

## 2 Conclusions

### **The reference**

2.1. On 21 June 1995 the DGFT in exercise of his powers under section 5 of the Act required the MMC to investigate and report on whether Tambrands has been pursuing a course of conduct which constitutes an anti-competitive practice within the meaning of section 2 of the Act.

2.2. By virtue of section 2(1) of the Act, a person engages in an anti-competitive practice if, in the course of business, he pursues a course of conduct which has, or is intended to have, or is likely to have, the effect of restricting, distorting, or preventing competition in connection with the production, supply or acquisition of goods in the UK or any part of it or the supply or securing of services in the UK or any part of it. The terms of reference, which are set out in Appendix 1.1, specified tampons as the goods to which the investigation was to extend; and, as the course of conduct to be investigated, the granting of discounts to persons carrying on business in the supply of goods by wholesale or by retail in the UK, on condition that such persons stock the whole or a part of the range of tampons manufactured by Tambrands.

2.3. By virtue of the reference and section 6(5) of the Act, we are required to investigate and report:

- (a) whether, at any time during the period of 12 months ending on 21 June 1995, Tambrands was pursuing, in relation to the goods specified, the course of conduct specified in the reference, or any other course of conduct which appears to be similar in form and effect to the one so specified;
- (b) whether, by pursuing such course of conduct, Tambrands was at any time during that period engaging in an anti-competitive practice; and
- (c) whether, if Tambrands was engaging in an anti-competitive practice, the practice operated or might be expected to operate against the public interest.

### **Background to the reference**

#### ***Tambrands***

2.4. Tambrands is a wholly-owned subsidiary of Tambrands Inc, a US corporation, which is a leading world supplier of tampons with over 40 per cent of tampon sales in the major markets (including North America, Latin America, Europe, Australia and New Zealand) taken as a whole. Tambrands products account for over a half of tampon sales in the USA, and about one-third of tampon sales in the EC, but varying significantly between individual member states (for example, from 3 per cent in Germany to 80 per cent in Spain). The product range, both of Tambrands and Tambrands Inc, consists almost solely of tampons.

2.5. The turnover of Tambrands in 1994 in the UK was some £51 million, with operating profit of about £4.5 million. Most of the Tambrands products offered for sale in the UK are manufactured

at its factory in Havant, although some tampons are imported, and there are also substantial exports from the Havant factory.

### ***The supply of tampons***

2.6. Tampons are defined in the terms of reference as any product designed to be worn internally for menstrual sanitary protection. Whereas tampons are internally-worn products for this purpose, external forms of protection are provided by sanitary towels (towels) and (to a small extent) panty liners. There are two main types of tampon available—those which are inserted digitally and those which are inserted by means of an applicator (see paragraphs 5.2 and 5.3)—and tampons also vary in absorbency and in terms of the pack sizes in which they are sold. Tambrands itself markets three types of tampon in the UK, each available in different absorbency and pack sizes:

- (a) the Tampax flushable cardboard applicator tampon (its original product, primarily manufactured in the UK);
- (b) the Tampax Compak (Compak) plastic applicator tampon (introduced in 1992 and imported); and
- (c) the Tampax Tampets (Tampets) digital tampon (reintroduced in 1994 and wholly manufactured in the UK).

### ***Previous MMC reports***

2.7. The MMC reported on the supply of tampons in 1980<sup>1</sup> and 1986.<sup>2</sup> In the first of those reports, the MMC concluded that the determination of tampon prices by both Tambrands and Southalls (Birmingham) Ltd (Southalls) (which at that time was the subsidiary of Smith & Nephew plc (Smith & Nephew) supplying tampons) was against the public interest and that tampon prices were higher than would be expected in conditions of keener price competition. There was, however, the prospect of new entry, no evidence of anti-competitive practices in the industry, nor any insuperable barriers to the entry of new competitors. The MMC did not therefore recommend any steps with a view to bringing about more active competition in the industry.

2.8. The second report, in 1986, referred to changes in actual and prospective competitive conditions since 1980, notably the marked improvement and reduction in prices of external sanpro products; the increasing importance of retailers' own-label tampons; and the increased likelihood of effective competition from new entrants to the tampon market, particularly in the light of the decision to allow advertising of sanpro products. Although Tambrands' profits and prices were still regarded as higher than would be the case if Tambrands had less market power, the report found no insuperable barriers to entry, nor any evidence of restrictive or anti-competitive practices. There was therefore no adverse public interest finding.

