6 Views of other parties

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Introduction

6.1. The views of a wide range of third parties were sought: processors and dairies, retailers, raw milk producers, trade associations, public sector bodies and other interested parties, including politicians, and individual consumers. Some 65 written submissions were received. The majority of these were not greatly concerned about the issues that were involved in the inquiry. Of the few that did express anxieties one, Express/Claymore, was Wiseman’s main rival in the market in Scotland; but there were some organizations and individuals, including politicians, who had various different concerns. This chapter summarizes the evidence that we received between March and October 2000; 13 hearings were held in this period.

Processors and dairies

Angus Dairies Ltd

6.2. Angus expressed its concerns about the hypothetical behavioural remedies published by the Commission on 27 June 2000. It said that the price middle-ground retailers paid for fresh processed milk had steadily declined since Express’s entry into the market and, in some cases, milk prices were at an uneconomic level for producers. It believed therefore that price controls were not required, and said that controlling Wiseman’s prices would create further damage: it would distort the market’s pricing structures. Furthermore, it believed that controlling prices would undermine the viability of medium- and small-scale processors and would give consumers fewer choices. It believed it was inevitable that the dairy-processing sector would move into fewer and larger hands. It saw prohibiting Wiseman from acquiring further processing plants as problematic as it damaged the interests of innocent third parties, for instance, those that wished to sell their businesses. Instead, if deemed necessary, the imposition of fines for anti-competitive behaviour was an appropriate remedial measure.

Arla Foods Plc

6.3. Arla (formerly MD Foods Plc) copied to us its earlier submission to the OFT in connection with the inquiry into the Scottish market for fresh processed milk. This said that Arla had supplied Sainsbury's ten Scottish stores for two years from its dairy in Newcastle. Arla subsequently lost the Sainsbury's Scottish business to Express as a result of supplier rationalization. The experience had, however, usefully shown that the economics of supplying fresh processed milk from Newcastle into Scotland were harder than having a platform over the border in Scotland. In addition MD had had a joint venture with McLeod's in 1995 and 1996. Arla regularly bought milk from Scotland, even though it did not supply customers there at present. It said that it was considering supplying Scottish customers once again and, were it to do so, might well deliver milk directly from England, or by establishing a new facility in Scotland, or it could acquire or set up a processing facility in Scotland.

Barclay's Dairy Foods Ltd

6.4. Six years ago, Barclay's Dairy Foods Ltd (Barclay's) bought its milk from Scottish Pride, Wiseman's and from Renfrew Dairy. The Renfrew arrangement had continued until Scottish Pride was sold to Wiseman. This left Renfrew and Wiseman as Barclay's suppliers and meant that Wiseman supplied 90 per cent of Barclay's business. In terms of service through promotions, modern packaging and thinking, Barclay's said that Wiseman was the best company that it had dealt with.

6.5. Barclay's said that problems had occurred only when Express entered the market in Scotland in June 1999. This was because Express saw Barclay's as an easy target to obtain some of Wiseman's market. Since Express's entry, Barclay's had seen some prices drop to less than 20 ppl for 2-litre cartons. As a middleman between the supplier and the market, Barclay's said that, in order to prevent canvassing of its customers by Express, it had started to buy some 15 per cent of its supplies from Express on the understanding that Wiseman accepted this decision and would not seek to undercut Barclay's. In other words, it had to give some business to Express at Wiseman's expense.

6.6. By November 1999, however, every week there were late deliveries or a shortage in delivery. Express had also threatened to target Barclay's business.

6.7. Barclay's acknowledged that Wiseman had a monopoly but said that, at the same time, it had provided a quality service and product to its customers. It said that the real cause for concern was players such as Express which had destabilized the market and was responsible for job losses.

Easter Weens Enterprises

6.8. Easter Weens Enterprises (Easter Weens), a cheese-making enterprise based in Hawick, said that the restrictions on the free marketing of milk were disgraceful and had led to its having had to suspend production in 1998. The present arrangements would lead to the vertical integration of the milk industry and a lack of competition. The MMBs were formed to preserve milk producers from the unfair buying power of the large dairy companies. These dairy boards should never have been disbanded. Raw milk and its products could be consumed with safety when produced by specialists, with beneficial effects to health. Easter Weens said that, unlike in England and Wales, it was illegal to sell raw milk for human consumption in Scotland. All this discriminated against the small specialist producer of niche market products.

Express Dairies plc and Claymore Dairies Limited

6.9. Express/Claymore's overall view of this case was that the facts clearly demonstrated that, without regulatory intervention, there was no prospect of fair and effective competition developing to the ultimate benefit of Scottish consumers in what Express/Claymore saw as the Scottish middle-ground market. This was because Wiseman was dominant in this market, currently having an estimated share of 83 per cent across all customer segments by comparison with the 52 per cent share it had had in 1996 prior to its acquisition of Scottish Pride; because it had abused its dominance and was likely to continue to do so; and because, should Express/Claymore be forced to leave the market, there would be no prospect of Wiseman facing any effective competition at all in Scotland. Wiseman had admitted, at the joint meeting which the Commission had arranged with the two companies early in the inquiry, that it was in a position to decide which competitors were legitimate.

Background

6.10. The company had purchased a 51 per cent interest in the fresh processed milk business of Claymore, then wholly owned by NMC, in December 1998. It said that, prior to 1992, when Wiseman had acquired Mackies, Claymore had not come across Wiseman as their respective businesses had operated in different areas in Scotland. However, Claymore had begun packaging and distributing the Fresh'N'Lo brand of milk from around 1990 onwards. This brand was acquired by Wiseman in 1997 when it purchased the fresh liquid milk business of Scottish Pride. It had subsequently more than trebled the royalty rate for the use of this brand. Prior to that, Claymore had in December 1994 very reluctantly agreed to a market-sharing agreement with Wiseman involving Claymore leaving the Grampian area in return for Wiseman agreeing not to operate in the Highlands and Islands area. Following an article in the *Scottish Farmer* on 24 January 1998 indicating that Express's owners might acquire an interest in Claymore, Wiseman had expressed its concern at this possibility to Claymore and had said that Claymore should expect pressure from its major customers in the succeeding months. Instead Wiseman had proposed that Wiseman itself should purchase Claymore's liquid milk business. This offer was declined; but Claymore found that, very soon after, stores and major customers serviced by it, such as CWS, had been approached by Wiseman. And despite the market-sharing agreement, Wiseman made an arrangement to supply the central delivery operations of C J Lang (Spar) with milk for Spar's Highland stores in May 1998.

6.11. Since early 1994 Wiseman had systematically eliminated competing suppliers of fresh processed milk in Scotland, as Express's table below shows.

Date	*Processor acquired*	*Acquired processor's share at time of acquisition (across all customer segments)* *%*
Feb 1994	Mackies	3
May 1994	Kennerty	15
July 1995	CWS	8
Sept 1995	Hamilton	9
March 1997	Scottish Pride	26
April 1999	Gilmours	4

Wiseman currently operated four fresh liquid milk dairies in Scotland, including three in the Glasgow area (at Belshill, the glass dairy at Rutherglen and the specialist dairy at East Kilbride) and one in Aberdeen. Wiseman also operated eight depots located in the Central Belt of Scotland and the east coast. Following Express's acquisition of a majority share in Claymore, Wiseman had immediately terminated the agency arrangement it had had with Claymore for the latter to deliver Wiseman milk; and in August 1999 Wiseman had also cancelled the licence Claymore had held since 1990 for packaging and distributing the Fresh'N'Lo brand as part of an attempt to secure Safeway's Highland region business.

Strategy

6.12. In 1995, Express had considered the possibility of acquiring Scottish Pride, but had rejected the idea on the basis that the investment would have been considerable in terms of capital and management time and effort. The company had, however, continued to monitor the Scottish market and, after

Express's acquisition of Scottish Pride's Kirkcudbright UHT dairy in May 1997, its interest in entering the Scottish market was renewed at the end of 1997. This was stimulated by Wiseman's very high market share and a suspicion that it was enjoying monopoly profits, particularly in the middle-ground market. A regular survey of retail prices of independent grocers in Scotland and in England and Wales, carried out by TNS, consistently showed higher prices for Scotland. In particular, retail prices for milk in the Scottish non-supermarket grocery sector were on average 8 per cent higher than in England and Wales (over the period April to December 1998) and wholesale prices were higher still. It was Express's perception that these price differences were unlikely to be attributable to cost differences. Moreover, the high average prices in 1998 masked the fact that Wiseman's prices appeared to be considerably higher than the average in areas where it faced no local competition.

6.13. In addition, most of Express's supermarket customers operated in Scotland, and there was therefore perceived to be an opportunity to build a major retail business in Scotland on the basis of its existing relationships in England. Its strategy for entry into Scotland was based on a presence in the populous Central Belt and a presence in northern Scotland. It had looked at the possibility of supplying Scottish customers from its dairies in northern England, but had discarded the idea for a number of reasons, including; the strong preference among Scottish customers for Scottish raw milk; distance from England; the need to invest in a network of depots and distribution facilities and; the importance of having Scottish management and corporate identity. Its Chief Executive noted in a board paper of July 1998, when approval was given to this strategy, that Express already had a UHT factory at Kirkcudbright and that 'one market nuance (in Scotland) of which we are aware is that the middle-ground chains and the Multiples [that is, the larger supermarkets] require an all-Scotland supply. [

Details omitted. See note on page iv.

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6.14. [

Details omitted. See note on page iv.

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6.15. [

Details omitted. See note on page iv.

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6.16. To support the operations at Gilmours and Express/Claymore, Express had identified a factory at Coatbridge which would initially be used as a distribution hub but could eventually be converted into a modern fresh milk processing facility when critical mass had been achieved in Scotland. At that point, Gilmours dairy would be closed. However, on 3 April 1999, Wiseman announced the purchase of Gilmours over a shorter timescale than Express had been planning and with an offer that exceeded Express's. Express considered it strange that, having been offered a sum by Wiseman, Gilmours did not then revert to Express (with which it had been in discussions until this time) in order to establish whether Express would be willing to revise its offer. It was notable that, as recently as a year earlier, Gilmours had invited Claymore to submit a joint complaint to the OFT about Wiseman's anti-competitive conduct in the Glasgow area. Given Wiseman's acquisition of Gilmours, Express's business plan was rendered redundant, with the consequence that there were no expansion plans for Claymore, which had a 5 per cent market share.

6.17. Following Express's acquisition of Claymore, Wiseman had also attacked the Express/ Claymore business in other ways—principally through the removal of business agented to Express/ Claymore: securing Express/Claymore's major-volume customers; forcing down prices in Express/ Claymore's core trading area (the Highland region); the purchase of AMCo to inhibit expansion by Express/Claymore, to force up Express/Claymore's raw milk cost, and to restrict Express/Claymore's ability to balance its raw milk supplies; and the removal of Express/Claymore's licence to produce milk under the Fresh'N'Lo brand. Express/Claymore had a modern plant in Nairn which supplied the great bulk of customers in the Highlands and Islands—according to Express, equating to about 5 per cent of Scottish demand. Following Express's investment in Claymore, and Wiseman's subsequent targeting of the Express/Claymore business, Express/Claymore had lost a significant number of customers in its core area (equating to over [✄] per cent of Express/Claymore's middle-ground business (by volume)). The result was that Express/Claymore moved from a small profit in the first week of Express's investment to losing [*Details omitted. See note on page iv.*] six months later. By spring 1999, therefore, Express/ Claymore faced three options:

(a) first, to liquidate the Express/Claymore business which would have involved substantial costs;

(b) second, to continue to trade only in Claymore's traditional core area of activity, as imposed in 1994 by Wiseman. However, having lost material sales volumes, and being on notice to lose even more, there would have been no future for the business and liquidation would only have been delayed; or

(c) third, defensive expansion into Aberdeen and the Central Belt in order to sell the milk which it was contractually bound to purchase from NMC.

With a reasonable expectation of swift action by the OFT, it was decided that *(c)* was Claymore's only option. In the event, when Express/Claymore entered the Central Belt, Wiseman responded with ever deepening price reductions. Despite this reaction, however, by the end of February 2000, Express/ Claymore [*Details omitted. See note on page iv.*]. This demonstrated that there was a desire in the market for a credible alternative to Wiseman.

6.18. Express/Claymore was still making [✄] losses despite having taken remedial action. The losses were wholly attributable to Wiseman's targeting of Express/Claymore's key accounts and to Express/Claymore being forced to make marginal sales over considerable distances at low prices and higher costs. This situation was unsustainable. However, Express remained very interested in operating in Scotland and had invested significantly in a Scottish processing facility. From having previously supplied very few customers north of the border, it had now become the second largest supplier there through its controlling stake in Express/Claymore, and the relationships it had built up with other Scottish dairies such as SMD. It had told its customers north of the border that it was in Scotland for the long term. Express had also taken the decision [*Details omitted. See note on page iv.*] and it was currently reviewing all its options.

6.19. In relation to the allegation made at the joint meeting (with Express and Wiseman) that Express's investment was a market wrecking strategy, the company observed that any such strategy would be entirely illogical because, in the absence of a dominant position, there was simply no prospect that Express or Express/Claymore would be able to recoup the purchase price and recover the very substantial losses that Express/Claymore had suffered as a result of Wiseman's targeting. Wiseman, on the other hand, would—in the absence of intervention—be able to recover through price increases any reduced profit once Express had left the market. Further, it was bizarre to suggest that, as 49 per cent shareholders in Express/Claymore, NMC farmers would have had any interest in pursuing any other than a profit-maximising strategy. In this connection they had welcomed Express/Claymore's decision to make sales into the Central Belt after it had lost 45 per cent of its volume by the end of April 1999 as a result of Wiseman's activities. Moreover, the Express/Claymore directors had a fiduciary duty to act in the interests of all Claymore's shareholders including NMC, which had supported the decision to make sales to the Central Belt.

The market

6.20. Express/Claymore considered that the relevant geographical market for the supply of fresh processed milk to middle-ground customers was no wider than Scotland. On current levels of cross-border trade in fresh milk, as at September 1999, there were virtually no imports of fresh processed milk into Scotland. The fact that there were so few imports into Scotland reflected, in Express/Claymore's view:

(a) First, prohibitive transport costs for dairy processors in England wishing to supply middle-ground customers in Scotland. Distance was a significant factor in milk supply and a new entrant to the market in Scotland would need to have processing capacity within Scotland. While Wiseman might have supplied milk from Glasgow to Manchester, a distance of 200 miles, supply from England to Scotland generally was a different matter and generally unrealistic given the considerable distances involved in servicing the whole country, which would mean a requirement to distribute through a network of local depots in Scotland.

