

# 7 Views of other manufacturers, distributors, retailers and consumers

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## Introduction

7.1. This chapter summarizes the views of manufacturers other than those whose views are included in Chapter 6, distributors, retailers and consumers. A number of ex-dedicated distributors expressed concerns particularly about the establishment of Wall's Direct, the terms on which independent distributors were supplied and the methods used to promote Wall's Direct, and the effects of freezer exclusivity. Of over 150 other manufacturers and distributors from which we heard, about 100 expressed concerns about aspects of the market, in particular distribution arrangements, freezer exclusivity and terms to retailers; or suggested, in response to a questionnaire we put to them, that their sales and/or industry sales would increase if freezer exclusivity were abandoned. However, we also heard from about 100 retailers, few of whom expressed concern about any aspects of the market. We received very few views from consumers.

## The views of a group of ex-dedicated distributors

7.2. A group of ex-dedicated distributors<sup>1</sup> attended hearings and made the following points. (The separate submissions of individual ex-dedicated distributors are summarized in paragraph 7.38 et seq.)

7.3. The group told us that they were in a position of confusion and uncertainty. From 1 March 1999 they faced a situation where their major competitor (BEW) was also their major supplier. BEW had made it clear that it expected to capture at least 50 per cent of the market through Wall's Direct. The ex-dedicated distributors, now ice cream wholesalers, were facing a future where, although their terms were reasonably transparent, they faced competition from Wall's Direct whose terms (for example, promotional benefits) were not transparent and were unlikely to be so until the end of the 1999 season. The ex-dedicated distributors were also facing competition from national wholesalers such as Booker and Snowking, who received significantly better terms than the ex-dedicated distributors.

7.4. In the view of the group, BEW had used the Commission's 1998 report as an excuse to go down the road of instituting Wall's Direct in order to keep the monopoly stranglehold it had on the market place. At the time of the revision of contract terms in 1998, two dedicated distributors had decided to become independent wholesalers. Those two commenced acting as wholesalers in the middle of April and had to quickly collate information about where to source industry refrigeration, other manufacturers' brands, terms for other brands, advertising, and gain contact with the customer base about the opportunity to be no longer tied to a single supplier. The initial reaction from the trade had been overwhelming; there had been much interest in the option of being able to have a freezer from the wholesaler on free loan and be able to carry brands that were being heavily advertised on television that hitherto retailers had not been able to stock. Both wholesalers sited about 100 freezers each last year, and proposed to install a similar number this year. Looking at the rate of sales through those freezers compared with the previous sales of only Wall's ice cream, the initial indications were that sales were 25 to 30 per cent above the site average for last year; subsequently, on the basis of 15 examples, it was established that the average increase in sales for March to June was well over 50 per cent.

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<sup>1</sup>Speediserve, Harlech, Coldstream, King Bros, N W Levers Ltd. The transcripts of the hearings were, however, copied to all other members of ICW and Ice Cream UK.

7.5. Some of the group had been offered the opportunity to become partners with Wall's Direct, and some of those had accepted the invitation, but others felt that the Wall's Direct system was potentially flawed. In particular, Wall's concept of cross-docks did not give any scope to a wholesaler who could provide cold storage, and a number of ex-dedicated distributors had previously invested heavily in such storage at BEW's request. BEW was offering a 24-hour delivery service in the summer period only, anticipating that the independent wholesalers (mostly the ex-dedicated distributors) would pick up the non-economic winter operation. As for tendering for the cross-docks, BEW set conditions to the effect that its products had to be exclusively delivered in vehicles used for the Wall's Direct operation, and had to be kept only in appropriate cold stores. It followed that, as an operator carrying on a wholesale business, in a Wall's Direct delivery it was not possible to get the benefit of a single drop including product from other suppliers. Particularly in rural areas, it was necessary to mix loads in order to reduce unit costs. BEW had also demanded delivery to some cross-docks at 4.00 am to depots in residential areas. There was a danger that because of increased handling of products under the Wall's Direct operation, quality could be compromised.