2.9. In comparison with these earlier monopoly reports which considered the prices of tampons, the current inquiry is limited to the course of conduct by Tambrands which has been referred to us. In the context of the current inquiry, however, we have taken note of significant developments since the MMC's previous reports.

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<sup>1</sup> *Tampons: a report on the supply in the United Kingdom of tampons*, HMSO, Cmnd 8049, October 1980.

<sup>2</sup> *Tampons: a report on the supply in the United Kingdom of tampons*, HMSO, Cmnd 9705, January 1986.

## ***The market***

2.10. Retail sales of tampons in the UK are estimated at some £130 million in 1994, out of total sanpro sales of £317 million. Within the tampon market Tambrands has a market share of about 58 per cent by volume, and the Smith & Nephew branded products—primarily Lil-lets—about 30 per cent [ *Details omitted. See note on page iv.* ].

2.11. The introduction of ultra-slim towels, particularly by Procter & Gamble in 1992 under the Always brand name (see paragraph 5.34), has had a significant impact on the tampon market. As a result of product innovation, these ultra-slim towels are more convenient both to carry and to use, addressing a number of disadvantages which traditional towels had been seen as having compared with tampons. As shown in Table 2.1, these developments have led to a significant reduction in the share of tampons in total sanpro sales from 43.5 per cent in 1991 to 36.9 per cent in 1994.

TABLE 2.1 **Volume of sanpro sales in UK**

	<i>million SUs*</i>			<i>Tampons as % of total</i>
	<i>Tampons</i>	<i>External products</i>	<i>Total sanpro</i>	
1984	0.79	1.06	1.84	42.7
1985	0.84	1.14	1.99	42.4
1986	0.85	1.18	2.03	41.7
1987	0.90	1.26	2.17	41.7
1988	0.94	1.31	2.25	41.8
1989	0.97	1.26	2.23	43.5
1990	0.99	1.24	2.23	44.2
1991	0.98	1.27	2.26	43.5
1992	0.93	1.38	2.32	40.2
1993	0.89	1.45	2.33	38.0
1994	0.85	1.46	2.32	36.9

*Source:* See Table 5.5.

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\*SU= a statistical unit, equivalent to 1,440 tampons.

2.12. Changes in shares of the tampon market are shown in Table 2.2. There has been a significant increase in the share taken by retailers' own-label sales, from some 2 per cent in 1986 to over 10 per cent in 1994. [ *Details omitted. See note on page iv.* ] As well as the increased share of own-label products in the total tampon market, multiple retailers have become more significant in the distribution of tampons, about two-thirds of sales currently being through the grocery sector (see paragraph 5.38).

TABLE 2.2 Brand shares of tampon market by volume, 1984 to 1994

Year	<i>per cent</i>			
	<i>Tambrands</i>	<i>Smith &amp; Nephew*</i>	<i>Kimberly-Clark</i>	<i>Own label and other</i>
1984	59.1	37.2	3.5	0.2
1985	59.7	35.9	3.7	0.6
1986	59.8	35.7	2.6	1.9
1987	60.5	35.8	2.0	1.7
1988	62.2	34.4	1.8	1.7
1989	62.0	34.8	0.1	3.1
1990	62.0	33.7	0.7	3.6
1991	61.3	31.1	2.0	5.6
1992	54.9	29.5	2.5	13.1
1993	55.9	29.0	1.9	13.2
1994	57.7	29.5	1.0	11.8

*Source:* Tambrands, based on Nielsen Marketing Research data.

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\*Share of Smith & Nephew branded products only.

2.13. There has also been some successful new entry to the tampon market, notably by Hygieia Healthcare Ltd (Hygieia), which supplies both retailers' own-label sales and its own branded product (Confident). In addition, Tambrands and Smith & Nephew have launched new products in areas where the other has traditionally had a stronger position, with Tambrands marketing digital products and Smith & Nephew marketing applicator products.

2.14. Estimates of the total advertising expenditure of the seven leading sanpro companies indicate that advertising expenditure in this sector more than doubled in real terms between 1991 and 1994, from some £9 million to £19 million at 1994 prices (see also Figure 5.3). The increase was initially largely due to expenditure by Procter & Gamble as part of its launch of its Always brand, but Tambrands and other suppliers subsequently also increased their expenditure, the increase in Tambrands' advertising expenditure corresponding with the partial recovery in its market share between 1992 and 1994. Relaxation of controls over advertising of tampons on television contributed to this increased expenditure.