(b) Second, the preference of consumers in Scotland for Scottish milk. Independent research indicated that over twice as many consumers in Scotland would prefer to buy Scottish milk rather than English milk from a corner/grocery store, even if Scottish milk were to be 10 per cent more expensive. When M&S in Scotland moved its business to an English supplier (from the SMMB's processing arm) in 1991 the Scottish tabloid press ran a campaign to encourage consumers to boycott its stores, and consequently, M&S saw a reduction in sales. In addition, Sainsbury's recent contract with Arla, although met from Newcastle, required the dairy to process raw milk brought down from Scotland. In any event, in effect all middle-ground milk sold in Scotland was Scottish milk. Processors who transported raw milk from Scotland to northern England and then imported processed fresh milk to the Central Belt would face additional distribution costs, which were high relative to Claymore's average prices. The costs would be higher still in relation to Dundee and Aberdeen. Moreover, the motorway system in Scotland was well developed only in the Central Belt. Supply elsewhere was primarily by rural roads, adding to costs and journey times and shortening the effective life of the milk.

(c) Third, there were a number of other barriers to trade: the average cost per litre of a secondary distribution network depended upon having significant volumes in a densely populated area; the establishment of such facilities would involve incurring sunk costs in relation to, for example, fitting out refrigeration equipment, IT systems, staff training etc; and entry would occur only if the profit opportunity was perceived to be long lasting. However, Wiseman's reputation as a highly aggressive dominant supplier would make severe post-entry targeting highly likely. Moreover, there was no evidence that imports were triggered by price differences. Indeed, Express's decision to invest in Claymore was influenced by the belief that Wiseman had been able to charge excessive prices in Scotland.

If it were viable for middle-ground customers to import fresh processed milk from England, it was relevant to ask why they had not done so previously when prices were higher in Scotland than in England. Express/Claymore was aware of only one customer, [✂], currently importing English milk into Scotland, accounting for at most 0.05 per cent of Scottish consumption.

6.21. In addition, Wiseman had also engaged in substantial price discrimination which implied that there was not an unbroken chain of substitution linking overlapping local areas, even within Scotland. Wiseman also had a policy of supplying free branded refrigerators to its middle-ground customers. So any new entrant would face additional capital expenditure replacing them. This Wiseman practice was designed to increase barriers to entry. Finally, in considering the likelihood of imports in sufficient volumes to constrain Wiseman's conduct, Express said that it should be noted that English processors within 'striking distance' of the Central Belt had already tried to enter the Scottish market and had failed (MD Foods Plc) or withdrawn (CWS/ACC). Accordingly, there was no justification for treating the middle-ground market as any larger than Scotland.

6.22. As far as the relevant product market was concerned, Express/Claymore considered that it comprised fresh processed liquid milk to middle-ground customers. The retail prices of middle-ground retailers and the larger supermarkets displayed very different characteristics. In particular, the retail prices for the latter in Scotland tracked very closely the retail prices of the larger supermarkets in England and Wales. However, the retail prices of middle-ground retailers in Scotland followed a very different trend. So the conditions of competition in the middle-ground and the larger supermarket sectors were materially different, such that these sectors should be regarded as separate product markets.

Operational issues

6.23. Since this inquiry began, Express/Claymore said that it had rationalized its operations in the Central Belt. The depot at Coatbridge had been closed, because Express's logistic arm had recently acquired Blakes, with a refrigerated storage facility in Airdrie (east of Glasgow) that could be used to supply customers in Scotland. Express had also entered into agency agreements with four dairies to process milk on its behalf: [

Details omitted. See note on page iv.

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Competition issues

6.24. In Express/Claymore's view, prior to Express's investment in Claymore there had been no effective competition between Wiseman and Claymore. Claymore's own board records showed that it had decided not to compete with Wiseman because of the threat of Wiseman targeting Claymore's customers. More generally, although as a consequence of the Commission's 1996 Wiseman/Scottish Pride report[1] Wiseman had given undertakings to the Secretary of State intended to allow the DGFT to monitor its pricing strategy and to identify either excessive pricing or predatory pricing, it was clear that the monitoring regime had had no such deterrent effect and that the undertakings had failed in their intentions.

6.25. Express/Claymore made a number of allegations about Wiseman's anti-competitive behaviour which are discussed in Chapter 3 (paragraph 3.12 and Appendix 3.2) and Chapter 4 (paragraphs 4.248, 4.253, 4.255, 4.259, 4.263 and 4.269). It also believed that, as a consequence of Wiseman's dominant position, Scottish Milk was in fear of it, not least because Scottish Milk was dependent on that company for the sale of its raw milk and feared that Wiseman would lure away its member farmers if Scottish Milk did not do what Wiseman wanted. Express/Claymore also suggested that Scottish Milk's purchase of SMD had been made with Wiseman's approval, both because Wiseman itself might not have been given regulatory approval to purchase this processor and because it was a means of preventing entry into Scotland of any major England-based processor. Express/Claymore said that it would appear that the aim of the co-operation between Wiseman and SM was to preserve Wiseman's large fresh milk business, with SM being left to supply the raw milk and to provide the balancing manufacturing capacity in relation to longer-life processed dairy products.

6.26. Commenting on the targeting by Wiseman of Express/Claymore's key customers following Express's acquisition of a majority stake in Claymore in December 1998, Express/Claymore said that while Wiseman had claimed merely to have responded commercially to aggressive competitor activity, the reality was that Wiseman had responded to the perceived threat to it from a change in the ownership structure at Claymore in order to protect its monopoly position in Scotland. Express/Claymore had not been in competition with Wiseman in early 1999 and had not supplied a single litre of milk outside its normal trading area until late April 1999. The company believed that Wiseman's actions in the six months following Express's investment had had a single objective: to force the closure of Express/Claymore and therefore the exit of Express from the market in Scotland before Express/Claymore was in a position to become a material threat to Wiseman's monopoly. If Wiseman's targeting of the Express/Claymore accounts that it had not previously supplied, together with the termination of its agency agreement with Claymore, were the most profitable courses of action for Wiseman to take, then why had Wiseman not taken these courses of action before Express's investment in Claymore? If Wiseman were successful in forcing Express/Claymore out of business, and therefore the exit of Express from the

[1]See footnote 1 to paragraph 2.27.

Scottish market, then it would have extended and reinforced its monopoly position in Scotland. With no effective competition, middle-ground prices would undoubtedly return to their previous monopoly levels.

6.27. It was also untenable for Wiseman to argue that its selective targeting of Express/Claymore's largest customers with discriminatory low prices (often conditional on all-Scotland deals), and its very low prices and free goods to small accounts in northern Scotland at significantly lower prices than those paid by customers located near its dairies, constituted a proportionate response to competition. Express's investment in Claymore had not increased Claymore's market share and, following Express's failure to acquire Gilmours, Express/Claymore had no market share ambitions. There was no basis for concluding that a pre-emptive strike to eliminate Claymore and Express could be a proportionate response to competition. Wiseman had clearly stated at the joint meeting organized by the Commission that it had acted in the way that it had because it had perceived Express to be an 'illegitimate competitor' in Scotland, and that it would have acted in a different manner if the investor in Claymore had been, for example, a Norwegian co-operative. This statement clearly demonstrated Wiseman's ability to act independently in the marketplace by deciding who should and who should not be permitted to enter and survive in the market. Wiseman's conduct was all the more extreme given that, in selectively targeting Claymore's customers, it had engaged in exactly the conduct which the Commission had been concerned about in its 1996 report on Wiseman and Scottish Pride. Wiseman had been engaging in very material price discrimination which was not cost-related. Coupled with Wiseman's admission at the Commission's joint meeting that it was able to determine which entrants to the Scottish market were 'legitimate' and those which were not, this price discrimination was clear evidence that competition in Scotland was ineffective. Competition would not be ineffective if the scope of the market were genuinely wider than Scotland and/or Wiseman faced effective competition from local Scottish processors.

6.28. Express said that comparisons with its English dairies showed Express/Claymore to be efficient. And it was the only facility in Scotland to be approved by the larger supermarkets, other than Wiseman's. There was no reason for it not to be profitable. But no business, however efficient, could survive its customer base being selectively targeted with very low prices, as Wiseman had done by displaying tactics that were a textbook of exclusionary activity. These had allowed it, as the dominant undertaking, to strengthen that position and to maintain profits. Express/Claymore had no doubt that Wiseman's prices to CWS involved the deliberate sacrifice of profits in a manner which corresponded to the OFT research paper's definition of predatory behaviour. Express/Claymore had been supplying CWS's north Scotland stores at [✂] ppl ([✂] ppg) and Express/Claymore believed Wiseman's price to CWS elsewhere to have been similar. Wiseman would have needed to operate at a marginal cost of less than 20 ppl (91.5 ppg) for it to have been as profitable for it to operate with the former Claymore business as it had previously been without it. Such a figure would have been impossible in serving high-cost Highland outlets. Express/Claymore believed Wiseman's marginal cost was between 28.6 and 33 ppl (130 to 150 ppg). Due to Wiseman's targeting, Express/Claymore had been forced to cut prices substantially to retain its customers—by a simple average of [✂] per cent in a year to the 11 largest (and [✂] and [✂] per cent, respectively to two customers). Wiseman had charged 62p for a 2-litre unit of milk in Thurso, in the far north, while charging £1.20 near its Aberdeen dairy. Despite losing a sizeable volume of business in the Highlands and Islands in the first half of 1999, by March 2000, Express/Claymore had increased its share of supply in Scotland from the 5 per cent held by Express/Claymore at the end of 1998 to 8 per cent. It had raised the output of the dairy at Nairn from the equivalent of [✂] million litres a year to [✂] million litres, over the same period. However, Express/Claymore's profitability had been severely damaged over this period, due to the loss of a number of major accounts in the Highlands, significantly reduced prices on its retained business in the Highlands (resulting from Wiseman's highly selective price cuts in the area), and significantly higher distribution costs associated with supplying customers in the Central Belt.

6.29. Express/Claymore provided over a dozen examples of Wiseman cutting prices by over 25 per cent in Aberdeen and the Central Belt. If, prior to Express's investment, Wiseman's prices had been high enough to encourage new entry, then it had probably been charging excessive prices. If its prices had previously been at a competitive level, it would not have been able to offer the significant discounts that it had offered in targeting Express/Claymore customers without starting to make losses. Prices would undoubtedly rise if Express/Claymore left the market. Wiseman's targeting activities, which could not be related to any real cost savings, also deterred entry, by encouraging the belief that entry costs could not be recovered even if, prior to entry, Wiseman's prices were excessive. The targeting was exclusionary in its object and effect, possibly predatory, and ultimately abusive.

6.30. Wiseman's practice of offering low prices conditional on acceptance of all-Scotland deals was a further abuse of its dominant position. Such practices were abusive because they had the effect of denying other processors access to important customers in the market. As a local processor, the Express/Claymore facility was not a cost-effective supplier for the whole of Scotland and had no interest in placing itself at a competitive disadvantage by trying to be one, whereas it was very competitive in northern Scotland and the Aberdeen area. In the few cases where the company had offered all-Scotland deals to middle-ground retailers, it had done so only after Wiseman had offered them very low prices which were conditional on them agreeing all-Scotland deals. Express/Claymore said that its loss of the key CWS and Alldays contracts to Wiseman was due to such behaviour and showed the anti-competitive effect of Wiseman's deals, despite Express/Claymore's ability to offer similar deals in its core area. Express/Claymore had asked CWS to be allowed to tender for its northern Scottish stores and, later, to supply CWS's Highland stores at the same price that Wiseman was supplying the rest at; but CWS refused, explaining, according to Express/Claymore, that Wiseman's price was conditional on it being for an all-Scotland deal. In addition, it was Wiseman which had initiated this deal at the end of January 1999, according to the information given to the OFT by CWS. All-Scotland deals had not been a major middle-ground market feature prior to Express's arrival. Express/Claymore said that this reflected either illegal market-sharing or the lack of cost effectiveness of such contracts—either way they were anti-competitive. Express referred to a number of cases of the European Court and decisions of the European Commission which indicated that:

> An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty … Obligations of this kind … are not based on an economic transaction … but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.[1]

6.31. Express/Claymore said that while the provision of refrigerators was a common feature of selling milk to middle ground retailers in Scotland, it was not 'normal' business practice and Claymore did not normally do so. The only occasions on which it had supplied free refrigerators were when it had been necessary to win the business of a retailer which had already been provided with a free refrigerator. Wiseman had increased its provision of free refrigerators following Express's investment in Claymore, and Express/Claymore considered this to be an attempt to raise the barriers to expansion facing Claymore.

6.32. The company also provided a number of examples of Wiseman having denigrated the Express/Claymore business to Express/Claymore customers, a further instance of Wiseman abusing its dominant position. And, commenting on the effectiveness of competition from Wiseman's smaller rivals, it said that the acid test was whether it was likely that such processors would respond to a price increase by Wiseman by expanding their sales so dramatically as to render the price increase unprofitable. A much more likely outcome was that these small processors would choose to match such a price increase and to shelter under the 'price umbrella' provided by Wiseman's higher prices, rather than risk retaliation from Wiseman, as was recognized by the Commission in its 1996 report.

6.33. Express/Claymore did not consider that small-scale processors in Scotland provided effective competition to Wiseman because small processors with less than 1 to 2 per cent market share could not achieve economies of scale in purchasing, production and distribution, and therefore could not compete vigorously on price; there were risks to smaller players engaging in aggressive competition with Wiseman, namely the triggering of predatory or aggressive responses; no small processor could ignore Claymore's recent experience. Wiseman's control of the Scottish market was strengthened by its influence over raw milk supply through its influence over Scottish Milk and its control of AMCo; middle-ground retail prices had not tracked those in England and Wales; competition from smaller processors clearly had had little or no bearing on Wiseman's overall prices in Scotland, or on its ability

[1]*Hoffman-La Roche v Commission*, Case 85/76 [1979] ECR 461.

to discriminate against certain customers; and there was evidence that market sharing had been imposed on small players.

Exclusion and foreclosure of the market

6.34. The company's allegations in respect of Wiseman's efforts to target key Express/Claymore customers so as to exclude Express/Claymore and foreclose the market are discussed in paragraphs 3.12, 4.248, 4.255, 4.259 and 4.263. In connection with the loss of Express/Claymore's accounts with CWS, Alldays and Aberness (Mace), Wiseman had stated that it was responding to competition. But it could have challenged for this business at any point prior to Express's investment in Claymore. The fact that it did not challenge for the business strongly suggested that it did not think that these contracts would increase its profits. The burden on Wiseman was to explain how, immediately after Express's investment in Claymore, it suddenly became profitable for Wiseman to supply these accounts. This argument also applied to the packaging and distribution agreement which was terminated by Wiseman after Express's investment in Claymore. If, prior to Express's investment in Claymore, Wiseman considered that its profitability was best served by the agreement, this must have been because Claymore was able to supply these accounts more efficiently than Wiseman. Accordingly, termination of the agreement must have reduced Wiseman's profits compared with what they would otherwise have been—the hallmark of a predatory strategy. The change in strategy by Wiseman could only credibly be explained by some benefit to Wiseman that had offset the reduced profits it would have made itself—this could only be the elimination or weakening of a competitor now perceived to be dangerous.