7.6. BEW had agreed a budget with cross-dock operators and was offering payment to cover these budgeted costs and a management fee in addition. This management fee could be enhanced by 50 per cent by achieving very easy targets—for example, in the first year the target was to deliver 97 per cent of orders captured. Distributors' costs differed for each location but were likely to be between £1.39 and £1.70 per unit, without the management fee, compared with the £1.10 offered to independent wholesalers. The £1.10 equated solely to the distribution costs and took no account of sales, storage and financing the stock and debtors, or a profit to the shareholders. The actual cost of the cross-dock operation could be anything between £1.04 and £9.00 per unit. On the face of it, the Wall's Direct contract looked very attractive for such operators, but those ex-dedicated distributors who had declined or were not invited to join Wall's Direct did not have faith in its distribution system. They had become disillusioned with their previous relations with BEW, and were uneasy at the prospect of being effectively tied to it.

7.7. Asked what the minimum discount from GSV ought to be to enable independent wholesalers to conduct a viable business as a general group, the ex-dedicated distributors said that the £1.10 per unit offered to independent wholesalers had equated to about 10 per cent of GSV overall in 1998. Operating costs were around 17 per cent and in order to make a profit and allow reinvestment in new trucks and facilities, distributors needed to earn margins more like 20 per cent, which they had done in the past. Wholesale margins from Nestlé and Mars had been 20 to 25 per cent. A company as large as BEW should be in a position to offer margins at the same level as other manufacturers.

7.8. A number of ex-dedicated distributors had formed a company called Ice Cream World. BEW had refused a request that ICW be recognized as a buying entity whose collective turnover was higher than £7.5 million (the limit beyond which the OFT undertakings about payment on published terms did not apply and therefore a deal would be separately negotiable). Despite initially suggesting discussions, BEW had subsequently said that it would not consider this request because ICW was an unknown quantity—although in fact all members of ICW had been dedicated distributors for BEW for 12 years. At present, those companies which fell into the category of over £7.5 million were the big national wholesalers. The £7.5 million included purchases of frozen food plus ice cream. The collective turnover of ex-dedicated distributors was in excess of £60 million for ice cream alone. BEW also said that it had refused this request on the grounds that it would be in breach of the OFT undertakings, because ICW had not been in existence as a group in 1998.

7.9. There were enormous disparities in delivery terms between ex-dedicated distributors and Wall's Direct. The quantities which could be ordered from BEW had been reduced and the start of season stocking facility had been withdrawn. Up to and including the 1998 season, the dedicated distributors had been able to order from BEW at 24 hours' notice provided they ordered a full trucker load of 26 pallets. BEW had withdrawn this facility and in 1999 wholesalers would now only receive deliveries on two specified days a week. The minimum order size had gone down to 50 cases, but that was small comfort for the loss of the overnight ordering facility which was essential to enable wholesalers to respond to customer demand when the sun came out. All orders whether 50 cases or 26 pallets were now on 48 hours' notice.

7.10. BEW's stance was that retailers would be entitled to discounts and bonuses whether their supplies came through Wall's Direct or through wholesalers. However, the system for claiming discounts and bonuses through wholesalers seemed very complicated and convoluted, with three different options, and therefore wholesalers had to say to retailers that they were not certain how the system would work.

BEW was enticing retailers who had previously been customers of the dedicated distributors to buy from Wall's Direct with an introductory offer which was not available through wholesalers. In effect, BEW was offering up-front discounts which retailers would find it hard to refuse.

7.11. The ex-dedicated distributors also claimed that in a number of cases about which they gave details, retailers had been persistently contacted by BEW even when they had made it clear that they wished to stay with their existing wholesaler; that misleading and/or disparaging claims had been made about whether the ex-dedicated distributors would have sufficient stocks or remain in business at all, or whether retailers could still obtain bonuses or promotional material if supplied through ex-dedicated distributors; that BEW had not made clear that there was a choice of distributors; that Wall's Direct staff had incorrectly claimed that any order placed with them would be passed on to the regular independent supplier, or not made it clear that they were calling from Wall's Direct; and that BEW had given better terms or other incentives, including free holidays, to retailers supplied by Wall's Direct.

7.12. If terms were competitive and transparent, wholesalers could compete on a level playing field with BEW, but they would still be at a disadvantage if faced with a situation where a large proportion of freezers were exclusive to one particular manufacturer. The ex-dedicated distributors would still have the facility to request BEW to supply a freezer to a retail customer, but they would be looking towards placing industry freezers in future. Therefore retailers supplied by the ex-dedicated distributors would have a choice between a BEW freezer and an industry freezer. The right choice for an individual retailer might depend on circumstances but the promoters of industry freezers argued that a choice of products could increase sales by 30 per cent (or even 50 per cent—see paragraphs 7.4 and 7.19). Only about a quarter of the ex-dedicated distributors had the resources to provide and fund industry freezers, but they were all capable of placing industry freezers supplied or partly funded by manufacturers.