2.15. Despite the above developments, which point to increasing competition between tampon suppliers and between tampon and other sanpro products, Tambrands' prices have increased significantly since 1984, as have almost all tampon products (see Figure 5.4). Table 4.5 shows Tambrands' trade prices to have increased by 47 per cent in real terms between 1984 and 1994, while Table 5.15 shows Tampax retail prices to have increased by 45 per cent in real terms since 1984. The increase was most marked in 1992, when Tambrands increased prices, partly to finance additional advertising expenditure, when Always ultra-slim towels were introduced. As shown in Figure 5.5, the prices of Always towels were initially more than double those of tampons, but while the prices of Always were reduced in 1994, the prices of leading tampon brands have not followed suit.

## ***Profitability of Tambrands***

2.16. As a result of the above developments, there has, as shown in Table 2.3, been a significant reduction in the profitability of Tambrands. Operating profit as a percentage of sales has declined from over 20 per cent at the time of the 1986 report to less than 10 per cent in 1994. Return on capital employed (ROCE) has declined from between 60 and 70 per cent to some 12 per cent over the same period. As shown in paragraph 4.20 and Table 4.4, ROCE on a more appropriate allocation of operating assets between UK sales and exports would be about 19 per cent in 1994. Tambrands told us that profitability is expected to have increased in 1995.

TABLE 2.3 **Tambrands: summary of UK trading results**

	<i>Sales</i> <i>£m</i>	<i>Production</i> <i>costs</i> <i>£m</i>	<i>Brand</i> <i>support</i> <i>£m</i>	<i>Other</i> <i>overheads</i> <i>£m</i>	<i>Operating</i> <i>profit</i> <i>£m</i>	<i>Return on</i> <i>sales</i> <i>%</i>	<i>ROCE</i> <i>%</i>
1985	23.7	[			6.2	26	70
1986	25.8				5.4	21	58
1987	29.3				7.1	24	60
1988	32.8				8.9	27	73
1989	36.3		<i>Figures omitted.</i>		8.7	24	74
1990	41.1		<i>See note on page iv.</i>		9.8	24	78
1991	46.7				13.2	28	83
1992	46.6				14.5	31	44
1993	49.4				9.2	19	27
1994	50.9			]	4.6	9	12

*Source:* Tambrands and 1986 report.

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## ***Tambrands' market power***

2.17. We have considered whether the market power of Tambrands has been reduced compared with that at the time of our previous reports.

2.18. First, we considered whether it was still appropriate to regard tampons as a separate market, or whether they should be regarded as part of a wider sanpro market. It is clear that the entry of Procter & Gamble with its Always brand did have a significant effect upon the tampon market in general and on Tambrands. The change in consumer preferences in favour of external sanpro products and the cost of increased advertising in response to Procter & Gamble's entry into the market have had a significant impact on Tambrands' level of sales and on its profitability, as shown in Table 2.3.

2.19. Against that, we believe competition from external sanpro products is not at present sufficient to constrain tampon prices. From the evidence in Chapter 5, choice of sanpro products is based primarily on factors other than price—in particular, the personal preference of consumers and the strong loyalties to a chosen method of protection in general and to an individual brand in particular. Secondly, there is little relationship between the price trends of external and internal sanpro products (as shown in Figure 5.5) and no convincing evidence of strong price competition between them, and the prices of tampons have continued to rise despite the growth of the towel market. On the basis of this evidence, we see the increased use of towels as a result of significant product innovation (backed by substantial and effective product promotion) which has changed the preference of many users (as have other factors such as fears of toxic shock syndrome (TSS)). Users still retain strong preferences, however, either for internal or for external sanpro products, and do not regard towels and tampons as substantially interchangeable; hence tampons cannot at present, in our view, be regarded as part of a wider sanpro market. The European Commission

reached a similar conclusion that the markets for tampons and towels in Germany could be regarded as separate, in its consideration of the effects of the merger between Procter & Gamble and VP Schickedanz on the market for towels in Germany and Spain.<sup>1</sup>

2.20. Within the tampon market, Tambrands remains in a position of strong market power. As shown in Table 5.7, Tambrands' share of the tampon market remains large, at about 58 per cent in 1994, little changed from that in 1984. A number of retailers to which we spoke, moreover, referred to Tambrands as being less flexible than other suppliers in negotiations over prices and contract terms, suggesting that the company retains a strong position in the tampon market. Its market strength derives primarily from that of its brand, and the brand loyalty of consumers to which we referred in paragraph 2.19. The increase in tampon prices to which we referred in paragraph 2.15 also suggests that price competition remains weak.