6.35. Express said that Wiseman's acquisitions of Gilmours and AMCo had had the effect of weakening Express/Claymore as a potential competitor to Wiseman in the future. Further, Wiseman's purchase of AMCo had damaged Express/Claymore's competitive position by raising the raw milk price received by the former members of AMCo and so forcing Express/Claymore to pay more to the farmers who supplied it; and by preventing Express/Claymore from having easy access to additional raw milk supplies and forcing up the price Express/Claymore had to pay to its farmers to retain their loyalty thus foreclosing AMCo supplies and so requiring the dairy at Nairn to source milk from Scottish Milk's depots, located farther afield. Wiseman's acquisitions of Gilmours and AMCo had had the effect of weakening Express/Claymore as a potential competitor to Wiseman in the future. Additionally, Wiseman's purchase of Gilmours had removed a major opportunity for Express or any other potential market entrant to purchase a significant existing business servicing middle-ground customers in the Central Belt, thereby strengthening Wiseman's dominant position. Both the Gilmours and AMCo acquisitions had served to strengthen Wiseman's position in the market and weaken that of any potential competitor, including Express/Claymore. In such circumstances, it was difficult to reach any other conclusion than that Wiseman had illegally abused its dominant position in the Scottish milk market.

Market sharing

6.36. Express's allegations on market sharing are discussed in Appendices 3.2 and 3.3. The company said, in connection with the 1994 market sharing deal between Wiseman and Claymore, that although the arrangement had led to an extra 4,500 or so litres per day being processed at Nairn, overall it had operated against Claymore's interests. The quality of the customers Claymore had gained was inferior to those it had lost; and the territory over which it was left to operate was sparsely populated with high transport costs. Express claimed that Claymore felt that it had had to agree to the arrangement because it feared the commercial pressure (via retaliation and targeting) that Wiseman could have applied had Claymore not accepted the proposal. The Claymore board minutes demonstrated how reluctantly it had entered into this arrangement. Wiseman's actions had also raised Claymore's costs and had prevented it from becoming an effective competitor to Wiseman, as larger customers within its area (for example, Tesco) were referred to Wiseman and Claymore was prevented from expanding its sales to more populous adjacent regions such as Aberdeen. While it had been claimed by Wiseman that the agreement had been a business swap arrangement aimed at simplifying invoice trails, invoicing had not in fact been simplified—customers served and invoiced by Claymore were transferred to Wiseman and after the arrangement, Claymore had delivered milk on an agented basis to a number of accounts on Wiseman's behalf. The market-sharing arrangement was therefore evidence of Wiseman's market power to set the terms on which its competitors were permitted to 'compete' in the market. Between the date of the agreement (8 December 1994) and the date of Express's investment in Claymore (5 December 1998), neither Wiseman (with two exceptions) nor Claymore delivered milk outside their designated areas. Wiseman, however, did disregard the arrangement on two occasions; first, when Tesco built new stores in Aviemore and Inverness in 1997 and, second, in relation to C J Lang (Spar). Neither was an example of normal competition: the C J Lang case followed a meeting at which Wiseman had warned Claymore in the light of a press article about Express's interest in Claymore, while, on Tesco, Wiseman had advised Claymore not to try to supply the firm.

6.37. Claymore had been an unwilling participant in the arrangement, but Express considered that the arrangement had brought a considerable number of benefits to Wiseman: an unchallenged monopoly in Aberdeen, the major population centre in northern Scotland; a more concentrated area of supply (the Grampian area) which was cheaper to serve given the population density and Wiseman's existing infrastructure; an exit from unprofitable business in Fort William and Kingussie, together with a payment from Claymore of £75,000; the acquisition of more attractive business, ie supply to the major chains, entailing larger drop sizes and accounts settled promptly, which constituted a growing business sector; a formal introduction to CWS, a major retailer in Scotland which Wiseman had not previously served (Wiseman subsequently acquired the CWS milk processing activities in May 1995); and a compliant partner in Claymore to whom Wiseman could subsequently 'agent' business it gained on an all-Scotland basis, with Claymore bearing the cost of distribution to the remoter areas. Wiseman could dictate prices with the threat that it would come into the Claymore territory if Claymore did not comply with Wiseman's demands to act as its agent.

Conclusions and remedies

6.38. The facts merited only one conclusion: Wiseman's behaviour, in targeting Express/Claymore following Express's investment, had been an abuse of market power which justified the imposition of robust and effective sanctions. Express considered that if the Commission were seen to approve of conduct of this kind, such as to conclude that Wiseman's reaction to Express's entry was within the bounds of legitimate competition between an incumbent and a new entrant, there was no hope for the opening up of competition in the middle-ground market in Scotland for the benefit of consumers. Express/Claymore made no special pleading for the Claymore plant. It plainly could not withstand its current losses but Claymore could make a significant contribution to the economy of northern Scotland and to the competitive process. Its closure would lead to serious adverse consequences. At least under conditions of fair and effective competition it had a chance of survival. There was no doubt that the Express/Claymore plant would prosper if it were located in England, which was a fully competitive market.

6.39. In the 1996 Wiseman/Scottish Pride report, the Commission had raised a number of concerns in relation to Wiseman's then market position in Scotland. Far from proving a deterrent to Wiseman, that report was virtually a blueprint for market domination and exclusionary conduct. Express/Claymore considered that Wiseman had wholly disregarded UK and EC competition law. In such circumstances Wiseman should not benefit from the abusive conduct through which it had damaged the competitive process, as well as the interests of consumers and farmers.

6.40. As an efficient supplier of fresh processed milk within Scotland, Express had no doubt that Claymore would prosper in an environment of healthy and effective competition, particularly bearing in mind that it was the only non-Wiseman processor within Scotland to have been approved by the larger supermarkets, and that it benefited from excellent raw milk supplies from the NMC farmers.

6.41. Express/Claymore believed that the fundamental source of the various abuses was Wiseman's monopolization of the Scottish market. The most obvious solution, therefore, would be a structural remedy consisting of the divestment of Wiseman's Aberdeen and East Kilbride dairies. The introduction of an effective third force into the Scottish market, together with the resultant reduction in Wiseman's market share, could be expected to meet the fundamental objectives of negating Wiseman's excessive market power without materially reducing its efficiency, and thereby creating a market structure whereby processors could compete on their merits and consumers would be protected in the long run.

6.42. However, divestment would need to be supplemented by a number of other measures in order to manage the transition from monopoly to competition. In particular, Express/Claymore strongly advocated a non-discrimination remedy which would prevent Wiseman from selectively targeting smaller competitors, whereby only a subset of consumers would benefit from price cutting (and these only in the short term), and from offering 'all-Scotland' deals as a means of foreclosing a significant part of the Scottish market from smaller processors which could not offer such deals on a cost-effective basis. Under this remedy, Wiseman would be required to sell milk at the same *published* prices to all customers within defined geographical zones, with published volume discounts also being available provided that they could be objectively justified.

6.43. Such a remedy would ensure that any price cuts on the part of Wiseman were genuinely cost driven, since the cost of predation or other selective targeting would be increased. Wiseman would also be prevented from charging excessive prices to certain customers. This remedy would not prevent Wiseman from competing on its merits and passing on any cost advantage to consumers.

Mr Jim Gilmour

6.44. Mr Gilmour said that before Wiseman purchased it, Gilmours was a family-owned business based in Ayrshire, with a dairy in Newmilns and a depot in Kilmarnock. In 1983 it had produced on average around 2 million litres of milk per year. Over time, Gilmours had expanded and extended its operations beyond its local Ayrshire market to customers which were based as far away as Edinburgh and Carlisle. By the time the company was sold to Wiseman in April 2000, its milk production had increased to around 18 to 20 mlpa.

6.45. Mr Gilmour said that, prior to Wiseman's acquisition of the company, Gilmours often took customers from Wiseman; while Wiseman also took customers from Gilmours. Commenting on the sale of the dairy to Wiseman, Mr Gilmour confirmed that it was he who had approached Wiseman about the acquisition. He also told us that he did not tell Wiseman the identity of the other bidder. From the point of view of Gilmours' owners, the price which Express was offering was less of an issue than how the purchase was to be structured; Wiseman had offered a more attractively structured deal and a sum marginally higher than Express was proposing to pay. Express wanted to buy only a controlling interest in the dairy (51 per cent) with the existing directors continuing to be involved in the business for a number of years. It told them that the plan was then to use Gilmours to compete with Wiseman in the Central Belt. The directors had not been attracted by this proposition, fearing that the strategy would lead to their interest in the remaining 49 per cent of the business losing value if the competition with Wiseman were not a success. They were also concerned about the way in which Express conducted the negotiations. They feared that its lack of urgency might indicate an underlying lack of interest. Mr Gilmour said that the reason why he and his fellow shareholders were considering selling up was that their business had grown tenfold over the previous decade, but could not expand further as the plant was now working to the limits of its capacity and needed to be modernized. To stay in the industry would have required a substantial degree of capital investment, which they were not sure they could justify—hence their desire to get out at the top of the market. Mr Gilmour said that around August 1997 Express had approached Gilmours to enquire if its shareholders were interested in selling the company or part of it to Express, which was considering entering the market in Scotland. Express had told Gilmours it was concerned that Wiseman was poaching its business in England, and that it was therefore considering entering the market in Scotland to try to halt this trend. Express had offered to buy a 51 per cent stake in Gilmours, with the option to buy the remaining 49 per cent within five years. Despite its apparent wish to act with urgency to retaliate against Wiseman, Mr Gilmour said that, when it came to negotiating the purchase of his firm, Express was extremely slow and indecisive. He said that Express's indecisiveness was one reason why he approached Wiseman whom Gilmours preferred as a buyer. The second reason for choosing Wiseman over Express was economic efficiency, as he also believed that Wiseman was a stronger company than Express in this respect. Third, he would have been employed on a performance-related basis which, given Express's proposed confrontation with Wiseman, was an unattractive prospect. This confrontation could have reduced the value of Gilmours' retained 49 per cent shareholding—possibly to zero. It was rumoured that Express/Claymore was losing money at a rate of £2 million a year. Mr Gilmour also said that Express's aim to reduce Wiseman's profits in Scotland could well be detrimental to small processors, as the inevitable price war following Express's intervention could damage the ability of such processors to compete in the market in Scotland.

6.46. Mr Gilmour said that he did not view the Scottish milk market as separate from that in the rest of the UK market. He acknowledged that price differentials for milk might exist, or had existed, between England and Scotland, but he said that these differences were influenced by transportation costs. He said that, from his own experience, Scottish consumers preferred Scottish milk and that consumers associated the Gilmours brand with Scottishness.

6.47. He acknowledged that, prior to Express's entry into the milk market in Scotland, Wiseman had been the dominant producer. Express's entry had made the Scottish milk market more competitive; however, he did not view this increased competitiveness as a wholly positive development, and believed that in the long run it would mean that there were fewer small producers left in Scotland. Mr Gilmour thought that the Claymore dairy, while relatively modern, was less efficient than Wiseman's larger plants.

6.48. Mr Gilmour denied that, in the past, there had been any collusion between Scottish milk processors. Nor did he believe that the sale of various components of Scottish Pride had been influenced by collusive agreements. He denied that there had been any price-fixing agreements, as had been suggested, between Wiseman, Drakemire, Hamilton and Gilmours; or that price-fixing behaviour was characteristic of the milk market in Scotland. On the contrary, the market was characterized by 'dog eat dog' tactics. Gilmours, Graham's and Wiseman had, as they expanded rapidly, taken business from each other and other processors. With change as fast and as wide-ranging as it had recently been in Scotland, it would be difficult to sustain a charge of market sharing—which could more realistically be a feature of more static and mature markets.

6.49. If Express were to leave the Scottish market, Mr Gilmour believed that Scottish Milk might purchase the Claymore business.

Grahams Dairies

6.50. Graham's is a family business based at Bridge of Allan, with depots in Fife and Alexandria. The company said it also had two small depots that it used mainly for distribution to doorstep deliverers. It said that a very small proportion of distribution was done from these depots. It supplied middle-ground retailers, including symbol groups, and hotels, restaurants, garages and corner shops. It employed about 100 full-time staff. Graham's said that over the last few years it had grown its business by acquisition and also by picking up businesses that had gone into receivership, or had been taken over and sold on by other companies, such as Scottish Pride and Gilmours. The company had grown tenfold over the last decade. Rather than using the nature of the business as a guide, it had segmented its middle-ground customers by the coverage of its operations, principally by whether or not they were Scotland-wide retailers and customers.

6.51. Graham's said that its main competitors fell into three tiers: first, Wiseman and Express; second, SMD (ex-Drakemire); and third, small family businesses and small farmer businesses. Currently, there stood somewhere in the region of 60 liquid milk businesses operating in Scotland. The number of liquid dairies had decreased in the last three or four years following increases in the price of raw milk; however, in the last year or so, raw milk prices had fallen, and there had been a decline in those leaving the industry. There had also been a number of small farmer businesses entering the market. Graham's expected to see a continuing flow of farmer operations into the market over the next few years, and this would increase the competitive situation in Scotland. Graham's did not feel that there was any strong preference among consumers for Scottish milk.

6.52. Graham's said that it competed with Wiseman and Express in its own area of operation, which was from Dundee down throughout the whole of central Scotland; with SMD in the Glasgow and Edinburgh areas, and from Glasgow towards Stirling; and with the smaller processors in their own areas. Graham's had lost business to, and gained business from, all its competitors. It was currently down 5 per cent, having lost business to Express, since Express began operations in Scotland. And it had also lost a significant amount of business to Wiseman, particularly in the six months to the end of April 2000. As regards inducements, Graham's said that the provision of refrigerators was a standard feature of selling milk to middle-ground retailers in Scotland, and this was a normal part of doing business in Scotland. Graham's explained that, from June 1996 for two years, there had been a time-limited no-compete agreement with Wiseman which was later registered. Under it, Graham's had purchased retail business from Wiseman and Wiseman had purchased doorstep business from Graham's; Wiseman had agreed to exchange its middle-ground retail business in the area around Stirling and Falkirk with Graham's doorstep business in roughly the same area. There was also a two-year no-compete clause. Commenting on a report we had received from a different participant in the market which had claimed that Wiseman and Graham's had arrangements in place to agree wholesale prices to middle-ground retailers and other customers, and to compensate Graham's—by means of uncontested access to new customers—when it lost contracts to Wiseman in the Glasgow area, Graham's denied that there was any truth in this report. It said that rumours of market sharing were rife in the milk business and that it had never entered into any such agreements, formal or informal, with Wiseman. Its continuing expansion was a counter to any allegation of market sharing.