7.13. Asked about price competition at the retail level, the ex-dedicated distributors said that consumers were not very price-conscious when buying impulse ice cream. What was important was the issue of choice. Customers needed in freezers the choice of different types of product from a range of manufacturers, so that there was a choice between (say) a Magnum at £1 and something else at 30p. There were 12 Magnum-type products from different manufacturers and they were essentially competing for the same consumer demand, although increased choice of similar products but of different manufacture, if displayed together in the same freezers, would lead to greater price competition.

7.14. With regard to the position in leisure sites, it was not clear that the appearance of several brands from different manufacturers would lead to lowering of prices as there was a captive audience in many such sites.

7.15. Focusing on the public interest, the ex-dedicated distributors believed that, BEW being by far the largest supplier of ice cream in the UK, no wholesaler could operate a viable business without carrying BEW products. BEW had been exploiting that market power, in particular by trying to attract retailers to buy from Wall's Direct rather than from their ex-dedicated distributor. If the freezer network were also opened up to competition, there would be much greater scope for a better service to the public. Ideally, retailers should be able to choose their freezers and what products to stock in them. If the market were opened up to greater competition, more choice for consumers and some degree of price competition and greater promotional activity would result. Product innovation would also be encouraged.

7.16. In conclusion, the group drew attention to the issue of vertical integration. It was surprising that a private monopoly should be allowed to vertically integrate downwards without any control, in a way which had the result of potentially putting out of business or making uneconomic an independent distribution structure that had been in place for the last 12 years.

7.17. The group therefore believed that BEW should be prohibited from operating Wall's Direct as this constituted unfair competition with other distribution routes; that freezer exclusivity should be prohibited; that wholesaler consortia should be allowed to aggregate their purchases to exceed the £7.5 million threshold (if that were to remain); and that the £1.10 per unit allowance (which equated to a discount of about 10 per cent) should be increased to a realistic level so as to provide, say, a 20 per cent margin. If Wall's Direct were to continue, BEW should be prohibited from granting inducements to retailers to switch to Wall's Direct, while putting administrative obstacles in the way of retailers who had accounts with ex-dedicated distributors and wished to obtain discounts from BEW. BEW should also be prohibited from changing the definition of 'direct customer' to suit itself and so to reduce the range of customers in respect of which the ex-dedicated distributors could earn bonuses.

7.18. At a second hearing, the group of ex-dedicated distributors said that their business during the 1999 season had been severely depleted. One company's sales of Wall's ice cream were down by 49 per cent from last year, although this was compensated for slightly by sales of ice cream from other manufacturers. Some 10 per cent of business had been lost because Wall's had changed the characteristics of accounts so that they were 'direct' under the 1999 definition, that is, receiving an off-invoice discount rather than an end-year bonus. It was not possible for wholesalers to earn bonuses on such accounts. Moreover, BEW's conditions for wholesaler bonuses were such that ex-dedicated distributors were unlikely to be able to earn them. If 50 per cent of 1998 sales were achieved, the bonus was only 1 per cent. At 90 per cent of 1998 sales the bonus was 5 per cent, but as BEW was aiming to take 50 per cent of the ex-dedicated distributors' business, the chances of a full bonus being earned were nil.

7.19. The ex-dedicated distributors had found that other manufacturers' brands had provided good opportunities, in some cases offering improved margins. Industry freezers carrying several manufacturers' brands were turning over in the region of 50 per cent more than the equivalent volume of Wall's ice cream sold in a Wall's exclusive cabinet. There had also been examples of total sales increasing in outlets which had installed a second freezer alongside a Wall's exclusive freezer.

7.20. The group submitted that distribution exclusivity was efficient only for the dominant market leader. The group had about 250 delivery vehicles between them which was sufficient to provide comprehensive coverage of the whole country, but Wall's Direct had almost exactly duplicated this fleet with its own 250 liveried vehicles. This duplication of vehicles flew in the face of government environmental and road transport policy. The result was not only disadvantageous to consumers and society as a whole, but also specifically operated as a cost barrier to any other manufacturer wanting to enter the market, because costs of distribution were higher than they need be for everyone. BEW was clearly able to operate in this extravagant way only because it was being subsidized by other parts of Unilever. The group had lost business to Wall's because Wall's was able to offer one single unit at any time the customer wanted, on any day of the week, and that was a service which the ex-dedicated distributors could not possibly afford at £1.10 per unit.