2.21. On the other hand, the increase in the share of retailers' own-label tampons (although with little effect on Tambrands' market share) and the increase in the proportion of tampons sold through multiple retailers (as opposed to chemists) represent significant increases in the countervailing power of the retailers. The major retailers (three of which-Boots The Chemists Ltd (Boots), J Sainsbury plc (Sainsbury's) and Tesco plc (Tesco)-alone account for over one-third of Tambrands' sales) are in a strong position to promote their own-label products, being able to dictate their positioning on the shelves and allocation of shelf space, although Tambrands produces a number of 'must stock' products.

2.22. In our view, therefore, while Tambrands' market power remains strong, it cannot be regarded as being as strong as at the time of our previous reports. It is in the context of such developments since our 1986 report that we have to consider the course of conduct referred to us.

## **Reasons for the reference**

2.23. As explained in paragraph 3.5, following consumer complaints about prices, the Office of Fair Trading (OFT) conducted a comprehensive review of the UK tampon market in 1993. The OFT concluded that while the market continued to be dominated by Tambrands and Smith & Nephew, there were signs that the trends referred to in the 1986 report were continuing. Profitability, while still high, was declining, the only entry barriers were the strong positions of the dominant brands, and there was evidence of stronger competition from other forms of sanpro products. The DGFT therefore decided that a general monopoly inquiry was not merited.

2.24. In 1994, however, a multiple retailer-Somerfield Stores Ltd (Somerfield)-complained to the OFT about the special contract terms and conditions on which it was supplied by Tambrands. These terms required Somerfield, if it were to qualify for a particular discount, to stock the full range of Tambrands' products (Somerfield and Tambrands subsequently agreed that Somerfield should not have to stock Tampax mini 32s). The OFT, which had not been aware of this condition during its earlier review of the industry, then learnt that it was applied to nine leading retailers and to all chemist wholesalers.

2.25. Bearing in mind the market power which Tambrands had already been judged to possess, the OFT identified two possible effects of Tambrands' range-stocking provision: first, it might restrict the availability of scarce retail shelf space to competing brands; and secondly, it might act as a barrier to new entrants to the UK tampon market. Following Tambrands' refusal to agree undertakings to delete the range-stocking requirement from its terms and conditions, the DGFT referred the matter to us for investigation.

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<sup>1</sup>European Commission decision of 21 June 1994, IV/M.430-Procter & Gamble/VP Schickedanz (II), 94/893/EC.

## ***Tambrands' special contract terms and chemist wholesaler terms***

2.26. As stated in paragraph 2.2, the course of conduct we are required to investigate is 'the granting of discounts ... on condition that such persons stock the whole or a part of the range of tampons manufactured by Tambrands Ltd'. The course of conduct derives from Tambrands' special contract terms which it uses to contract with nine multiple retailers, and from a further set of terms with 30 chemist wholesalers, these retailers and wholesalers together accounting for some 70 per cent of Tambrands' sales. These terms include a number of other conditions, including payment terms and, in the case of multiple retailers, a minimum direct order which makes up 150 Tambrands cases in full pallet quantities (as explained more fully in Appendix 3.2). At the time of the reference to us, condition 8 of the special contract terms applying to retailers and of the chemist wholesaler terms ('the condition') stated that 'the full range of Tampax must be stocked', although in July 1995 Tambrands added the word 'tampons' after 'Tampax' to make it clear that the condition did not apply to Tampax handbag containers and that it applied not only to cardboard applicator tampons (branded as Tampax), but also to plastic applicator tampons (Compak) and digital tampons (Tampets). One of the retailers on special contract terms to which we spoke (Tesco) was initially unaware of the condition and said it regarded itself as buying from Tambrands on its own standard terms and conditions, as did another multiple retailer (Waitrose Limited (Waitrose)) and some of the chemist wholesalers. However, it is clear that Tambrands considers that the terms apply and it grants discounts, after appropriate negotiations, accordingly. Even if this were not so, it would not affect the question of whether Tambrands carries on the reference practice in relation to other retailers and chemist wholesalers.

