

# **The supply of impulse ice cream**

A report on the supply in the UK of ice cream  
purchased for immediate consumption



COMPETITION COMMISSION

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purchased for immediate consumption

**Presented to Parliament by the Secretary of State for Trade and  
Industry by Command of Her Majesty  
January 2000**



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<sup>1</sup>These members formed the Group which was responsible for this report under the chairmanship of Mr P G Corbett.

## **Note by the Department of Trade and Industry**

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Part I

# **Summary and Conclusions**

# 1 Summary

1.1. On 22 December 1998 the Commission<sup>1</sup> was asked to investigate and report on the supply of impulse ice cream in the UK (see Appendix 1.1). Unilever plc (Unilever), primarily through its subsidiary Birds Eye Wall's Limited (BEW), accounts for about 55 per cent of the supply of impulse ice cream in the UK, but about 65 per cent of wrapped impulse ice cream (the other categories of impulse ice cream being soft ice cream and scoop ice cream). The three major manufacturers of impulse ice cream—Unilever (predominantly BEW, although another subsidiary of Unilever also supplies the reference goods in Northern Ireland), Mars UK Limited (Mars) and Nestlé UK Ltd (Nestlé)—together account for about 72 per cent of all sales of impulse ice cream, but 86 per cent of sales of wrapped impulse ice cream. Only BEW has been consistently profitable. We identified a scale monopoly situation in favour of Unilever in the supply of impulse ice cream by manufacturers, and complex monopoly situations in favour of Unilever, Mars and Nestlé in respect of freezer exclusivity and outlet exclusivity. We judged that the market in Northern Ireland was different to that in Great Britain. We also judged that the segment of the market comprising non-wrapped impulse ice cream did not give rise to the same concerns as wrapped ice cream: our conclusions and recommendations therefore relate to the supply of wrapped impulse ice cream in Great Britain.

1.2. This is the fourth inquiry undertaken by the Commission into the supply of ice cream. In a monopoly inquiry in 1979, the Commission found outlet exclusivity to be against the public interest, following which outlet exclusivity by BEW and certain other manufacturers can only be at the written request of the retailer. In a monopoly inquiry in 1994, the Commission found that, in the circumstances of the market at the time, freezer exclusivity was not against the public interest.

1.3. In 1998 the Commission reported under the Competition Act 1980 on certain practices by BEW as regards the distribution of wrapped impulse ice cream, in particular the giving of more favourable terms to dedicated distributors—who distributed only BEW's products—than to other wholesalers. The Commission found in the 1998 report that distribution arrangements were of importance to competition between manufacturers due to the need to preserve the cold chain from manufacture to sale and to meet the considerable fluctuations in demand, and given the economies of scale by which unit costs reduce sharply, the greater the number of units delivered and the greater the density of outlets served. The Commission concluded that as a result of BEW's reducing the ability of distributors who were not dedicated distributors of ice cream to distribute BEW products (the leading brand), the ability of independent wholesalers to distribute other products was also adversely affected, thus reducing competition between manufacturers. However, the 1998 report noted a number of wider concerns about the industry (for example, exclusivity in distribution and freezer exclusivity) which the Commission could not investigate and suggested that, if the Director General of Fair Trading believed the matters giving rise to these concerns were or might be distorting competition and were not being alleviated, he should consider whether a wider review of the industry was necessary.

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<sup>1</sup>The reference was made to the Monopolies and Mergers Commission (MMC) on 22 December 1998. Section 45 of the Competition Act 1998, which came into force on 1 April 1999, dissolved the MMC and transferred its functions to the Competition Commission. For convenience, we use the term 'Commission' to refer to the Competition Commission or the MMC as the context requires.

1.4. Following the 1998 inquiry, BEW gave a number of undertakings not to discriminate in its terms of supply between dedicated distributors and other wholesalers. At about the same time, BEW terminated the contracts of its dedicated distributors and set up a new contracted-out exclusive distribution system called Wall's Direct. These steps largely undermined the purpose of the undertakings which concerned relativities between independent wholesalers and dedicated distributors.

1.5. During the current inquiry we received a wide range of complaints from manufacturers and distributors (although few from retailers or consumers), particularly about arrangements for distribution, freezer exclusivity, outlet exclusivity and discounts and other terms to retailers, particularly on the part of BEW, but also on the part of other major manufacturers.

## **Effects on competition**

1.6. As regards distribution, we believe that BEW established Wall's Direct in order to maintain an exclusive distribution system for a large part of its sales. We further found that BEW's published terms to independent wholesalers were considerably below both the unit costs of its exclusive distribution system, and the level needed to make an independent wholesaler sector of such size and coverage as to offer effective distribution of all manufacturers' products economically viable in the longer term. BEW denied that it had any incentive or intention to harm independent wholesalers, including the ex-dedicated distributors, but with the establishment of Wall's Direct we believe it is in BEW's interests to restrict the operation of independent wholesalers who supply the products of its competitors, and the evidence we saw suggested BEW expected Wall's Direct to take over a large part of that business. During our inquiry, indeed, some independent wholesalers (who were former dedicated distributors) ceased business or withdrew from wholesaling. We concluded that BEW's distribution arrangements adversely affect competition between distributors. This in turn has adverse effects on manufacturers, whose ability to compete effectively depends upon the availability of an independent wholesale sector which is able to supply their wrapped impulse ice cream products to retailers in multi-product drops, simultaneously with the supply of BEW products.