7.21. The practice of BEW in relation to certain large accounts was to insist that they were on 'direct' terms which were not known to the wholesaler and to act as the wholesaler's agent in collecting the retailer's money. This meant in practice that the wholesaler had to take the debt risk without being able to check references, or know when the customer was overdue. BEW had also reserved the right to charge an invoicing fee, although it had said that this fee would be waived for 1999.

7.22. The group repeated that in their view BEW had used a variety of tactics to persuade retailers to buy through Wall's Direct rather than from, or through, their regular wholesaler. These tactics included repeated telephone calls from Wall's Direct or calls in person from BEW field staff, who sometimes purported to be staff belonging to the ex-dedicated distributors; misleading claims about the service offered by the independent wholesalers as contrasted with that offered by Wall's Direct; inducements; erratic deliveries to the ex-dedicated distributors; and inadequate terms to wholesalers.

7.23. BEW had in effect brought its distribution system under its direct control and by giving this system very generous terms would make it virtually impossible for the independent wholesalers to compete.

7.24. In addition to the confusion over the definition of 'direct accounts', BEW had caused further confusion by incomprehensible accounting systems which had discouraged retailers from remaining with their traditional distributor; delays in invoicing through wholesalers; delays in payment of the distribution fee to distributors; encouraging retailers to join buying groups, often artificially created, in order to earn higher discounts, and at the same time switching the buying group to Wall's Direct; and delaying the processing of discount claw-back claims and issuing credits relating to deliveries to direct accounts.

7.25. On the issue of freezer exclusivity, the ex-dedicated distributors submitted that freezer exclusivity eradicated head-to-head competition between brands, thus depriving consumers of choice and eliminating the possibility of price competition. It also raised costs by reducing wholesalers' ability to supply a complete range of ice cream products to outlets which had exclusive freezers. Freezer exclusivity was only one of the restrictive practices used by BEW which included exclusivity for BEW's products at wholesale distribution level coupled with exclusivity at shop level (freezer exclusivity or in some cases outlet exclusivity). The two practices were both interlinked and interdependent; freezer exclusivity could be enforced because distributors were exclusive and wholesalers were prepared to

operate on an exclusive basis because they had guaranteed access to the large fleet of exclusive Wall's freezers. The ex-dedicated distributors also said that BEW had used a number of tactics to encourage retailers to take or keep BEW's freezers, or conversely to dissuade them from having other freezers; these included trying to ensure that second freezers were badly sited in shops, encouraging them (when Wall's concessionaires) to persuade retailers to place second Wall's freezers, and filling industry freezers with BEW's products in order to make deliveries of competing products difficult. At present, the main anti-competitive behaviour consisted in BEW preventing retailers moving a Wall's freezer except on 28 days' notice. This practice significantly inhibited them from placing replacement freezers where a retailer wished to have an industry or multi-brand freezer. In addition, the 28-day period gave BEW plenty of time to lobby the retailer in an attempt to persuade him to keep a Wall's freezer.

7.26. Industry freezers were the proper way to display ice cream at retail level. The market could be opened up if all the major manufacturers contributed to the cost of industry freezers. The simplest solution was to prohibit freezer exclusivity completely. It would not be workable to have specific space in industry freezers allocated to particular manufacturers. Retailers were likely to create their own range of products required, according to the demand in particular outlets.

7.27. In the view of the group, BEW had used its bonus system in such a way that fair competition was eliminated. BEW had engaged in the practice of converting prospective end-year bonuses into large off-invoice discounts, regardless of performance, and without making the terms transparent to the distributor. The result was that BEW was able to benefit from economies of scale while the distributors lost out.

7.28. In response to a question as to whether promotional and other incentives were common practices when selling consumer products, the group said that what distinguished the present situation was that BEW was engaging in promotional activity in order to take retail customers away from existing wholesalers, many of whom had until this season been working in partnership with BEW.

7.29. On the issue of outlet exclusivity, the ex-dedicated distributors submitted that, because of the existence of a monopoly supplier, outlet exclusivity arrangements automatically froze out competing manufacturers. The practice should therefore be banned, at any rate for the monopoly supplier.