6.53. Graham's said that the main obstacles to entry to the processing business were the geography of the country, its low population and the spread of the population. It did not believe that it was possible to grow a new business in Scotland without the support of supermarkets. However, this was not easily feasible, as supermarkets were increasingly looking for fewer suppliers of fresh milk; this was of great concern to Graham's. Graham's thought that the Claymore dairy, while relatively modern, was less efficient than Wiseman's larger plants. Asked about the costs and difficulties facing dairies located outside Scotland in supplying fresh processed milk to customers located in Scotland, Graham's thought that distribution costs and the type of service that customers required from fresh milk suppliers were quite demanding. Graham's also said that diesel costs had dramatically increased over the last few years. It mentioned a catering company which supplied milk from England to Scotland, along with other types of food.

6.54. Graham's said that it was extremely concerned about the price war between Wiseman and Express, as this was having a very serious effect on its own business. In Graham's view, the prices in the deals being offered by Express to its customers were unsustainably low; Graham's own operation could barely sustain the prices that it was currently having to offer, especially when looked at in the light of its distribution costs. Graham's believed that Express was subsidizing its business in Scotland from its control of the English market; according to rumours widely circulating in the market, Express/Claymore was expected to lose between £2 million and £3 million this year on its Scottish operations. [

Details omitted. See note on page iv.

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Mr McLeod

6.55. Mr McLeod, a small dairy farmer, said that 95 per cent of his business was in doorstep delivery and the remainder was to small corner shops. In his area, the other suppliers to the small stores were Whites Dairies and Angus. Wiseman sold produce to the bigger stores such as Tesco and the Co-op. Mr McLeod noted that Express/Claymore did not operate in the area and that there had been no observed price changes.

Mackies of Scotland Ltd

6.56. Mackies said that it was not aware of any middle-ground retailers having suffered as a result of Wiseman's dominance. In the Central Belt of Scotland in particular there were still a number of smaller suppliers offering a reasonable choice to independent retailers. However, experience had shown that the small-scale operations of these suppliers meant that they were unable to get their unit costs down to the level available from efficiently run large-scale businesses using automatic machinery. Mackies said that the Claymore dairy, while relatively modern, was thought to be less efficient than Wiseman's larger plants. It would be unfortunate if the smaller suppliers were to suffer because of the current price war between the two dominant suppliers.

6.57. Mackies said that it was not party to Wiseman's pricing policy regarding middle-ground retailers, but thought that it would be logical for smaller runs and smaller deliveries to be reflected in higher wholesale prices. Such a pricing policy left room in local markets for the efficient, smaller and often farm-based processors. Mackies had little doubt that as Express, through its investment in Claymore, had aggressively tried to force its way into the middle-ground market, Wiseman's had reacted with price cuts rather than lose customers. Retailers were the only winners as profit margins shifted to them from the processing sector. There was little evidence of any benefit to the consumer; local employment would be reduced if smaller operators were squeezed out, and primary producers would be squeezed even more at a time when most were already operating at a loss.

6.58. Mackies observed that Express had decided to tackle Wiseman on its home ground; hence the present price war. It was Express that had complained about Wiseman to the competition authorities—not the retailers. Express's motives were questionable because, Mackies suspected, it was feeling the competitive pressure that Wiseman was creating in England, and its complaint against Wiseman might simply be a disruptive ploy.

6.59. In terms of milk processing, Scotland was a small market with little room for two major players as well as its small number of smaller local processors. Mackies noted that, by comparison, the English market was ten times bigger, with four businesses possibly accounting for over 80 per cent. Economies of scale were a fact of life in the liquid milk sector. Thus, Mackies believed that Scotland's dairy industry as a whole was better served by having one strong, efficient and profitable liquid milk processor subject as it was to the OFT monitoring any misuse of power by overseeing its pricing policy. The Scottish market was open to English-based companies, as was the English market to Scottish-based companies: it was a UK market. Efficient transport systems and the power of supermarkets, with their huge central delivery capability, ensured that attempts to use any local dominance to inflate prices had no, or very limited, effect. It was the power interaction between supermarkets and major processors that established the baselines/benchmarks for the wholesale price of liquid milk across the whole of the UK.

6.60. Mackies believed that securing competition was not the only way forward. As product and service companies—through amalgamation and takeover—concentrated into a smaller number of national, international and global conglomerates, this ensured that competition was impossible. The Commission should ensure that consumers got the best deal; the competitive process was not the only way to deliver that. The current, unstoppable, worldwide movement towards the concentration of business was driven by the goal of increased profits coming from unit cost reduction. Governments, through their competition authorities, needed to run with this tide, aiding and encouraging efficiency and cost-reducing amalgamations and partnerships, rather than trying to prevent them. But, in doing so, the authorities must develop new tools that ensured that these massive potential gains of concentration were passed on to the consumer, and not just to owners and shareholders.

Meikle's Dairies Ltd

6.61. Meikle's Dairies Ltd (Meikle's) said that it was initially cautious of Wiseman's acquisition of Gilmours as it had acted as both a customer and a supplier to Gilmours and felt that Wiseman's involvement would damage its business. However, contrary to its initial fears, Meikle's said that it had built a strong and mutually-rewarding relationship with Wiseman. As an example of this relationship, Meikle's said that Wiseman became its supplier shortly after it had decided to discontinue the production of its own milk. After this change occurred, Meikle's said that Express/Claymore targeted its wholesale business by offering free refrigerators and by offering milk at sub-market prices. In a bid to retain its client base, Meikle's had lowered its prices for a number of months and, in some cases, it had provided milk at a loss. Meikle's was unsuccessful in retaining several of its customers which opted for Express/ Claymore's more attractive prices and free refrigerators. Meikle's said that Express/Claymore intended to target Wiseman's business. In fact, one of Express's employees was quoted by Meikle's as saying that Express's intention was to target businesses that sold Black & White milk—the Wiseman brand marketed by Meikle's.

6.62. Meikle's mentioned eight previous customers who had been enticed away from Meikle's by Express/Claymore's low prices and the provision of free refrigerators. It also listed six other customers which remained loyal, even after Express had offered to lower its prices to them by a further margin.

Stratton Depot Ltd

6.63. Stratton Depot Ltd (Stratton) said that it ran a small processing business in Inverness. It said that it was hit by lower price margins resulting from the price war between Wiseman and Express. It said that the price war was likely to bring some short-term benefit to consumers. However, in the long run, it would weaken competition and consumer choice in the area as it would drive out third party operators.

6.64. Stratton said that it was severely disadvantaged by the Express/Claymore producer co-operative (NMC), which had a local monopoly in the supply of raw milk to processors. The disadvantage arose because Stratton bought its raw milk from an aggressive competitor. It believed that Express had acted unfairly; for example, without any prior notification, Express had changed the price that it charged Stratton from 22 ppl to 25 ppl.

6.65. Stratton said that it was in the position of competing with Express/Claymore in the market place, and that it relied on that company for raw milk supplies. It also said that it had a trading relationship with Wiseman.

A dairy manager

6.66. One dairy manager said that his company had suffered at the hands of Wiseman, which had earlier been responsible for putting it out of business. He was now operating a wholesale dairy business serving shops and houses in part of the Central Belt. One of his colleagues in the same company also told us that the activities of Wiseman's and Graham's could drive this dairy out of business. The colleague said that he had worked for Scottish Pride but also had experience with other fresh milk processors, such as Graham's and Wiseman.

6.67. While working for one of these, the colleague said that he had become aware of market-sharing arrangements that took place between Wiseman, Graham's and Drakemire (now SMD). He said that, under these arrangements, Graham's was given the Stirling and Falkirk areas and Drakemire was given an area in Glasgow; and that the Wiseman/Graham agreement was still operating. He also said that, for several years from the mid-1990s onwards, he had been aware of agreements between these two whose purpose was, among other things, to provide some offsetting arrangement for the one for milk volumes lost to the other.

A former milk retailer

6.68. This former milk retailer used to retail milk in northern Scotland, but ceased operations due to the shrinking market. In the 1960s most local shops had sold locally-produced milk, but now many had closed because of competition from large supermarkets, open seven days a week. Those remaining were tied to buying groups (for example Mace, Spar, Costcutter), all of which had contracts with Wiseman for the supply of milk. Local milk suppliers had lost customers as a result of pressure on the shops by Wiseman and by the buying groups which had allegedly been known to link the price charged for milk with that for other goods (for example, bread), according to whether they bought Wiseman's milk. It would be virtually impossible for any milk supplier to start up and compete against Wiseman. Producers which sent their milk to AMCo, which had been taken over by Wiseman, now had no option but to sell to Wiseman: the price of raw milk had fallen from 22 to 16 ppl. The price war between Wiseman and Express did not help the independent dairies. Wiseman's aim had been to get 100 per cent of the fresh processed milk market in northern Scotland, although that would now be more difficult with Express on the scene.

A long-established milk producer/retailer

6.69. A long-established milk producer/retailer gave its opinion that Wiseman had used its considerable size and power over the last few years to establish a near-monopoly in the Scottish market, to the detriment of the industry and consumer choice. Following its acquisition of Gilmours and an agreement that Meikle's (which was bottling for Gilmours) should cease milk processing, Wiseman had aggressively cut its prices to the complainant's doorstep customers, down to 95p for 2-litre containers. This was substantially below the price charged before the Gilmours/Meikle's deal, and also 40 per cent below Wiseman's doorstep franchisees' prices (£1.56 for 2 litres) in Edinburgh.

6.70. By removing Meikle's from milk processing and offering enhanced terms to sub-purchasers of bottled milk, Wiseman had substantially strengthened its position in the market. At the same time, Meikle's had begun an aggressive canvass of the complainant's semi-retail customers (shops, hotels, garages), offering them considerable price reductions below its own previous prices, together with free Wiseman refrigerators, orange juice and point of sale material as incentives. This had led to a loss of customers, lower turnover and an enforced reduction in prices by the complainant. Although Wiseman claimed that its actions were in response to an extreme marketing campaign by Express, the latter did not appear to have canvassed either retail or semi-retail customers in the area.

A milk wholesaler

6.71. A milk wholesaler told us of his experiences with Wiseman and Express. When Scottish Pride went bankrupt he and a small group of colleagues had signed a deal for the supply of milk with Wiseman, to be renegotiated after three years. One of the group contacted Express which offered a price undercutting Wiseman, and also convenient milk storage facilities. He said that the group was told that Express had allocated a £10 million budget to make inroads into the Scottish dairy milk industry. Following a further meeting with Wiseman, at which it disclosed the Express price list, the group decided to continue dealing with Wiseman because, he said, its package of proposals was more suitable and Wiseman had treated the group very well in the past.

A small milk producer/retailer

6.72. This retailer ran a small milk processing business in central Scotland. It said that it believed Wiseman controlled the Scottish milk market, and it feared that if it were to be named in our report, Wiseman would seek retribution against it. Wiseman, and other processors which operated in the same area, were also trying to compel this retailer to raise its prices so that they could increase theirs. To do as they were pressing it to would not be in its commercial interests. This retailer stated that Wiseman controlled the Scottish milk market and that Wiseman cooperated with Graham's for their mutual benefit but to the detriment of other processors. This retailer had experienced problems with Wiseman regarding its returnable containers and that this had led to a financial loss for its business.

6.73. It also stated that Wiseman had acted with Graham's to pressurize and influence other processors' pricing policies. This was designed to allow Wiseman and Graham's to charge higher prices by eliminating lower prices in the marketplace. Wiseman would deter customers from seeking other suppliers and entice them back from other processors by offers of free milk. This was designed to limit the expansion of smaller operators. In addition, one of Wiseman's former customers whose shop this retailer had begun to supply, at a competitive price and with good service, cancelled its order as Wiseman had offered it free milk for four weeks if it resumed its previous status as a Wiseman customer.

An industry participant

6.74. A former industry participant, who was closely involved in the dairy industry in northern Scotland in the early 1990s said that, in the 1980s and early 1990s, a number of dairies had been active in the Grampians and in the Highlands and Islands. Kennerty, for example, operated mainly in the Aberdeen area and only became significantly involved in the area when the Northern Co-operative Society transferred its engagements to CWS. Kennerty took the opportunity to purchase depots in Kingussie and Fort William. In the same period, Claymore made an agreement to supply all CWS's stores in the Highlands and Islands and the Aberdeen area.

6.75. In addition to Kennerty, Mackies of Rothienorman and Mitchells of Inverurie operated in the Grampian region. Wiseman and Scottish Pride also serviced a number of stores in the Aberdeen area. The major dairies in the Highlands were Allarburn, Farmers Dairy and Stratton Dairy. In 1993/94, Kennerty was sold to Wiseman.

6.76. In 1994, Wiseman offered Claymore an exchange-of-volume agreement which aimed to allow both parties to eliminate unnecessary administrative costs and to concentrate their activities more profitably within an area that was closer to their home bases. In effect, the proposal meant that Wiseman would exchange Kennerty's milk volumes in the Highlands area for Claymore's in the Aberdeen area. Both parties believed that the exchange of milk volumes would provide efficiency improvements in their overall costs and distribution.

6.77. Although the agreement between Wiseman and Claymore was reached freely, this participant believed that Claymore had no option since Wiseman had a reputation as a ruthless competitor. Without the agreement, it was believed that Wiseman had the potential to take Claymore's contracts with CWS and with its other main supermarket purchaser, Safeway.

6.78. This participant said that, at the time, neither Claymore nor Wiseman saw the agreement as a market-sharing agreement. It was seen purely as a business swap agreement. Indeed, the participant believed that there was evidence that the agreement provided a degree of stimulus for greater competition in the area.

Retailers

Aberness Foods Limited

6.79. Aberness was a long-established family-owned distribution and retail business employing 600 people and based in Aberdeen. It supplied and serviced some 160 retail stores in Scotland operated by Mace and Morning Noon & Night, and also managed 27 company stores of its own, trading as A R Gray (Retail). It also acted as the procurement agent for all these. The processors which Aberness had negotiated deals with for the supply of milk were: Wiseman, Express/Claymore (including Inverness Farm Dairies) and Mitchells. The major supplier was Wiseman. The retailers benefiting from this arrangement could order supplies from any of these, the invoicing being done centrally through Aberness. Aberness said that it had no favoured supplier and no favoured terms.