1.7. As regards freezer exclusivity, although there has been some reduction in the prevalence of exclusive freezers since the 1994 report, experience since 1994 suggests that BEW's freezer exclusivity limits the ability of other manufacturers to compete effectively or profitably with BEW. We have concluded that the practice of freezer exclusivity particularly by BEW but also by Mars and Nestlé restricts competition between manufacturers and distributors.

1.8. As regards outlet exclusivity, we found that the major manufacturers (BEW, Mars and Nestlé) have entered into agreements with some retailers to stock only their respective products, which has also adversely affected competition between manufacturers and between distributors.

1.9. Finally, we found that BEW has offered retailers bonuses and other terms which operate retrospectively (that is, higher bonuses are applied to the full value of purchases over a period once a particular level of purchases is reached) and unpublished discounts and price incentives which affect the ability of other manufacturers and distributors to compete.

1.10. We found that the effect on competition (and on the public interest) of each of these individual practices on the part of BEW was enhanced by the existence of the others, and by BEW's market share, its level of advertising expenditure and its strong brand.

## **The public interest**

1.11. We have concluded that the following practices operate and might be expected to operate against the public interest:

- (a) the establishment and maintenance by BEW of a distribution system which is exclusive and which BEW already uses for a considerable part of its sales and deliveries, and its supply to independent wholesalers on published terms which are below both the unit cost of its own distribution system and the level necessary to make an effective independent wholesale sector economically viable in the longer term;
- (b) BEW's arrangements for exclusive freezers; we believed that in the case of Mars and Nestlé the benefits of freezer exclusivity in assisting them to compete with BEW outweighed the adverse effects;
- (c) the outlet exclusivity arrangements of any major manufacturer with a turnover of more than £10 million in wrapped impulse ice cream in Great Britain (currently BEW, Mars and Nestlé); and
- (d) BEW's offering to retailers of retrospective bonuses and other terms, and of unpublished discounts and price incentives.

These practices adversely affect the ability of other manufacturers and distributors to compete, resulting in a reduction of choice of wrapped impulse ice cream available to the consumer, and in a higher level of prices than would otherwise be the case, and ultimately in a reduction of the quality of product and innovation.

## **Recommendations**

1.12. In considering the measures needed to remedy the adverse effects identified, our objective has been to establish a framework in which competition would be effective with as little ongoing regulation as possible.

1.13. On freezer exclusivity, we have recommended that BEW be prohibited from entering into any agreement or arrangement for capacity in any freezer in any retail outlet used to stock wrapped impulse ice cream, to be reserved for BEW's products unless 50 per cent of the display space and all of the storage space of the freezer is permitted to be used for other manufacturers' products. In our view, this would allow other manufacturers and distributors to compete to supply the remaining space in the freezer.

1.14. On outlet exclusivity, we have recommended that any manufacturer with a turnover of more than £10 million in wrapped impulse ice cream in Great Britain—currently BEW, Mars and Nestlé—be prohibited from entering into any arrangement with a retailer or controller of retail outlets that the wrapped impulse ice cream products of other manufacturers cannot be supplied at any outlet. Application of this prohibition to mobile vans and seasonal kiosks should be postponed until December 2002.

1.15. On terms to retailers, we have recommended that BEW be prohibited from offering to any retailer or controller of a retail outlet any scale of bonuses, discounts or rebates which operate retrospectively or under which the price for incremental sales is less than incremental costs. Given our other recommendations, however, we do not believe it is necessary or desirable to prohibit BEW from offering other published or unpublished price incentives.

1.16. On distribution, we considered remedies that would regulate the supply by BEW to independent wholesalers—such as specifying minimum terms—while allowing BEW to

maintain an in-house or contracted-out distribution system. However, we do not believe that an effective independent wholesale sector, whose economic viability depends on the terms on which it is supplied by BEW, can co-exist with a vertically integrated distribution system of any scale controlled by BEW. Thus we do not believe this would provide an adequate remedy.

1.17. We therefore believe that prohibition of the sale or delivery by BEW to retailers, or controllers of retail outlets, other than national accounts is the only action that would adequately remedy the adverse effects we have identified.

1.18. Urgent action is needed if the independent wholesale sector is not to be further diminished. If there is likely to be any delay in implementing these recommendations, interim measures, in particular a requirement that BEW supply independent wholesalers on minimum terms of 22.5 per cent of gross sales value (manufacturers' list price to retailers) and a prohibition on unreasonable refusal to supply by BEW, should be adopted.