7.30. On the issue of advertising and promotional expenditure, the group considered that the level of expenditure by BEW to assist in establishing Wall's Direct had severely distorted competition. Small independent businesses could not compete with a distribution operation which was in effect being cross-subsidized by Unilever to the tune of £30 million. The group did not have concerns about straightforward advertising expenditure, provided it was done in the normal way at manufacturer level, designed to promote the brand as a whole. The investment by Unilever in Wall's Direct to set it up was disproportionate to the value of sales it had achieved. However, Unilever shareholders would not complain because they had just received an enormous extraordinary dividend.

7.31. As regards the issue of retail price competition, the ex-dedicated distributors believed that retail competition would increase when directly-competing products were on display side by side in the same freezer in every retail outlet. There had been little incentive for price competition when so many outlets had had exclusive Wall's freezers. As for RRP's, these were useful guidance for retailers, who would probably need guidance from wholesalers if manufacturers did not suggest prices.

7.32. With regard to the public interest generally, the ex-dedicated distributors submitted that the key issue in this inquiry was the effect on consumer choice. Choice would come about only if manufacturers abandoned freezer and outlet exclusivity and sold through independent wholesalers on transparent terms. Head-to-head competition would inevitably force complacent manufacturers to bring out new and innovative products.

7.33. The group gave details of possible remedies. They believed that supply to distributors must be on an economically viable basis and that BEW should be required to supply to distributors on wholesaler terms that allowed them to earn the sort of margin that was common for grocery products, including, for example, other frozen foods. Asked about the possible separation between BEW's manufacturing and distribution activities, the ex-dedicated distributors said that they did not have any faith that a notional Chinese wall would prevent BEW from continuing to abuse its dominant position. Previous Commission reports had indicated that where vertical integration operated against the public interest then divestment was the only workable solution.

7.34. Commenting on vertical integration, the ex-dedicated distributors said it was noteworthy that no other manufacturers in the ice cream business (or in frozen foods or other impulse products, or any other significant grocery line) had felt the need to bypass independent wholesale distribution channels by vertically integrating into retail distribution. BEW should be prohibited from delivering or selling its products direct to retail outlets. This prohibition should extend not only to pure in-house operations but also to subcontract or agency arrangements involving third party owned or leased vehicles and third party employees or self-employed contractors. This remedy needed to be imposed without delay in the light of the damage suffered in 1999 to the ex-dedicated distributors' businesses.

7.35. Further, the group submitted that no manufacturer should be allowed to impose exclusivity on any distributor; that a dominant manufacturer should not be allowed to use information supplied by its former distribution agents in order to compete with them; that freezer exclusivity by manufacturers should be prohibited; that no outlet should be supplied on an exclusive basis; and that terms of supply should be non-discriminatory and transparent. The specific proposals on terms of supply were:

- (a) Standard wholesale (ex-factory) prices to independent distributors should be set at the beginning of the season, should be the same for all wholesalers, and made available to all wholesalers. Quantity discounts for volume-related deliveries should be permitted.
- (b) Terms should be a straight wholesaler price, or discount off RRP (as Mars and Nestlé already offer) and not (as at present with Wall's) a price per unit with variable, unquantifiable and probably unachievable bonuses.
- (c) Wholesalers should be solely responsible for the terms on which products were sold or supplied to retailers.
- (d) If any manufacturer were permitted to continue dealing with any retailers as 'direct accounts', then the wholesaler should act strictly as an agent, selling to the retailer at prices set by the manufacturer with commission being payable to the wholesaler at margins known in advance—equivalent to the normal margin received as a wholesaler.

7.36. Asked about the telesales activity of Wall's Direct, the ex-dedicated distributors said that in their view the manufacturer should not engage directly with retailers in either delivery or sales activity.

7.37. On the Commission's statement of possible remedies (see Appendix 2.4), the ex-dedicated distributors' view was that:

- (a) Freezer exclusivity should be totally prohibited; it was not needed by any manufacturer.
- (b) Outlet exclusivity should be totally prohibited.
- (c) On discounts to retailers, the ex-dedicated distributors firmly believed that a simple transparent price list applicable to all wholesalers was easily the best solution, rather than a remedy relating to the permitted level of discount or margin. It would be preferable for terms to be a standard delivered price, with the only discount being in respect of large single deliveries. Delivered pricing was the industry norm, rather than ex-factory terms. However, if there were to be an Order or undertaking relating to a minimum discount or margin, then the ex-dedicated distributors' view was that it should be not less than 20 per cent of GSV. The 17 per cent merely covered costs and the wholesalers needed at least 20 per cent (and preferably 25 per cent) in order to earn a respectable profit.
- (d) On distribution, BEW should be prohibited from operating a direct sales business. While the ex-dedicated distributors had no objection to the suggestions made in 4(a) and (b) of the remedies statement, which in theory would solve a number of the problems, they did not think there was in fact any substitute for an outright prohibition on Wall's Direct, as proposed in paragraph 5 of the statement of possible remedies. At least three of the distributors had confirmed that they were ready and willing to provide comprehensive coverage of the M25 area, at very short notice.