2.27. By 'full range', Tambrands means all stock keeping units (SKUs)-ie the full range both of lines and of pack sizes. In practice, Tambrands has given concessions of different types to all nine retailers. As shown in Table 3.3, for example, [

*Details omitted. See note on page iv.* ]

Nevertheless, stocking of the full range, subject to Tambrands' agreement to any exceptions, remains a condition for supply on special contract terms and this amounts to a condition that the customer stocks the whole or part of the range, as specified in the terms of reference.

2.28. Tambrands does not insist that a retailer stocks the full (or agreed) range in all its outlets, nor does each order have to contain the full (or agreed) range. Tambrands told us that it would only regard as an infringement of the condition the failure by a multiple retailer to offer the full (or agreed) range for sale 'in any of its stores'.

2.29. Tambrands is, however, very reluctant to agree to its retail customers not stocking its new products, Compak and Tampets, unless sales performance in these products can be shown to be very poor. When we asked about the possibility that one particular customer [

*Details omitted. See note on page iv.*

] Tambrands confirmed that it was seeking to get the broadest possible distribution of its product range and acknowledged that the range-stocking requirement could be expected to benefit new products such as Tampets and Compak.

2.30. As noted in paragraph 2.26, some 30 chemist wholesalers are required under the terms of their purchase arrangements to stock the full range; Tambrands told us that it saw this as a requirement to list all Tambrands' SKUs in the catalogues they send to individual retail chemists and meet any order for Tambrands' products they receive from their customers. We consider that for many chemist wholesalers this in practice requires them to stock the full range at most times.

There is no requirement for individual orders by chemist wholesalers to include all Tambrands' SKUs, nor is there a minimum order quantity of any SKU.

2.31. In return for acceptance by retailers of the range-stocking condition and other conditions in the special contract terms, Tambrands grants extra discounts, which vary from customer to customer depending on their size and importance. For some of the smaller retail customers on special contract terms, the extra discounts are between [ \* ] and [ \* ] per cent depending on the product; and for the largest retail customers between [ \* ] and [ \* ] per cent. These discounts are above those in Tambrands' standard terms for retailers, which themselves provide a discount for larger purchases of about 13 per cent off standard prices (see Appendix 3.3). Chemist wholesalers receive an extra discount of about 2 per cent (above the 13 per cent discount available in Tambrands' standard terms for larger purchases), the more limited extra discount reflecting the smaller volume of purchases by chemist wholesalers and differences in the other conditions on which they buy.

2.32. We noted that in supply of sanpro products the relationship of discounts to the range stocked is not unique to Tambrands: we are aware of one other supplier which offers additional discounts, the greater the range stocked, although in a somewhat different way to Tambrands.

### **The course of conduct**

2.33. As we have stated above, Tambrands grants additional discounts conditional (together with other conditions) on the customer stocking all of its range except where Tambrands has agreed otherwise. Despite the concessions it has made, it requires the stocking of part of the range before granting such discounts. As regards the first of the questions in our terms of reference, we therefore conclude that Tambrands was, during the period of 12 months ending on the date of the reference, pursuing in relation to tampons the course of conduct specified in the reference. This was not disputed by the company. Tambrands did, however, point out that the terms of reference refer to 'the whole or a part of the range of tampons manufactured by Tambrands Ltd', but as evident from the discussion above, the requirement is also applied to tampons imported by Tambrands (ie some Tampax and all Compak sales) from elsewhere in the Tambrands group. This does not affect our conclusion that Tambrands was pursuing the course of conduct specified in the terms of reference in the 12 months prior to the date of the reference to us.

### ***The relation of the course of conduct to full-line forcing***

2.34. The course of conduct we are considering may be thought to have various similarities to two other practices: full-line forcing, where a customer cannot acquire supplies of a single product in a supplier's range, but must accept all or part<sup>1</sup> of the supplier's range; and tie-in sales, where the supply of one product or service is tied to that of another. The MMC reported on them in 1981.<sup>2</sup> Broadly, these practices may enable a producer in a dominant position in one product market to use its market power to secure a greater presence in another market than would otherwise be possible.