6.80. Aberness said that in 1994 the price of milk from both Wiseman and Claymore was 44.6 ppl (for 2-litre cartons). That price had remained stable until 1997 when both producers reduced the price to 39.5 ppl and then to 39 ppl. Following another period of stability, price competition between the two to secure business from all-Scotland multiple retail stores led to further reductions. Aberness approached the two producers and in April/June 1999 secured price cuts to 37.5 ppl and 36 ppl.

6.81. In July 1999, Express offered milk at 29.5 ppl to Aberness's company-owned stores, while keeping the price to the independent businesses at 36 ppl. Wiseman had then countered with 31 ppl for stores owned by the company and by Morning Noon & Night. It had also offered a loyalty bonus plus support for new store listings, in the form of free on-loan chillers and start up stocks.

6.82. Express had then improved its offer to match Wiseman in all respects but remained at the lower price of 29.5 ppl. Wiseman finally returned with an offer of milk at the same price of 31 ppl, but with an increased loyalty bonus and new store listing allowance. Aberness had accepted this offer on behalf of its company-owned stores, Morning Noon & Night and the Mace independent retailers. In August 1999, Express had agreed to supply milk at the same invoice cost as Wiseman to the independents, which remained free to choose from any of the three producers.

6.83. Aberness said that the decisive factor in its decision was the service that it had received from Wiseman; price was secondary. The service that it had received from Wiseman was worth more than 1 ppl. It saw the continuation of the business depending on Wiseman maintaining exacting standards on service and price, and Aberness said that it could withdraw from the deal at any time if it felt that Wiseman's performance was falling short.

6.84. Aberness said that it did not believe that the supply of fresh processed milk to middle-ground customers was a separate market from supply to major supermarket groups. It thought that virtually all the independent wholesale and distribution stores in Scotland were members of buying groups, thereby strengthening their market power.

6.85. Aberness said that, as far as it was concerned, there was no reason for the supply of fresh processed milk to middle-ground customers to be segmented into retailers and non-retailers, such as caterers and schools. The company dealt only with independent retail stores apart from its own groups of stores.

6.86. The geographical market definition for fresh processed milk should, it thought, be either Scotland or the UK, provided that there was an element of competition within the defined market area.

6.87. We asked Aberness whether there had been any agreements, arrangements or practices between suppliers of fresh processed milk to middle-ground retailers in Scotland which had affected prices or customers' purchasing preferences, or which might be anti-competitive. It replied that it currently supplied all Mace stores in Scotland at exactly the same cost prices for all three accredited suppliers. It did have an agreement with Wiseman to supply into most of the company-owned stores but this was not a sole or exclusivity deal, as Mitchells was a dual supplier to a number of these stores. This company agreement had initially been instigated by Express/Claymore but, after extensive negotiations with both suppliers, Aberness had reached a ‘gentleman’s agreement’ with Wiseman that Wiseman would be the main supplier.

6.88. Wiseman had never had any contracts with Aberness’s retailers for the supply of fresh processed milk which stipulated exclusivity of supply. It would not agree to such a contract because Aberness encouraged competition to keep the ongoing pricing competitive against the larger super-markets. Aberness believed that being in many camps kept it in a stronger competitive position.

6.89. Aberness did not believe that a factor in Wiseman’s offerings to middle-ground retailers in the last year or so had been a desire to prevent new competitors from establishing a foothold in the Scottish market by, for example selective targeting of discriminatory prices. It noted that the initial price reductions had been instigated by Express/Claymore in a bid to secure footholds further south from their operating base in the Highlands.

6.90. In Aberness’s experience, Wiseman’s winning new business from middle-ground retailers in the last year or so had certainly not involved inducements or pricing policies that were anti-competitive.

6.91. It could not comment on the question whether Wiseman’s marketing activities in the last year or so had been a response to proactive marketing by competitors. It added that it had received the same local support and service from Wiseman as it always had, which was excellent, and emphasized the importance of Wiseman’s flexible delivery service in particular: this meant more to Aberness than price.

6.92. Aberness said that milk suppliers were making profits at today’s prices, and suggested that most of the negative consequences from the recent price squeeze had been on the farmer. Prices had been held at the same level by all the milk suppliers in the early 1990s. The arrival of Express had stirred up the market. Aberness thought that current price levels would be sustainable only if Express and Wiseman got bigger, for example by acquiring more companies. But retailers would not accept increases from the milk distributors, provided that they had an alternative source of supply, including supplies from England.

6.93. Aberness said that Wiseman had a reputation as an efficient and effective producer and distributor of milk. It said that these efficiencies had certainly ensured that Wiseman had won over less efficient businesses in the past. Neither Aberness nor its retailers had experienced any aggressive dealings with Wiseman. Claymore’s efficiency, however, had always been in question. Retailers had received many years of good service from Wiseman, and it would take much to make them switch to another company for a product which they needed fresh every day. Conversely, Wiseman had been able to eat into some of Express’s customer base in northern Scotland, which indicated that they had not received a good service.

6.94. Aberness thought that, if Express were to leave the market, another player would come in to compete against Wiseman. Aberness said that it had not experienced any collusion or market-sharing arrangements prior to or after the entry of Express. It did not know of any differences in the prices charged for milk between regions in Scotland; they were charged the same price.

Alldays plc

6.95. Alldays was a convenience store retailer with some 800 outlets in the UK. Its operations in Scotland were an important part of its business as 16 per cent of its stores were located there. At the end of its financial year (1 November to 31 October), its turnover was in the region of £460 million.

6.96. Alldays sold branded milk. It said that milk was an important commodity; it accounted for 5 per cent of the business and 45 per cent of Alldays’ chilled sector receipts. It said that it did not sell milk as a loss leader to attract customers. It also noted that its centralized buying and distribution systems were similar to those used by the larger supermarkets. It had reduced milk prices in some of its stores, and was negotiating to see whether prices should be dropped further. It said that it had no evidence that consumers in Scotland preferred Scottish-produced milk even though people would probably say that they did if they were asked ‘do you prefer Scottish milk?’ The brand that Alldays sold, Wiseman’s, was almost certainly perceived as Scottish and probably gave the company some marketing advantage. However, it believed that this behaviour was not specific to Scotland and was exhibited in other parts of the milk market; for instance, consumers in East Anglia would prefer milk that was East Anglian.

Alldays viewed milk as a commodity and not as a branded product, so it did not believe that significant emphasis should be placed on the origins of the milk that it sold. Moreover, it did not view the Scottish market as separate from the rest of Great Britain. It said that the average volume of milk it sold in Scotland and northern England was 7.4 and 9.2 mlpa respectively. Taken together, the volume of milk sold in Scotland accounted for around 45 per cent of the total volume that was sold by Alldays in both Scotland and northern England.

6.97. Since 1998, the only suppliers to Alldays' stores in Scotland had been Express/Claymore and Wiseman. In January 1999 Express/Claymore had been the first to propose an all-Scotland deal, following this with a faxed quote in February. Subsequently, negotiations had continued with both Express/Claymore and Wiseman, culminating in agreement on an exclusive all-Scotland deal with Wiseman. Quality products, competitive prices and efficient delivery had influenced Alldays' choice of supplier.

6.98. The company said that Wiseman had raised the issue of Express/Claymore's reliability on deliveries with a number of retail outlets. However, Alldays saw the market as highly competitive and cited Express's entry as the reason for the recent lower milk prices and its stronger negotiating power.

C J Lang & Son Limited (Spar)

6.99. C J Lang was a family-based company with headquarters in Dundee which employed some 1,600 people and it currently had 49 company-managed stores. The company was organized in two divisions: a wholesale foods division with a turnover of £75 million, and a retail division with a turnover of £170 million. On the wholesale side, C J Lang was a member of the Landmark Buying Group and operated from six cash-and-carry depots. On the retail side of the business, it was part of The Spar Organisation. Lang distributed to every Spar store in Scotland and had contracts with Texaco and the NAAFI. Spar was the world's largest retailer: it comprised 18,500 stores in 28 countries, with 200,000 employees and a turnover of £26 billion.

6.100. Lang had various methods of purchasing and distributing milk within the Spar network in Scotland. It brought its products into a central distribution and a chilled distribution facility; it delivered milk on a three-day-a-week basis; it had milk that went direct to its company-managed stores; and it had agreements with Express/Claymore and Wiseman to pay for their goods on delivery. It said that it did not buy from Wiseman at a uniform price. Rather, prices were determined mainly by the volumes that were going into individual stores. It would continue to seek to negotiate deals with processors so as to reduce the price differential between the middle-ground and the supermarkets.

6.101. In 1999 it had spent £6.4 million with Wiseman and £140,000 with Express/Claymore. Wiseman was its preferred supplier, and its service was second to none. Wiseman had been supportive of new store openings with promotional activities and it was willing to communicate and negotiate. Express/Claymore was, however, viewed as the main alternative to Wiseman. The company had no evidence that consumers in Scotland preferred Scottish milk but, as a Scottish company, C J Lang promoted Scottish products and was proposing in due course to label milk sold in its own and Spar's stores in Scotland as Scottish. If, however, English milk could be sold at a cheaper price, Lang doubted whether Scottish consumers would remain loyal to more expensive milk produced in Scotland.

6.102. C J Lang would certainly consider importing milk from England if the price differential made it economical to do so. However, it said that in a situation of importing English milk, distribution costs would rise by more than 8 per cent as it was unlikely that an English supplier would be able to distribute its product in the Highlands and Islands. Consequently, the price of English milk would have to be at least 8 per cent lower than Scottish milk if it were to be seen as an attractive alternative.

6.103. C J Lang said that it had received free refrigerators from Wiseman. It believed that this was a widely used form of promotion and, although the refrigerators were branded, there was no stipulation that other product names could not be displayed. It said that the milk market was not characterized by long-term agreements or anti-competitive contracts, and it was not aware of any collusive practices in the market either before or after Express's entry.

6.104. If Express were to exit the market, Wiseman could operate without the pressures of competition. In such a scenario, C J Lang said, the market would be deprived of healthy alternatives to

Wiseman. However, C J Lang said, although its interests lay in having a number of market suppliers, Wiseman had not abused its dominant position.

6.105. On possible hypothetical remedies for activities deemed to be against the public interest, C J Lang said that, if Wiseman were seen to be abusing its market position, then cutting its capacity would be an inappropriate remedy. Such a remedy would damage retailers, as Wiseman would limit its operations to its more profitable areas such as those with lower distribution costs.

Co-operative Wholesale Society Limited

6.106. CWS's business was involved in food retail. It had over 1,000 stores nationwide. 161 of these were in Scotland. The CWS operated on three levels: retail, the middle ground and superstores. It was a large business; £343 million of its £1.4 billion food turnover was generated in Scotland.

6.107. The CRTG acted as the procurement agent for CWS which also included ACC. ACC supplied a high proportion of CWS stores in England and Wales with milk. Milk was an important component of CWS's business; it accounted for 3.68 per cent of its total food turnover and it comprised 23.5 per cent of its chilled turnover.

6.108. CWS characterized the milk market as relatively straightforward. It only sold Wiseman's milk in Scotland. The vast majority of its milk sales were under the Co-op brand. However, in some cases where there was a demand for another brand such as Wiseman's Fresh'N'Lo, it stocked other labels in its stores. It believed that Scottish consumers preferred Scottish milk and it planned to label its Scottish milk as such in early 2001. The wholesale prices paid to Wiseman were broadly in the middle of the range of prices paid to its various suppliers across Great Britain. CWS would continue to seek to negotiate volume deals with processors so as to reduce the price differential between the middle ground and the supermarkets.

6.109. It said that Express's entry had injected a more competitive element into the Scottish market. However, CWS had chosen Wiseman's services rather than Express/Claymore's for myriad reasons: for example, in 1996 Claymore had had to make a product recall and close its dairy for a number of days. Wiseman was called in by Claymore to identify certain quality control problems and to package and distribute milk to some of CWS's customers in Nairn. In addition to questions of product quality, CWS had grown increasingly dissatisfied with Claymore's prices in the period between 1996 and Express's arrival and had been pressing the company for reductions. CWS said that, before and throughout its contract with Claymore, it had remained in contact with Wiseman as it had been in CWS's interests constantly to look for the best deal that it could obtain from either a chosen or a potential supplier. At the end of the day Wiseman's prices and terms of service were more attractive than Claymore's and, when firm negotiations had started in early 1999 about an all-Scotland deal, CWS had settled for Wiseman's offer to supply its business. Subsequent to the deal being concluded, Express had approached CWS to ask if there were any way in which it could win the business. CWS told Express that it would be happy to look at a fresh bid at the end of 1999, if Express/Claymore wished to make one. CWS told us that it had heard nothing since.

6.110. CWS favoured the use of a single supplier as this provided it with greater efficiencies of cost, administration and communication, rather than using a number of different suppliers. Nevertheless, it believed that a single supplier should not dominate the market as this would severely limit choice.

Iceland Frozen Foods plc

6.111. Iceland said it believed that Express's allegation—that from 1997 onwards, the prices Wiseman had charged to middle-ground retailers in Scotland were 8 per cent higher than in England, especially northern England—was a tactic to prevent Wiseman's continued growth in England.

6.112. Iceland said that Wiseman supplied its 350 stores in Scotland and northern England at rates which were only marginally higher ([✂]p per 4.6 litres) than those in force further south, ie from Birmingham southwards, where Dairy Crest supplied 418 Iceland stores. Iceland also said that it believed its buying power was sufficient to bring it into the category of larger supermarkets, which was excluded from the Commission's terms of reference.

Londis Holdings Ltd

6.113. The Londis organization represented a large group of independent retailers. Upon joining, the retailers purchased a share of the business and obtained voting rights. Londis itself did not own any outlets. Londis retailers in Scotland sold Wiseman and Claymore brands—Wiseman handled around two-thirds of its business. In 1999 the group's turnover was £500 million, of which milk comprised £18 million. By 2003 its aim was to have some 250 stores in Scotland.

6.114. Londis said that milk prices were around 5 per cent lower in Scotland than in England. Wiseman's prices were lower than Express/Claymore's, by roughly 5p for 2 litres. Londis saw producers such as Graham's as realistic alternatives to Wiseman and Express/Claymore. It believed that Scottish consumers preferred Scottish milk; however, it did not view the Scottish market as being separate from the rest of the UK.

6.115. Londis favoured having two or three operators in the marketplace, as a single supplier would have greater control over prices. It would continue to seek to negotiate volume deals with processors so as to reduce the price differential between the middle ground and the supermarkets. Londis characterized the Scottish market as highly competitive, and said that it was not aware of any anti-competitive behaviour. It believed that middle-ground prices would eventually drift upwards.

Marks and Spencer plc

6.116. M&S reported that it pursued a national policy for buying and selling. It believed that there was generally a single UK market for milk, but with regional variations in demand. It saw no distinction between the market for raw milk and for fresh processed milk in this respect.