## **Individual ex-dedicated distributors<sup>1</sup>**

### ***Anglia Frozen Foods Ltd***

7.38. Anglia Frozen Foods Ltd (Anglia) said that it had been a dedicated distributor of BEW's ice cream until 28 February 1999, when the arrangements were terminated by BEW. It then became an independent wholesaler. This would enable it to stock other brands of ice cream in addition to BEW's. However, Anglia believed that there were still many obstacles to competing in the market and that competition hinged on terms and cabinet exclusivity.

7.39. Since the termination of its contract with BEW, Anglia had heard that wholesalers supplying BEW's products could negotiate improved terms, if their turnover exceeded £7.5 million. Anglia, with other former dedicated distributors, had established ICW, a buying group of appropriate size. BEW had said that it would recognize it as a group, but would not accept that it had a turnover higher than the benchmark.

7.40. Anglia believed that BEW was using freezer exclusivity as an additional means of maintaining its control over the market. Anglia thought freezer exclusivity should be ended altogether, or (depending on the retailer's choice) subject to the supplier's use of the freezer being limited. Installation of freezers should be accompanied by a purchase scheme option, exercisable at the retailer's choice.

7.41. To summarize, Anglia believed that if BEW adopted predatory trading terms and maintained freezer exclusivity, Anglia would be driven out of business without any benefit to the market, or to consumers.

### ***Coldstream Ice Cream & Frozen Foods Ltd***

7.42. Coldstream was an ex-dedicated distributor which acted as an independent wholesaler last year. It supplied non-exclusive freezers to some outlets, but requested the retailer to purchase from it.

7.43. Coldstream believed that if all manufacturers, or only BEW, were no longer allowed to supply exclusive freezers, both its own sales and industry sales would increase. It believed experience had shown that there was a clear willingness and ability for the wholesalers and manufacturers to combine in funding the cost of freezers. The benefits to the consumer from banishing exclusivity would be greater choice, real price competition, competitive pressure on suppliers to improve product quality and value for money, and more investment by manufacturers leading to growth and development, new products, new ideas and more buoyancy in the market.

7.44. Coldstream also criticized the methods used by BEW to compete with it after it had ceased to operate as a dedicated distributor in early 1998 and BEW set up Wall's operation in Norfolk and Cambridgeshire, known as 'Wall's N&C' (see footnote to paragraph 5.3); these problems continued in 1999 after the establishment of Wall's Direct. Problems included suggestions to its customers that Coldstream would no longer be able to supply or have difficulty in obtaining stock, that bonuses or other benefits would not be available or would be more difficult to obtain if customers were supplied by Coldstream, and sales staff not making clear that they were telephoning on behalf of Wall's Direct. Coldstream told us that it had complained to BEW about stock shortages and delivery constraints during the summer of 1999. There had also been ongoing disputes with BEW about the calculation of payments related to sales targets and delays in agreeing bonus payments and refunds for damaged stock. Coldstream had also been adversely affected by the reclassification of some previous 'indirect' accounts as 'direct' accounts, although Coldstream continued to take the credit risk. Coldstream supplied copies of its 1998 accounts, which showed that it had made losses after it became independent.

### ***Cornish Farmhouse Frozen Foods***

7.45. Cornish Farmhouse Frozen Foods (Cornish Farmhouse), in its response to the statement of possible remedies (see Appendix 2.4), said that it believed freezer exclusivity should be banned as policing a proportion of a freezer would be difficult and costly. However, a manufacturer that supplied

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<sup>1</sup>The views of certain ex-dedicated distributors who are Wall's Direct contractors are summarized later in this chapter.

freezers would require a return on its investment, and Cornish Farmhouse considered that a minimum annual turnover of, say, £200 would be appropriate, and would stop abuse by other manufacturers who would otherwise act as ‘cuckoos’, placing their ice cream in competitors’ freezers. It believed that having total non-exclusivity enabled retailers to offer a complete range of ice cream products for the consumer.