2.35. In the 1981 report we concluded that the practices of tie-in sales and full-line forcing frequently 'took their character from the circumstances in which they occurred' and that their effect on the public interest was not consistently harmful, beneficial or neutral but depended on the

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\*Figures omitted. See note on page iv.

<sup>1</sup>To which, strictly, the term range forcing or line forcing should be applied.

<sup>2</sup>*Full-Line Forcing and Tie-In Sales: a report on the practice of requiring any person to whom goods or services are supplied to acquire other goods or services as a condition of that supply*, HMSO, HC 212, March 1981.

circumstances. The 1981 report did, however, suggest certain guidelines which might usefully be borne in mind in the process of identifying tie-in sales and full-line forcing and in deciding when to initiate action against them. These were as follows:

- (a) Tie-in sales and line forcing are unlikely to be found, or are unlikely to persist, except when the supplier has some degree of market power in the supply of the tying goods or service, and any adverse effect on the public interest is likely to depend on the extent of the market power. Where there is little market power (because, for instance, there are alternative goods or alternative suppliers available) a tie may be difficult to operate and, to the extent that it is operated, may not have any significant effect on the public interest.
- (b) Where a supplier has substantial market power in the tying good or service the exclusionary effect on competitors is likely to be against the public interest, but how far this is so in practice is likely to depend on the structure of the market for the tied good or service and the extent to which it may be changing. If a tie forecloses only a small part of the market and there are numerous other outlets available the effect on competitors in the supply of the tied good or service may be negligible.
- (c) Tie-in sales and line forcing may simply represent the exercise of monopoly power in one market to restrict competition in another market, with no additional factors being involved. Any such cases are likely to be almost invariably against the public interest.
- (d) The anti-competitive effects of tie-in sales and line forcing are likely to be much more significant if the practices are associated with an insistence on exclusive dealing.
- (e) Ties which are potentially anti-competitive may often be defended on technical grounds, as in the case of tying of spare parts and consumable materials. These ties may be hard to evaluate and may often require detailed examination.

2.36. Tambrands argued against attaching the somewhat emotive label of full-line forcing to the range-stocking condition. It believed such a label failed to take account of the way in which the condition operated in practice, in particular:

- (a) The special contract terms were not forced upon customers. Rather, these terms had been developed in response to key customers' demands for preferential discounts to reward them for the special role they played in the distribution of Tambrands' products. The range-stocking provision was there to give the customer an added incentive to continue to stock the different products in the Tambrands range, despite the fact that some lines within its range were sold in smaller volumes than others.
- (b) The special contract terms were based on and reflected Tambrands' established trading relationships with its major UK customers. They provided starting points for negotiation or renewal of supply terms of each individual customer. During the course of those negotiations Tambrands may have to concede certain aspects of its terms with different customers. Tambrands' objective, however, was to continue to offer broadly comparable pricing and trading terms to equivalent customers.
- (c) Tambrands aimed to negotiate broad distribution of the different products in its range, persuading retailers of the competitive attractions of each line. It encouraged each retailer to stock an appropriate mix of different lines in each store. However, it recognized the constraints of shelf space under which different retailers operated, particularly in small stores. It was ultimately the retailer which decided which Tambrands lines to stock in each individual store. Tambrands did not dictate to the retailer what share of the sanpro product

shelf space should be allocated to its products, as opposed to competitors' branded products or towels or retailers' own-label products; indeed Tambrands generally found that its share of retailer shelf space was below its share of the market for tampons or the wider market for sanpro products.

(d) There was no refusal to supply if retailers were not prepared to accept the condition.

(e) The practice had also to be seen in the context of the power of the major retailing groups.

2.37. Against the guidelines in the 1981 report, it is clear that Tambrands has substantial market power: a share of 58 per cent of the tampon market (a partial recovery from 55 per cent in 1992), a very strong leading brand (referred to by some retailers as a 'must stock' item) and, as we have noted, a reputation for being less flexible than other suppliers in negotiation with retailers. Some 60 per cent of Tambrands' sales are, moreover, to those multiple retailers and 10 per cent to those chemist wholesalers subject to the condition.