6.117. M&S said that, from its own experience, consumers in Scotland preferred milk produced from Scottish farms. It told us that in 1991 it had withdrawn Scottish milk from its Scottish stores because of dissatisfaction with its quality standards and had transferred this business to an English company. This had resulted in adverse publicity and a substantial initial decrease in sales, recovering to a small decrease thereafter. M&S said that it eventually reverted to the Scottish supplier, but only after improvements to its building. M&S also introduced milk from pedigree Ayrshire herds, which proved popular with Scottish customers.

6.118. M&S now labelled its products 'Scottish' milk, with an added descriptor 'produced and packed in Scotland'. The milk was collected from specially selected farms that kept the Scottish breed of Ayrshire cows. M&S fully endorsed these farms' animal welfare policy. M&S said that there were clear commercial benefits from doing so, insofar as consumers in Scotland had a preference for Scottish-produced milk. For the same reason, it said that it preferred not to have English-produced milk in its Scottish stores, where possible. It did source milk from outside Scotland when the product required a different raw material, for example speciality milks, such as Channel Island and organic milk.

6.119. M&S told us that it would consider using any milk processor in Scotland provided that it complied with its animal welfare policy, its select farm scheme and its food manufacturing standards. It had recently consolidated its milk supply base and it used one preferred supplier. Several factors had influenced its choice, including price, service levels, production standards, category management expertise, quality, innovation, strength in specific geographic areas, and continuity of supply. Prices were negotiated on a sole supply basis and reflected these influencing factors. The contract also included targets on waste and availability, and a strategy to increase sales.

6.120. As regards quality requirements, M&S said that it was its policy to ensure that all animals used in the production of M&S foods were treated well, carefully handled and managed with consideration for the animals' needs and well-being. These requirements were set out in its select farms scheme and were based on recommendations from the Farm Animal Welfare Council, various MAFF codes of practice and current industry best practice. The content of the scheme was regularly reviewed and updated. Milk producers were also required to keep to M&S internal codes of practice for food handling and manufacture. They were required to have full traceability controls and meet rigid micro-biological standards.

6.121. Depending on the quality and experience of the supplier and the individual dairy, M&S said that it could take anything from one month to six to nine months for a dairy to meet its standards.

Morning Noon & Night Limited

6.122. Morning Noon & Night had opened its first store in June 1991. Its annual turnover was around £37 million a year; of which milk accounted for some £1 million. The majority of its stores had been trading under the Mace banner, but this was now being changed to the Morning Noon & Night fascia.

6.123. It had negotiated a deal with Wiseman whereby milk was delivered to its stores on a daily basis (Monday to Saturday). Prices were negotiated with Wiseman annually and were also influenced by the market climate. Morning Noon & Night said that, in order to survive, it needed an overall price margin of [✂] to [✂] per cent.

6.124. Morning Noon & Night sold milk under the Wiseman brand, and the company believed that this was a cost-efficient arrangement. It had concentrated its business with Wiseman as Wiseman's prices were low and its services were efficient. Morning Noon & Night preferred to deal with one supplier; this was why it had discontinued using Express/Claymore. It was willing to sell other brands of milk and, depending on the region, it would be happy to trade with companies other than Wiseman. Brand recognition and compliance with health and safety regulations also influenced Morning Noon & Night's decisions to trade with other parties.

6.125. Wiseman provided Morning Noon & Night with free refrigerators, but many other suppliers also provided this service. Wiseman also gave Morning Noon & Night a marketing allowance and, again, this was a strategy that was commonly used by suppliers. It was not obliged to purchase from Wiseman and it would not hesitate to move to another supplier if it found that Wiseman compromised health and safety regulations, or if it charged uncompetitive prices for raw milk.

6.126. Morning Noon & Night said that, although Wiseman had always been a good operator in the past, it had become more efficient following Express's entry into the market.

6.127. The company said that the market had changed; independent retailers had disappeared rapidly as they could not compete with supermarkets. In ten years' time, it believed, a few retailers with the power to negotiate prices on an all-Scotland basis would dominate the market. Morning Noon & Night said that it would continue to seek to negotiate volume deals with processors so as to reduce the price differential between the middle-ground and the supermarkets.

J N Morrison & Co

6.128. Morrison told us that Express and Graham's had offered to supply it with milk at a lower price than Wiseman, if Morrison were to disclose it. But it had no intention of entering a bidding war.

6.129. Wiseman had always provided Morrison with a good quality service and product, and quickly resolved any disputes fairly and freely. Wiseman's prices were fair, having regard to its own costs, and Morrison was provided with a reasonable margin. Morrison noted that the price of milk to the consumer was actually determined by supermarkets, which were not making a profit from milk.

Pace Convenience (Alexandria)

6.130. Pace Convenience in Alexandria, Dumbartonshire said that it had wanted Wiseman to supply its store but, on realizing that Graham's was the normal supplier to Pace, Wiseman had refused to supply this Pace store.

Safeway Stores plc

6.131. Safeway told us that it had no view on the key issue whether there was a separate market for fresh processed milk in Scotland or a single British or UK market. As a retailer it purchased only fresh processed milk and had no involvement with the supply of raw milk to the dairies. To that extent the company drew a distinction between those two product markets. Safeway had no evidence to show the preferences by consumers in Scotland for milk produced on Scottish farms.

6.132. As far as branding was concerned, Safeway told us that at present all its milk in Scotland displayed the Union flag; however, this would be replaced with the Scottish flag at the next print run. The change was to meet customer expectations and not for any measurable commercial benefits.

6.133. Safeway did not consider it appropriate to source its milk supplies from dairies in England, as Wiseman supplied all its requirements in Scotland. The company said that it intended to continue this arrangement as the most cost-effective solution available. It would only consider sourcing milk for sale in its Scottish stores from a producer located outside Scotland if there were tangible commercial, operational and quality benefits for doing so. The company would consider purchasing milk from any milk processors in Scotland that could offer the necessary processing capacity; guarantee standards of service and product quality; and supply milk at a competitive price. At present, however, Safeway saw no alternative to its existing arrangement with Wiseman.

6.134. Safeway told us that it had no current plans to consolidate its supply base. Prices paid for its milk supplies were determined by competitive tendering, which were reviewed twice a year. There was no difference in prices between England and Scotland.

Sainsbury's Supermarkets Ltd

6.135. Sainsbury commented that the market for milk in Scotland was very similar to that for the UK as a whole. It added that there was, however, an increasing customer requirement for milk to be sourced and bottled in Scotland and labelled 'Scottish'. It said that all milk sold in Sainsbury's Scottish stores met these criteria and was labelled as 'Scottish Milk' as Scottish consumers preferred Scottish milk.

6.136. Having established a Scottish source, Sainsbury said that it had no requirement to consider English milk for its Scottish stores. The use of English milk would only be considered if there were to be a supply problem, in which case the milk would be labelled 'British'. The company's main priority was to meet its customer requirements in the most efficient way. In recent years this had meant a consolidation of the supply base, but this was a function of market conditions and the current structure of the industry. It did not necessarily indicate a continuing trend. Sainsbury also noted that it had a relatively small market share in Scotland.

Somerfield plc

6.137. Somerfield viewed the whole of Great Britain as a single market. It said that it did not differentiate on the wholesale or the retail price of milk on a geographic basis. It also saw no distinction in this respect between the market for raw milk and that for fresh processed milk. Nor had it any evidence that consumers in Scotland preferred Scottish-produced or packed milk.

6.138. As to branding, Somerfield told us that the milk it sold in Scotland was labelled as Scottish milk. However, it said that it was unable to discern any particular commercial benefits from doing this. It said it would consider using milk of any origin for sale in Scottish stores provided it met its technical specifications and the commercial package as a whole was beneficial.

6.139. Somerfield said that it had no policy of consolidating its supplier base in Great Britain although it was looking at the benefits which might be obtained from building stronger relationships with fewer suppliers. Once the technical specification was met, it negotiated prices for milk supplies in the same way as for any other product: that is, it looked at the benefits of the commercial package taken as a whole. As regards quality requirements, Somerfield said that it had technical specifications, and all suppliers had to be third party accredited by an acknowledged independent company before being added to its approved list.

An independent retailer

6.140. An independent retailer based in Glasgow wrote to say that he had been a customer of Wiseman for over ten years. He said that Express had recently approached him offering to supply milk at a rate that was well below that offered by Wiseman. As a result, he had chosen Express as his supplier and had used it for the past few months. He stated that, having lost his custom, Wiseman had requoted for his business and, as a result, had regained a proportion of his orders.

6.141. The retailer said he thought that Wiseman had lost several customers through Express's tactics. Rather than seeing Wiseman's actions as anti-competitive, he believed that they should be viewed as retaliation for Express's undercutting.

Raw milk suppliers

Ayrshires Milk Marketing

6.142. Ayrshires Milk Marketing said that Wiseman, as one of a number of licensed processors of its brand, had been very supportive of its concept of adding value to milk through marketing it as coming from one specific breed of cattle. At no time since the two companies started working together had there been any indication of market sharing, price discrimination, exclusive dealing or predation in developing the brand.

Esknish Farm

6.143. Esknish Farm (Esknish) was a small milk producer/retailer on the Isle of Islay. It said that a few years ago Wiseman had come to the island and contracted to supply milk through the local Co-op shop—but it was no great threat to Esknish. Some time later, the one other producer/retailer which supplied the Co-op decided to cease production and buy its milk in from Express/Claymore. Wiseman's products were then unfairly treated in the local Co-op; for example, milk was left standing on the floor instead of being refrigerated, while Express/Claymore's milk was given refrigerated space. The latter was promoted as Highland Fresh milk 'from the lush grass of the Highlands', although some of it might have come from further south. If true, this could deliberately mislead tourists and holidaymakers on whom the local economy depended, and would amount to unfair trading. Esknish added that, whereas Wiseman had been in the farming business itself and had always been considerate to the 'small guy', Express would put it out of business tomorrow if it could get away with it. In Esknish's view, Express should be under scrutiny, not Wiseman.

William Moffat & Sons

6.144. William Moffat & Sons (Moffat) were milk producers selling to Wiseman. It thought that it was being unfairly treated as regards price and quality assurance standards. Wiseman had told it that there would be another price cut, probably in the region of 2 ppl, which would mean that most producers were making a loss. Producers were therefore paying for the price war with Express, as Wiseman sought to protect its own profits. On quality assurance, Wiseman had responded to supermarket pressure to join the National Dairy Farm Assurance Scheme (NDFAS) and, without consultation, was seeking to force Moffat to join too by reducing the milk price a further 2 ppl if it did not sign a new contract embodying raised standards. Moffat did not disagree with farm quality assurance but the cost of qualifying fully for the NDFAS would be around 0.5 ppl. There was little evidence that the pressure was coming from consumers, but if it were, then they should pay, not the producers. Moffat suspected that the supermarkets were using quality assurance as a political tool to force down the price of milk to enhance their own profits.

North Milk Co-operative Ltd

6.145. NMC was a co-operative of dairy farmers producing raw milk. These farmers' average herd size was about 130 cows; this was above the Great Britain average of 80 and therefore the farmers were efficient. All of NMC's raw milk went to the Express/Claymore processing business in which NMC had a 49 per cent stake. Consequently, the future of NMC was inextricably linked with the fortunes of Express/Claymore. Most of the NMC members' raw milk production was in the Moray Firth area. In 1991 the co-operative had chosen Nairn as the site for its dairy so as to focus on two regional markets: the Highlands and Islands and the Aberdeen area. NMC had retained a 49 per cent stake in the Claymore dairy following Express's 51 per cent investment in the enterprise. It had invested around £1 million in cows, buildings, genetics and land. NMC was also one of only two supermarket-approved sites in Scotland: it had the approval of M&S, Tesco, Safeway, Somerfield and CWS. Excluding organic milk, NMC said that 100 per cent of the supplies of all the mainstream milks sold in leading supermarkets were produced in Scotland and were supplied by itself or Wiseman. NMC said that the processing market should be contestable and that it should have no insuperable barriers to entry. However, this was not possible as Wiseman had been pursuing particular methods which deterred entry into the milk market in Scotland.

6.146. NMC believed that Express would discontinue its services in Nairn. It said that it had tried to convince Express not to pull out as it did not feel that it could attract another similar purchaser to come to Nairn. NMC did not view Scottish Milk as a suitable alternative to Express as it did not have a supermarket business. It also said that there was a feeling in the industry that Wiseman, to all intents and purposes, controlled Scottish Milk and that Wiseman controlled the market as a whole by defining, and/or prohibiting, the level of operations in some areas. With reference to its own experience, NMC said that Wiseman had threatened to target its largest customer, CWS, if NMC were to consider supplying milk to Tesco.

6.147. NMC said that Wiseman's acquisition of Gilmours came down to the fact that Wiseman was prepared to pay over the odds to preserve its monopoly position. It said that Wiseman was not keen to see a company such as Express, one that was capable of providing proper competition, come into the market. NMC said that Wiseman had adopted an anti-competitive market strategy where, for instance, it had targeted the Highlands area and Aberdeen by offering extremely cheap milk, or free milk in some situations. It was believed that Wiseman had offered free milk with the sole intention of wrecking NMC's and Express's competitive business, as neither NMC nor Express were willing to provide milk for free.

6.148. NMC saw Scotland as a separate market from the rest of Great Britain. This assertion was based on Express's market research findings which showed that Scottish consumers preferred Scottish milk and, as a result, it clearly defined its brands—Highland Fresh and Scottish Pride—as Scottish.

6.149. NMC was concerned that, due to Wiseman's domination of the liquid milk market in Scotland, it had become increasingly difficult to compete. It feared that, if this situation continued, Express/Claymore might not be able to continue operating and NMC would have little option but to sell its milk to Wiseman at whatever price Wiseman was prepared to pay. In such circumstances, suppliers of goods and services to NMC would also suffer. NMC said that, in order to maintain a healthy Scottish market, there should be at least three major players in the market. This would allow greater choice; it would provide an element of competition, better service and greater quality. To achieve this, NMC suggested, Wiseman should be forced to divest a major part of its business. It did not believe that a price remedy would be an effective way of regulating the company.

Mr John Innes

6.150. Mr John Innes was a dairy farmer in northern Scotland and had recently become the chairman of NMC. His business depended upon the continued existence of the Express/Claymore processing plant. Mr Innes had himself recently made some large investments in his farm to meet health and safety requirements and to expand production.