7.46. With regard to outlet exclusivity, Cornish Farmhouse believed that all manufacturers with a turnover in impulse ice cream higher than £10 million should be prohibited from entering into any agreement with a retailer where other manufacturers’ products could not be supplied. It also believed that BEW should not be allowed to give away discounts and bonuses unless they were related to volume, and that discounts and bonuses should not be related to the supply of freezers.

7.47. Cornish Farmhouse said that BEW should not be allowed to operate a vertically integrated distribution system and that Wall’s Direct should be disbanded. Cornish Farmhouse’s operating costs were around 18.3 per cent and therefore the Commission’s proposed margin for an appropriate minimum level of discount for independent wholesalers would cover this. It received substantially more from some ice cream suppliers which allowed it to fund discounts, but these were generally volume-related.

7.48. The definition of national accounts in any exception to the proposed remedies on distribution should refer only to one with its own central invoicing system, and not clubs, associations or buying groups.

### ***Double A Foods***

7.49. Double A Foods (Double A) said that its contract as a dedicated distributor of BEW’s ice cream had been terminated at the end of February 1999, so that it had been forced to become an independent wholesaler. BEW could not guarantee that Double A in that role would have offers comparable to, or the same as, those which could be obtained from BEW direct. Double A might therefore lose one-half of its turnover.

7.50. Double A said that if manufacturers ceased to offer freezers free on loan, a number of small retailers might choose not to sell ice cream because of the capital costs involved. A recent survey had shown that some 83 per cent of retailers would continue to sell ice cream even if it meant that they had to invest some £350 to purchase a freezer. The cost of running a freezer to a retailer, however, could amount to about £270 a year. Both BEW and Nestlé offered profits to retailers of 22 and 23 per cent with various other discounts based on type of outlet, seasonal, buying group and back-of-price-list bonus etc. Double A said that a large number of its customers (over 33 per cent) had a turnover of £1,000 or less, hence their gross profits were below the cost of running the freezer. It added that there should be a basic price for ice cream; profits should be shared more evenly between manufacturers, distributors and retailers, and bonuses should be available, but based on volume etc.

7.51. In its response to the statement of possible remedies (see Appendix 2.4), Double A said that it would welcome the abolition of freezer exclusivity and replacing it with larger manufacturers having a 60 per cent share of freezer space. It also believed that opening up product availability within shops would increase competition as the consumer could choose the best deal available in the freezer. It said that the Wall’s Direct distribution operation was unfair, as its distribution costs were four times more than the average wholesaler was paid for storage, distribution and sales, and any orders taken by the field sales force went automatically to Wall’s Direct. Double A’s current deal with BEW was totally uneconomic, and it would welcome a remedy which gave wholesalers a minimum level of discount of between 17.5 and 22.5 per cent with any bonus based on volume; this would make them more viable and not dependent on the British summer.

### ***Eden Farm Ltd***

7.52. Eden Farm Ltd, a former dedicated distributor, told us that it was being disadvantaged by BEW as a result of BEW’s efforts to maintain a stranglehold on ice cream distribution and freezer exclusivity. The effect of the Wall’s Direct operations was that deliveries had to be duplicated so that customers could receive ice cream other than Wall’s, and accounts which could have been serviced by one supplier offering all ice cream brands were being serviced unprofitably by both Wall’s Direct and other suppliers.

### ***Hampshire Ice Cream Co Ltd***

7.53. Hampshire Ice Cream Co Ltd (Hampshire) was a former dedicated distributor based in Southampton. Its contract as a BEW dedicated distributor had been terminated on 27 February 1999. Hampshire said that its business had been reduced by 50 per cent because of insurmountable obstructions that had been put in place, leading to reductions in its fleet size and six redundancies.

7.54. Two-thirds of Hampshire's customer base had been direct customers whose terms and payment were dealt with directly by BEW. The detailed sales information for these customers was transmitted to BEW, enabling it to invoice each of them and to track sales and product data. Many of the direct customers had told Hampshire that they wished to continue receiving its service, but the sales information transmission facility was stopped by BEW on 26 February. The failure of BEW to allow access to the invoicing system would lead to a loss of 50 per cent of outlets within buying groups. This would include the larger account holders, such as multiples. The methods put forward by BEW on accessing the invoicing system of the buying groups had made it impossible to continue serving them, and this was completely against the customers' choice and was a complete obstacle. Hampshire had also learnt that BEW had secured a three-year contract with one buying group (which Hampshire used to deliver to) to be supplied by Wall's Direct by paying it an incentive: the buying group would stay on the same terms but would use only BEW's service for distribution.

