consumers of other manufacturers' wrapped ice cream products and hence inhibits price competition.

Issue C(iii) Whether the total costs (financial and environmental) of distribution and the price of wrapped ice cream to consumers would be increased if competitors had to duplicate BEW's deliveries or distribution network or if distributors were unable to maximise the efficiency of their distribution systems.

Issue C(iv) Whether there are offsetting benefits to the public interest from any course of conduct which otherwise constitutes an anti-competitive practice (eg the maintenance of a comprehensive network for distribution and sale of wrapped ice cream, or the efficiency and brand coverage of BEW's distribution system).

D. Possible remedies

Issue D(i) Whether certain courses of conduct should be discontinued, eg whether BEW be required to allow franchisees to supply retail outlets on appropriate terms; whether there should be no differential between the terms and conditions of supply to dedicated distributors and those to other wholesalers; or no differential in discounts to retailers, depending on the method of distribution; or whether there should be specified maximum differentials.

Issue D(ii) Whether BEW's terms with retailers, dedicated distributors and franchisees, intended to take effect at the end of March 1998, would adequately remedy any such adverse effects.

Issue D(iii) Whether any additional services supplied by dedicated distributors should be contracted for separately by BEW and available to be undertaken by other distributors, eg movement of freezers, or delivery to direct accounts.

Issue D(iv) Whether any direct remedy for the adverse effects of anti-competitive practices (if any are identified) could undermine the viability of dedicated distributors and should therefore be coupled with a requirement on BEW not to prevent any distributors of its products (including dedicated distributors) from distributing those of other suppliers. (A further suggestion made to us was that to make products available on equal terms may still not be sufficient and that other remedies may include action to limit the extent of freezer exclusivity.)

Issue D(v) Whether any of the above remedies may cause BEW to take distribution in-house and in that case whether further action would be required to remedy any effects adverse to the public interest, eg a requirement that BEW should always make its wrapped ice cream products available to independent distributors on a no less favourable basis.