2.38. Our first consideration is whether the course of conduct is an anti-competitive practice. The 1981 report was concerned with the effect of full-line forcing on the public interest, but, as is apparent from paragraph 2.35, considered the matter to a large extent in the context of competition. In our view, the practice we are considering differs from the types of full-line forcing which were thought by the MMC as likely adversely to affect the public interest. There is, for example, no element of exclusive dealing, or rewarding of any company specifically for excluding other competitors' products. Nor is there any refusal to supply if the full (or agreed) range is not stocked. There are substantial retailers which do not purchase their Tambrands requirements under the special contract terms, but whose purchases exceed those of some of the multiple retailers which are on special contract terms, suggesting that the size of the extra discounts is not such as to compel retailers to stock the full (or agreed) range. The discounts are granted in return for accepting a batch of conditions of which the order size and pallet ordering requirements (to which some exceptions have been made-see Table 3.3) are arguably more important than the range-stocking requirements. In addition exceptions (albeit minor) have been granted in relation to the stocking of certain pack sizes (eg the Tampax mini 32s, which sell in limited quantities, are stocked by [

*Details omitted. See note on page iv.* ]-see Table 3.3). There is no requirement to stock the full or agreed range in smaller stores where pressures on space and the possibility of displacing the products of competitors are likely to be greatest. Nor is there any requirement to purchase the full or agreed range in every order.

## **Whether the course of conduct is anti-competitive**

2.39. We have therefore to consider:

(a) whether the course of conduct does restrict, distort or prevent competition;

(b) whether it is intended to restrict, distort or prevent competition; and

(c) whether it is likely to restrict, distort or prevent competition.

## ***Whether the course of conduct does restrict, distort or prevent competition***

2.40. We heard from most of the multiple retailers which purchase on special contract terms. Six of them told us that they chose which Tambrands products to stock, regardless of Tambrands' terms. As noted above, one of these, when we approached it (Tesco), told us that it was unaware of the condition, while another (Waitrose) regarded itself as buying on its own standard conditions, which did not include any range-stocking requirement, although in practice they both stocked almost the full range out of choice. Sainsbury's objected in principle to the range-stocking condition (and to other aspects of Tambrands' conditions, particularly the minimum order sizes, with which, however, we are not concerned), but maintained that it purchased and stocked the Tambrands range by choice.

2.41. In our view, it is generally because Tambrands has a strong brand name, and consumers want to buy its products, that retailers decide to stock most of the range: it is not due to the range-stocking condition. With the minor exceptions shown in Table 3.3, Tambrands does sell its full range to all of the customers on special contract terms, but these exceptions show that Tambrands is not able to insist on customers stocking the full range. Given the strength of the retailers which buy under the special contract terms, we believe Tambrands is unable in practice to force on them products which it is not in the retailers' interests to buy.

2.42. Only one company-Somerfield, which is one of the smaller multiple retailers on special contract terms-told us that it did not wish to stock one of the new products (Tampets): see paragraph 6.47. It did stock Tampets because of the range-stocking condition; but it only stocked this product in its larger stores (28 out of a total of over 600). (The total value of this retailer's purchases of Tampets amounted in 1994 to only some [ \* ] of its total purchases from Tambrands; and out of total Tambrands UK sales of £50 million, and total UK tampon manufacturers' sales (at manufacturers' prices) of about £80 million.) Tampets being stocked only in its larger stores, moreover, it did not consider the effect of stocking them had been to exclude other manufacturers' products from the shelves. Only one manufacturer of tampons (Hygieia) expressed concern about the effects of the condition which, it felt, had reduced the shelf space available to Tambrands' competitors and had limited the products of other manufacturers which retailers would stock (see paragraph 6.21). We noted that Hygieia's products were nevertheless stocked by Somerfield and that Somerfield did not consider that competing products had been excluded. Smith & Nephew said it was possible that Tambrands' practice had had an effect, but it was difficult to say with any certainty whether this was the case.

2.43. It is apparent from this evidence that the condition affects the stocking by only one multiple retailer of one Tambrands product line-Tampets. We have noted that, since the retailer was only stocking these products in its largest stores, the effect of the condition was not to exclude the products of any other suppliers. This retailer does in fact stock tampon products from a range of other manufacturers (including Smith & Nephew, Hygieia and Kimberly-Clark Europe (Kimberly-Clark)).