6.151. He viewed Wiseman as having a monopoly, and expressed concerns over some of its activities. Mr Innes said that Wiseman had supplied free milk to its customers in the Highlands for two reasons: to remove Express/Claymore from the market and to teach the dairy farmers in the area a lesson for linking up with another processor. He said that the loss of dairy farming to the Highlands would have a disastrous effect on the way of life for several of its communities as it would remove much-needed jobs in an area that was desperate to attract more employment.

Mr James Philip, Kinnudie Farms

6.152. Mr Philip, a dairy farmer near Nairn, said that he had been able to produce milk at competitive prices through investments in his farm. He was a member of the NMC and his business depended on Express/Claymore's purchase of his produce. He said that, in recent years, Wiseman's dominance had given the members of the NMC the limited options of either selling part of their business to a larger company or leaving the market. NMC had therefore opted for the former: hence the deal with Express/Claymore.

6.153. Mr Philip said that, in a bid to take customers away from Express/Claymore, Wiseman had provided milk and refrigerators free of charge to its customers. If Wiseman were to put Express/Claymore out of business, it would be to the detriment of local farmers and consumers.

Mr Alistair Sutherland

6.154. Mr Alistair Sutherland, who was Chairman of NMC at the start of this inquiry, expressed concern about Wiseman's activities, in particular its potential to damage NMC's joint venture with Express at Express/Claymore. Mr Sutherland was concerned about the changing nature of the Scottish milk market where, in a short space of time, and through the acquisition of long-standing milk suppliers, Wiseman had acquired complete control of some of Scotland's regional markets. For example, Wiseman's growing dominance in the Scottish market was evidenced by its acquisition of Mackies' and Kennerty's milk processing facilities, which gave it complete control over the Aberdeenshire and Grampian markets.

6.155. Mr Sutherland said that Wiseman's acquisition of Kennerty coincided with the deregulation of Scotland's MMBs. He said that if Express/Claymore had lost any of its major customers during deregulation then, given Wiseman's dominant presence, NMC would have had to sell its surplus raw milk to a buyer outside Nairn and, because of the higher transport costs involved, NMC would have to offset these by charging higher prices to its customers. To avoid charging higher prices, and to safeguard NMC's business through the preservation of its customer base, Mr Sutherland said that NMC had acquired Wiseman's depots in Kingussie and Fort William. Despite these precautionary measures, NMC's market had remained threatened by Wiseman, especially when the William Low supermarket business was sold to Tesco and when Wiseman acquired the Scottish Pride business. These developments meant that Wiseman was Tesco's supplier for the North of Great Britain. Mr Sutherland said that NMC was allowed to deliver milk to Tesco, but not allowed to process or package milk for it. He said that the acquisition by Wiseman of Scottish Pride meant that Wiseman had a dominant grip over Scotland's processed milk market. These meant that the relatively smaller organizations, such as NMC, felt intimidated and were cautious of producing milk beyond certain volume levels or operating in certain areas. In particular, Mr Sutherland feared that, in the long term, Wiseman's increased dominance would exacerbate the plight of its competitors such as Express/Claymore which would have to incur greater transportation costs in trying to capture new markets.

6.156. Mr Sutherland said that, within the Scottish milk industry, it was common knowledge that any attempts by smaller processors such as Express/Claymore to obtain business from Wiseman's larger customers would be met with severe consequences and repercussions from Wiseman.

Scottish Milk Limited and Scottish Milk Dairies Limited (formerly Drakemire Dairy Foods Limited)

6.157. Scottish Milk said that Wiseman was its largest customer. It mentioned that its relationship allowed Wiseman to balance out seasonal variations in milk production and demand, and it believed that this justified the comparatively higher price that Wiseman paid for its raw milk. It did not feel that Scottish consumers had any preference for Scottish-produced milk.

6.158. Scottish Milk characterized the Scottish milk market as very competitive and saw the process of constantly gaining and losing business as the norm. It said that declining raw milk prices was a testament to the market's competitiveness and it did not feel that the downward movement of prices was wholly linked to Express's entry into the market. Scottish Milk believed, however, that the ongoing price war between Express and Wiseman would be detrimental to the survival of smaller processors.

6.159. Scottish Milk was not aware of, and had never been involved in, any market-sharing or price-fixing agreements, and did not believe that there were any significant barriers to entry in the Scottish milk market. Rather, Scottish Milk said that the most difficult problem facing prospective entrants would be in securing a customer base. In the absence of significant barriers to entry, Scottish Milk believed that acquiring Scottish plants might be in the minds of all the major players, as they were looking to expand their national distribution; this was one reason behind Express's entry into Scotland and others could follow suit.

6.160. Scottish Milk did not see the milk market in Scotland as particularly different from the market in northern England or even in the South West of England. Scottish Milk therefore found the concept of a separate Scottish market difficult to accept. It said that just because Scotland happened to be a separate country people were saying, 'yes, of course, the market conditions must be different' but, on an economic basis, Scottish Milk could not conceive how, in the present day, the Scottish milk market could be viewed as separate from the rest of Great Britain. It viewed the raw and processed milk markets as British and said that Scotland produced more milk than it consumed.

6.161. Scottish Milk had expanded its operations northwards to Inverness and Nairn and into England. It had producers in Cumbria, Cheshire, Lancashire, Warwickshire and Shropshire and it collected and delivered as far south as Oxford. It did not supply Wiseman's Manchester dairy and there were no plans to supply the new Droitwich plant now under construction.

6.162. Commenting on Wiseman's acquisition of AMCo, Scottish Milk considered that, prior to this, the whole enterprise had been to becoming insolvent. It was sensible of Wiseman having secured a part of the northern milk field—although it needed to be borne in mind that the farmers concerned were quite free to supply Express/Claymore rather than Wiseman if they chose to. The fact that the Express/ Claymore and AMCo producers did not, in practice compete in each other's areas might be a reflection of their history as members of different statutory MMBs, which did not compete with each other.

6.163. The company said that, as far as it was concerned, up to and around the mid-1980s, the Scottish market was heavily orientated towards bottle milk and doorstep deliveries. Since then, however, it said that supermarkets had become the most important sector for milk sales.

6.164. SMD told us that two other English-based dairy companies had been interested in acquiring Drakemire. SMD had acquired 80 per cent of Drakemire, with agreement in principle to own 100 per cent. It said that the Drakemire shareholders had expressed a preference for a Scottish orientation to the business.

6.165. SMD did not think that the Scottish sector of the milk market, whether for raw or processed milk, was in any way separate from the rest of the UK. Prices were comparable and set in largely identical ways, and there was always a margin of competition in each area. SMD said that there was no customer allegiance to, or insistence on, Scottish milk; what mattered was price. SMD's business was national and it saw its customers as national, not Scottish, players. On middle-ground customers, SMD supplied mainly corner shops, ie independent retailers, in the Glasgow area. These were often open all hours of the day and night. Customers paid extra for the convenience, although such shops were also striving constantly to close the gap with the lower prices of the supermarkets. SMD said that the provision of refrigerators was a standard feature of selling milk to middle-ground retailers in Scotland, and that this was a normal part of doing business in Scotland. All of SMD's distribution was carried out from its dairy in Hamilton; it did not use depots.

6.166. There was no doubt, in SMD's view, that the entry of Express into the middle-ground market had increased supply-side competition. Before that, companies had experienced gains and losses of business but, since Express arrived, prices had come down to the extent that SMD was losing money. It noted, however, that milk price competition was equally keen elsewhere, for example in Manchester and Birmingham. SMD had, however, introduced cost-cutting measures and had obtained a milk packing arrangement with Express which would benefit its financial position.

6.167. SMD said that Wiseman would have a cost advantage over SMD because of its efficient exploitation of economies of scale: eight times more fresh milk was put through Wiseman's Bellshill plant than SMD's plant, with consequent lower unit costs.

6.168. SMD was unable to comment on the efficiency of Express/Claymore, except to say that its plant was modern but was based in northern Scotland, which was not the best location to supply the Central Belt's market.

6.169. SMD said that, because of competition, it could not raise the prices that it had inherited, and so it was constantly striving to reduce costs. Customers showed no allegiance whatsoever and would switch suppliers solely on price grounds. The market was finite—not increasing—and any incoming players would secure business only by offering lower prices.

6.170. Asked its opinion on why Wiseman had bought AMCo, SMD replied that this had been to secure milk supplies locally in that area, signing up the farms direct to supply fresh milk and closing down AMCo's powder plant. It had made Wiseman less reliant on raw milk supplies from Scottish Milk. SMD also thought that Wiseman would have acted in the same way whether or not Express were present. Apart from its raw milk collection facilities, AMCo had only a milk powder plant—Express needed a milk processing plant.

6.171. Similarly, SMD did not believe that Wiseman had bought Gilmours so as to deprive Express of the chance to acquire a processing plant in the Central Belt: Express would not have wanted to operate the Gilmours site, as it was not of a standard that would have allowed Express to gain any supermarket business.

6.172. On the possible future competitive relationship between Wiseman and Express, SMD said that much seemed to depend upon how long Express could incur the kind of losses that were widely and informally being reported. SMD believed that, if Express left the market, there would probably not be much change, as it would be difficult for Wiseman and others to raise prices from their present established levels. SMD would not be interested in acquiring the Express site at Nairn, which was in the wrong location as well as making losses.

6.173. SMD acknowledged that any attempts to increase its market share in Scotland would place a strain on its raw milk selling arrangement with Wiseman, as it would be competing head-to-head on the processing side, and this would give sufficient incentive for another price war to ensue.

6.174. If the Commission decided that Wiseman was acting against the public interest, Scottish Milk did not believe that the proposed structural remedies were appropriate, given the competitive state of the market. It also believed that behavioural remedies were inappropriate, and that the suggested three-year remedial price freeze would be disastrous. Rather, it might be better to rely on the Competition Act 1998, which had extensive provisions to deal with abuse of market power. A price cap would operate to the disadvantage of other processors, given that Wiseman was an industry leader in efficiency terms and might call into question Scottish Milk's and SMD's continued involvement in the fresh processed milk market.

Trade associations

Federation of Small Businesses

6.175. The Federation of Small Businesses did not comment on the Scottish milk market. However, it provided a copy of its rules and regulations regarding market competition in the UK.

National Farmers Union of Scotland

6.176. The National Farmers Union of Scotland (NFUS) stressed the implications of the inquiry for its dairy farming members. Over the last three years, the price that they had received for their milk had fallen by over 25 per cent. This was due mainly to the strength of sterling, but actions of dairy processors had also contributed. The NFUS said it was important to recognize that the cost of predatory 'loss leader' pricing by any dairy company was inevitably passed back to the producer. Current milk prices to farmers were already well below the average break-even point, with further cuts in prospect. This threatened the availability of local milk supplies in Scotland, as producers would be forced out of business. The NFUS believed that the Commission inquiry should take account of these matters.

6.177. The NFUS also looked at the Commission's hypothetical remedies in the two categories, structural and behavioural. On the structural side, it wanted to ensure that, as a consequence of any possible structural remedy no dairy farmer would be left without a purchaser for their milk; processing capacity would not be reduced; and the viability of the overall Scottish dairy industry would not be jeopardized. On the behavioural side, the NFUS believed that any price freeze which did not allow for increases in the price of raw milk would unfairly disadvantage Scottish dairy farmers.

Scottish Grocers' Federation

6.178. The Scottish Grocers' Federation (SGF) said that its aims were: to represent its members at local and national level in Scotland; to try to redress trade grievances; and to work with other sectors such as suppliers/manufacturers and wholesalers. It estimated that there were about 3,000 convenience stores in Scotland.

6.179. The SGF believed that Wiseman did an excellent job in Scotland, both in terms of the service it provided and in its pricing structures. Representative member retailers—covering all areas of Scotland—felt that the present situation, in which Wiseman probably had a monopoly in the supply of milk, was not against the public interest: in their view, it served the public interest. The SGF said that, as far as its members were concerned, Wiseman had shown in the past that it was competitive and gave a good service. If Wiseman's share of the market were in the region of, say, 90 per cent, then obviously the situation might be different. Express was doing all it could to prevent that at present by entering the Scottish market and developing its own market share. The SGF said that it would be healthy to have a couple of major competitors in the market place, but there was still a whole host of smaller competitors in Scotland.

6.180. It was difficult to predict the longer-term prospects for the industry but, certainly over the next five years, the SGF did not foresee any problems. Potentially there might be, if Continental milk were to be imported, because of, say, a reduction in dairy herds. The SGF felt that the producer farmers had had a bad deal over the last few years because of the competitive nature and buying power of companies such as Wiseman.

6.181. The SGF said that Wiseman was undoubtedly a very efficient company. Part of the cost reduction in milk was due to the efficiency of distribution services and systems now in place. It believed that Wiseman would continue to expand its operations in England, and that that commitment might prevent it from expanding even further in Scotland. However, if Wiseman were to expand its operations into areas of the Scottish market to the extent that it became unviable for local suppliers to continue trading, then the SGF would be concerned.

6.182. The SGF said that its members welcomed greater competition in the market place, and that at present they were better off in terms of the efficiency of the service that they received. There was no doubt that a number of its members had been approached by various suppliers but it was not aware of any of its larger members having changed supplier. Retailers were unlikely to change their suppliers very often, as milk was an extremely important contributor to their turnover; they also saw it as a major contributor to their profits.

6.183. As to whether consumers in Scotland preferred Scottish-produced milk, the SGF thought that price was the determining factor, provided that milk supplies were fresh and of reasonable quality. Inducements to retailers were always a factor as suppliers sought to gain new business, or to retain existing customers. The SGF was not aware of any significant change in the way that inducements were given since Express had entered the Scottish market.

Public sector bodies

Dumfries and Galloway Council

6.184. Dumfries and Galloway Council said that its Department of Trading Standards had not received any complaints concerning the marketing or pricing of fresh processed milk in Scotland.

Fife Council

6.185. Fife Council said that it spent £623,000 a year to promote competition on milk for schools and residential homes. The Council said that it invited tenders based on geographical areas. These incorporated the main conurbation of Fife and consequently allowed small dairies to bid for manageable volumes of business. It stated that Wiseman had secured 60 per cent of the Council's available business and, in a number of cases, had been the only bidder.

The Highland Council

6.186. The Highland Council said that the Highlands area did not have a dynamic commercial environment as it was underpopulated and characterized by poor infrastructure. Low per capita income was one consequence of this climate, and the average GDP in the region was approximately 76 per cent of the EC average. This made the Highlands particularly vulnerable to monopolistic and anti-competitive practices. The Council therefore viewed the Commission's current investigation to be of particular importance to the Highlands area. The Council did not support any single company over another. Its main concern was the economic prosperity of the Highlands. To maintain prosperity, it asserted, controls were needed in the market. It believed that the wider rationalization of the UK dairy industry was working against the public interest. In the Highlands, where there was less likelihood of competition helping to hold down prices, if one company gained a dominant share of the market, this situation was likely to be exacerbated. Already substantial price differentials—of up to 40 per cent—had developed between middle-ground customers and supermarkets in the region. With transport costs rising, these problems would only get worse.