2.44. We have noted in paragraphs 2.30 and 2.31 that Tambrands, in return for a more limited additional discount compared with that available for multiple retailers, in practice requires chemist wholesalers to stock all Tambrands products at most times to meet any order for Tambrands products which they receive from their customers. No chemist wholesaler we heard from considered that the range-stocking condition affected its stocking of other suppliers' products, although some expressed concern in principle about such a condition (see paragraphs 6.87 and 6.93). The products stocked by chemist wholesalers therefore primarily reflect orders from retail chemists (which Tambrands promotes by other means), which do not appear in any way to be affected by the course of conduct we are considering. Nor, indeed, did we hear of any concern from chemists or retailers not on special contract terms that they were disadvantaged in any way by the course of conduct.

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\*Details omitted. See note on page iv.

2.45. Given that the condition does not appear to affect the display by retailers of products of competing suppliers (including those of a recent entrant, Hygieia), it should not in our view affect the ability of new suppliers to obtain display for their products; nor does it affect the ability of new suppliers to supply through chemist wholesalers. The condition does not therefore represent a barrier to entry to new suppliers: the main difficulties in entering the market are, as they were at the time of our previous report, the strength of the existing brands and the static nature of the market. Despite this, entry has recently occurred (see paragraph 2.13).

2.46. Because the course of conduct does not restrict the availability of retail space to competing products, or affect the ability of competitors to supply through chemist wholesalers, and does not act as a barrier to new entry, we do not consider that the course of conduct has the effect of restricting, distorting or preventing competition.

### ***Whether the course of conduct is intended to restrict, distort or prevent competition***

2.47. Tambrands told us that one of its reasons for retaining the range-stocking condition was to help it avoid pressure from key retailers for individually negotiated special pricing terms: its philosophy was to resist pressures to agree differential prices, overrides or other beneficial terms with some customers compared with those agreed with comparable customers. Even if Tambrands did not offer discounts expressed as reflecting in part the range of products stocked, it believed key retailers which stocked the full (or most of the) range would continue to expect to be rewarded financially.

2.48. Tambrands said that a further principal purpose of the range-stocking condition was to promote the distribution of the Tampax mini line. The Tampax mini product, being aimed at first-time tampon users and to encourage subsequent sales of other tampon products, is an important aspect of Tambrands' ability to compete in the wider sanpro market over the longer term. Without the ability to promote products suitable for younger users, Tambrands considers that there is a risk that the use of tampons could decline further relative to that of towels.

2.49. The company said that the inclusion in the condition of the requirement also to stock new products, such as Tampets and Compak, was aimed at achieving as broad a range of product stocking and consumer choice as possible.

2.50. We do not believe Tambrands' stated intention in granting discounts on condition that the whole or part of its range is stocked, namely to improve its competitive position in the way described in paragraphs 2.47 to 2.49, should be characterized as an intention to restrict, distort or prevent competition.

2.51. As we have noted in paragraph 2.38, there is no element of exclusive dealing, or rewarding of any customer for excluding the products of Tambrands' competitors. Tambrands has agreed to limited concessions to the full range-stocking requirement. It has not attempted to require the smaller stores of those retailers on special contract terms to stock the full or agreed range, or to require each order to cover that range, which could have the effect of more directly displacing other competitors' products because of limited shelf space. There is therefore in our view no convincing evidence to cause us to disbelieve Tambrands' statement of its intention, or to conclude that its actual intention is to restrict, distort or prevent competition. In our view, the full range-stocking condition is intended to serve as an opening bargaining position with retailers and to promote the distribution of Tambrands' brands, but not to exclude the products of its competitors from retail outlets, nor to act as a barrier to entry.

2.52. The course of conduct is therefore in our view not intended to restrict, distort or prevent competition.

### ***Whether the course of conduct is likely to restrict, distort or prevent competition***

2.53. Finally, we considered whether the course of conduct is likely to restrict, distort or prevent competition. We have concluded in paragraph 2.46 that the course of conduct does not currently have any anti-competitive effects. We have noted that Tambrands' power in the sanpro market has weakened in recent years. We have also noted the continued power of the major retailers. Given that these circumstances may be expected to continue, we do not believe the future effect of the practice is likely to restrict, distort or prevent competition.

### **Conclusion**

2.54. The circumstances of the particular case referred to us lead us to conclude that the practice we are considering does not restrict, distort or prevent competition: nor in our view is it intended to do so, or likely to do so. We therefore conclude that Tambrands was not at any time during the period of 12 months ending on the date of the reference to us engaging in an anti-competitive practice. We are not therefore required to consider the effect of the course of conduct on the public interest.