6.187. Highland milk prices showed disparities between the prices charged by supermarkets and middle-ground retailers. In Dingwall, Ross-shire, for example, it had been found that Tesco charged 49p for 1.136 litres while the local Mace shop charged 65p. Alldays in Nairn charged 66 ppl, while Safeway charged 49 ppl. It was not uncommon to find price differentials of over 40 per cent between shop-bought dairy products and local deliveries. Farm gate prices were being driven down by increased transportation costs, and the Council cited this as the main reason behind cost-efficiency-driven mergers and other industry rationalization measures. The increased presence of single dominant companies in the Scottish market was seen as operating against the public interest.

6.188. The Council stated that in the Highlands milk production and processing was heavily dependent on Express/Claymore in Nairn. Express/Claymore was the marketing arm of NMC. A few years ago, Express/Claymore formed a joint venture company with Express so that it could remain a competitor in the Highlands. This joint venture allowed Express/Claymore to offer milk to supermarket chains on an equally competitive basis with its main rival, Wiseman. This meant that the Highlands were experiencing a struggle for dominance for the local milk markets by these two companies.

6.189. Without Express/Claymore, the Council believed that the future of the Highlands dairy industry would be in doubt: 37 farms in the area sold their produce to Express/Claymore. Wiseman sourced milk from outside the Highlands and would have no operational requirement to buy from the 37 dairy farms supplying the Nairn dairy. Express/Claymore employed some 230 people in the Highlands. Directly and indirectly, it led to the employment of 750 people in the area, and it was the only company in the region that met the high quality standards set by the EC. Its importance to Nairn had been recently put in perspective when the town had suffered a major economic setback in the form of threatened large-scale redundancies in local oil industry operations.

6.190. The Council welcomed the Commission's investigation and said that it would support any measures the Commission might recommend to prevent a monopoly situation occurring in the Highlands or in Scotland as a whole. Such domination would deny choice to local consumers, undermine dairy farming and threaten local processing of milk products, to the detriment of the overall economy. Controls were needed to ensure sustainable competitive trading conditions over the longer term.

Councillor Eddie Aldridge, The Moray Council

6.191. Councillor Aldridge said that the Moray area contained some of the most efficient dairy farmers in Scotland, he added that the area's farms tended to be large and employed sizeable numbers of staff. It had been a long-standing tradition for dairy farmers in Moray to sell their milk to Express/ Claymore which processed it at its dairy in Nairn. However, given Wiseman's increased dominance in the market, this relationship was seen as under threat. Mr Aldridge said that Moray's agro-economy was going through a difficult phase. He added that north-east Scotland had witnessed the failure of several agribusinesses. He said that the size of Wiseman had been causing concern as it stifled and probably eliminated competition throughout the country.

6.192. Independent reports showed that prior to Express/Claymore's movement into the Central Belt, consumers in Scotland had paid comparatively higher prices than other UK consumers for their milk. The Commission's inquiry was viewed favourably as it addressed the impact of Wiseman's activities on consumers in Scotland. Mr Aldridge credited Express/Claymore with reintroducing competition in the market and believed that the inquiry should conclude that further competition of sustainable nature was required within the market in Scotland.

Highlands & Islands Enterprise

6.193. Highlands & Islands Enterprise (HIE) was concerned about the future of Express/Claymore, given the alleged anti-competitive tactics of its main rival, Wiseman. It stated that Express/Claymore was a key force in Nairn's faltering local economy. It directly and indirectly employed some 250 people, 130 of whom were in Nairn. Nairn's unemployment was high and was further threatened by redundancies in the local oil industry.

6.194. HIE said that it did not have any firm evidence on Wiseman's business activities in relation to Express/Claymore. Nevertheless, if the current situation between Wiseman and Express/Claymore continued, Express/Claymore would be likely to go out of business.

Politicians

Fergus Ewing MSP

6.195. Mr Fergus Ewing MSP for Inverness East, Nairn and Lochaber was very concerned about the future of Express/Claymore and its employees. Express/Claymore was a large and important business for Nairn, and indeed for northern Scotland. There were around 40 local farmers who supplied the dairy with raw milk and for whom it was the only locally-accessible outlet for their milk. Mr Ewing pointed out that the milk business involved one of the most perishable products and, because of the limited life of milk products, the vulnerability of any milk sector business to abuse of a dominant position was extreme. Milk products had to be sold within a limited period, and any delay would render them worthless. This meant that, if Express/Claymore were prevented from selling its milk, or were forced to sell it at greatly reduced prices because of the anti-competitive practices of a competitor, then this would have dire consequences for the profitability of the business.

6.196. Mr Ewing believed there was prima facie evidence that Wiseman was abusing its dominant position. The evidence included allegations that former customers of Express/Claymore had been given inducements to leave Express/Claymore and sign up with Wiseman. If these claims were substantiated, then Mr Ewing had no doubt that there must be an adverse finding against Wiseman, and there should also be an immediate interim measure put in place. Mr Ewing believed that Wiseman should be made to divest and relocate some of its capacity in order to create a more balanced milk market in Scotland. Disposal of Wiseman's dairy in East Kilbride on its own would be insufficient, but if combined with the divestment of Wiseman's Aberdeen plant, would have a significant and positive impact on the competitiveness of the Scottish milk market. Mr Ewing thought that there should be a non-discrimination remedy relating to middle-ground customers. He considered it essential that effective action be taken by the Commission.

Margaret Ewing MP MSP

6.197. Margaret Ewing MP MSP wrote to the Commission on the behalf of a number of her dairy farmer constituents who supplied milk to Express/Claymore. Her constituents felt that that Wiseman had abused its dominant position in the market. They also felt that the survival of Express/Claymore was of paramount importance to some 40 farmers in Morayshire and the Highlands. She estimated that around 250 to 270 people depended on Express/Claymore for employment, including these farmers, who owned about 49 per cent of the company. Express/Claymore was the only available outlet for the milk they produced. Ms Ewing urged the Commission to consider the impact that the closure of the dairy would have on these farmers.

Mr Duncan Hamilton MSP

6.198. Mr Duncan Hamilton MSP said that he had received representations from producers and retailers across the Highlands and Islands about the Commission's inquiry. Farmers and dairy staff employees were concerned about the future of the Claymore dairy and about the effect that Wiseman's growth was having on it. Mr Hamilton was told that Wiseman currently had over 80 per cent of the market for fresh processed milk in Scotland and, in his view, this was not a desirable situation. He asked the Commission to examine carefully the implications of Wiseman's dominance on competitors and producers.

Mr Ian Hudghton MEP

6.199. Mr Ian Hudghton MEP had learned about the Commission's inquiry following a meeting with Express/Claymore in 1999. He was concerned that both consumers and producers in the milk industry in the Highlands and Islands should be adequately and fairly catered for.

The Rt Hon Charles Kennedy MP

6.200. The Rt Hon Charles Kennedy MP wrote in support of consumers and dairy companies in the Highlands expressing concern and anxiety about the future of the milk industry in that part of Scotland. On a constituency basis, he had been approached by a number of dairy farmers who were extremely concerned about the future of their businesses, and dairy farming in general, in northern Scotland. Mr Kennedy said that, should the inquiry find in favour of Wiseman, then its predatory pricing and abuse of a dominant position could cause the closure of the Claymore dairy at Nairn. As the only other realistic outlet for farmers' milk production in such a scenario was Wiseman's dairy at Aberdeen, the farmers' concerns were understandable. Mr Kennedy added that the farmers had felt intimidated at the prospect of complaining to the Commission in their own right.

The Rt Hon Robert Maclennan MP

6.201. The Rt Hon Robert Maclennan MP expressed concern over Wiseman's alleged actions and their repercussions on his constituency's dairy enterprises. At the time of writing (August 2000), he said that he was surprised to learn that the Commission had not advocated any interim measures against Wiseman.

Maureen MacMillan MSP

6.202. Ms Maureen MacMillan MSP wrote on behalf of herself and fellow MSPs Ms Rhoda Grant and Mr Peter Peacock. They were concerned that Wiseman, which had in excess of 80 per cent of milk sales in Scotland, was making life extremely difficult for Express/Claymore.

6.203. They said that if Express/Claymore did not survive, the Highland dairy industry would not survive. They had received several anxious letters from farmers who were worried about their future and who believed that the only solution was for Wiseman to divest itself of some of the business which it had won from Express/Claymore because of its pricing policies.

John Farquhar Munro MSP

6.204. Mr John Farquhar Munro MSP said he had been told by Express/Claymore that Wiseman controlled approximately 84 per cent of the Scottish liquid milk market and expressed anxiety at the possibility of the Claymore dairy being purchased by Wiseman. He was concerned that Wiseman's dominant position threatened the livelihood of around 40 dairy farmers in his constituency. Most dairy farmers in the Highlands supplied Express/Claymore and he had been given to understand by Express/Claymore that the livelihood of over 400 milk industry workers would be placed at risk if Wiseman were to take over the dairy. He said that the recent closure of a creamery in Islay had put the Highlands' dairy industry in an extremely fragile position. A Wiseman takeover of the Express/Claymore facility would damage it still further.

John Purvis MEP

6.205. Mr John Purvis MEP wrote to the Commission on behalf of Express/Claymore. He said that the company had made him aware of the nature and scale of its operations in the Highlands and the detrimental effects that Wiseman's operations had been having on Express/Claymore following its acquisition by Express. Given that he had been told that Wiseman controlled over 80 per cent of the processed milk market, it was essential that conditions allowing the reintroduction of competition into the market were introduced. Data given to him by Express/Claymore showed that the milk market in Scotland was not a competitive one by comparison with that in England and Wales. Mr Purvis said, therefore, that Wiseman's abuse of its monopoly position, and its measures and tactics that sought to drive Express/Claymore out of the market, could not be continued unchecked.

David Stewart MP

6.206. Mr David Stewart MP wrote on behalf of a number of his dairy farmer constituents to convey their fears and concerns about the current state of the market in northern Scotland. One of his constituents had invested both in milk quota purchase and in meeting new hygiene regulations. He was concerned at the prospect of losing the market for milk. Claymore had always had an uneasy relationship with Wiseman, which was one of the main reasons for the new partnership with Express. It had been felt that, with Express working with Claymore, Wiseman would have to operate fairly in the marketplace. However, this had not been the case. Wiseman had continually abused its monopoly position by offering severe price cuts, and also by offering inducements (such as free milk, refrigerators and orange juice) to retain existing customers and to entice former customers away from Express/Claymore. If Wiseman were to succeed in its strategy, it was possible that Express/Claymore could be put out of business. Because Mr Stewart's constituents were located a long distance away from any other processing plant, haulage costs would certainly make it impossible for them to operate profitably. Unless the Commission recommended action against Wiseman, dairy farming could cease in northern Scotland. This would have a huge effect not only on the farming industry directly, but also on many ancillary industries, for example vets, animal feed companies and refrigeration companies. The farmers concerned expressed their concerns over the future of the Express/Claymore facility. They said that the survival of their businesses depended upon the survival and consolidation of the dairy at Nairn; and that, to sustain some competition in the market for processed milk, there should be at least two large milk processors in the market. Given Wiseman's acquisition of Scottish Pride, they expressed concern at the possibility of Wiseman also acquiring the Express/Claymore business.

6.207. On behalf of his constituents, Mr Stewart asked the Commission to consider the vast number of people in the Highlands whose livelihoods depended on Express/Claymore's continued survival.

Mr Jamie Stone MSP

6.208. Mr Jamie Stone MSP was concerned that Wiseman's dominance would affect the economic viability of dairy farms in the Caithness area of his constituency. He urged the Commission to carefully consider the clear and growing imbalance in the market. It seemed to Mr Stone that any threat to the present operations of Express/Claymore, would be an equivalent direct threat to dairy farms in the Highlands.

Others

The Anthony Nolan Bone Marrow Trust

6.209. The Anthony Nolan Bone Marrow Trust (Nolan) wrote in support of Wiseman. Nolan said that it had had considerable dealings with Wiseman as the company’s chosen charity over the last 18 months, and had been very impressed by Wiseman’s understanding of, and support for, the charity’s work. Enthusiastic and committed Wiseman employees had collected an amazing £20,000 through a variety of fund-raising challenges, thus enabling Nolan to recruit more than 400 new potential bone marrow donors to its life-saving register for leukaemia patients.

Mr B Brown

6.210. Mr B Brown from West Lothian said that his was one of the few households that still had milk delivered to his home. He normally paid 42p per pint (0.6 litres). In February 2000, he noted that Wiseman Farmfoods, was advertising milk at below 20p per pint. Mr Brown was confident that Farmfoods was not selling this as a loss leader, and believed that the company would still be making a small profit. He pointed out that at no time had Wiseman’s sales staff ever approached him with any offers such as money off or other incentives. Mr Brown added that he would continue to have his milk delivered, as he believed this was an excellent service to the community.

Mr Leon Cadman-Goodwin

6.211. Mr Cadman-Goodwin said that he lived in Wigtownshire, a rural area with a local economy that was sustained by farming and forestry. Mr Cadman-Goodwin’s concern lay with the unequal terms of trade between dairy farmers and processors: he said that dairy farmers were paid 13 ppl for their milk (although this should rise to 16 ppl in the autumn), yet processors charged consumers 41p for a pint of milk. Price trends in milk had changed so drastically and so unfavourably for dairy farmers that, unlike the situation in the past, dairy farmers were no longer guaranteed a steady income from milk production. If current trends continued, Mr Cadman-Goodwin believed, the number of dairy farmers in Scotland would decline significantly, to an extent where Scotland would have to import its milk from other countries with uncertain health standards.

Hamilton Design Ltd

6.212. Wiseman had been one of Hamilton Design Ltd’s clients for the past decade. Hamilton said that it found Wiseman to be an innovative and competitive company. It attributed Wiseman’s success to hard work, knowledge of the market, excellent quality control and eye-catching design initiatives, and not anti-competitive practices.

The Prince & Princess of Wales Hospice

6.213. The Prince & Princess of Wales Hospice was thankful to Wiseman for its continued support. It mentioned that Wiseman was also involved with several other charitable causes.

Scottish Consumer Council

6.214. The Scottish Consumer Council declined to submit any evidence to our inquiry.

Mrs M Watson

6.215. Mrs M Watson from Kirkcaldy questioned the need for this inquiry as she believed Wiseman was not abusing its dominant position in the marketplace.

D P B KINGSMILL *(Chairman)*

M CAVE

A T CLOTHIER

P MACKAY

P A BOYS *(Secretary)*
23 October 2000