7.55. This left Wall's Direct as the only source of supply of BEW's products for many customers. Hampshire believed the services that Wall's Direct gave them offered no advantages over its own. BEW's greatly-increased Field Sales Team would strengthen BEW's monopoly position and allow the trade no choice of brands.

7.56. Hampshire said that BEW had told wholesalers they would be supported by BEW's Wholesaler Management Team, but this would conflict with the operations of Wall's Direct, and its offer of free stock to customers who bought from it. Mars, however, would be offering a start-of-season stock incentive which would be available to retailer customers through their preferred distributors with no restrictions. This, in Hampshire's view, was fair trading, ensuring that the largest number of outlets had the opportunity to participate.

7.57. Hampshire had informed its 'indirect' customers about the changes in its operations. Many remained loyal and were pleased that they would be able to buy products other than BEW's from Hampshire. Nonetheless, those who did not have space for more freezers in their shops felt restricted by being unable to stock other brands in their BEW freezers. Hampshire could not contact the 'direct' customers to which it had previously distributed as it could not set terms for them.

### ***Harlech Frozen Foods Ltd***

7.58. Harlech Frozen Foods Ltd (Harlech) said that its contract as a BEW dedicated distributor had been terminated on 28 February 1999. It had not wanted to trade with any other manufacturer, but had been reluctantly forced to change. Harlech believed that the creation of Wall's Direct would have a serious effect on the small companies that were formerly BEW's partners. It made a number of comments in light of its experience since the termination of its contract as a direct distributor for BEW and its experiences in competing with the Wall's Direct operation.

#### ***Relations with BEW and Wall's Direct***

7.59. All of Harlech's customer information, under the dedicated distributor system, had been passed to BEW only for the purpose of paying bonuses or for the location of freezers. BEW had used this information to attract customers to its Wall's Direct network. Without this information BEW would not have been able to operate Wall's Direct with any ease.

7.60. Harlech said that the Wall's Direct operation was being funded to a level that, in normal circumstances, would make no commercial sense. The only interpretation was that the funds used to get this operation started were designed to put wholesalers out of business. This tactic could only be designed to maintain BEW's monopoly. Examples were:

- (a) The numbers of field sales staff were out of all proportion to sales.
- (b) The funding of the distribution of the product by Wall's Direct distributors was out of proportion to the sales and was probably designed to hide a cost comparison with the £1.10 offered to wholesalers from the investigation.
- (c) Buyers from some of the larger multiple and group accounts were reported to have been taken on a cruise to Monte Carlo.

7.61. Harlech said that, although BEW had not obstructed customers wishing to continue to be supplied by Harlech, it had tried various tactics to tempt customers into being supplied by Wall's Direct which amounted to unfair competition, for example:

- (a) special offers, namely one free case of Winner Taco, valued at £14.94, with every first order from Wall's Direct;
- (b) Wall's Direct giving the impression that it would be cheaper to deal directly with the manufacturer;
- (c) Wall's Direct persistently pestering the customer with visits and telephone calls, and ignoring customers' expressed wishes to be left alone unless in writing;
- (d) Wall's Direct telling customers who objected to unwanted telephone calls that they were allowed to continue because the Competition Commission had ruled that there must be fairer competition;
- (e) Wall's Direct taking orders from customers who said that they wished to deal only with the ex-dedicated distributors, with the promise to pass them on, which never materialized;
- (f) field sales personnel giving customers the impression that they were taking over from the ex-dedicated distributors' sales personnel, presumably to give the impression that the ex-dedicated distributors supported Wall's Direct;
- (g) Wall's Direct telling customers that the only way to guarantee supplies during hot weather was by dealing with Wall's Direct;
- (h) similarly, Wall's Direct telling customers that the only way they could be sure of getting a bonus was by dealing with Wall's Direct;
- (i) BEW cancelling the ex-dedicated distributors' refrigeration requests for legitimate freezer replacements without telling the ex-dedicated distributors, and then approaching the customer and authorizing their own replacements, to give the customer the impression that the only way to ensure getting a better freezer was through Wall's Direct; and
- (j) Wall's Direct appearing to volunteer to replace freezers, when they were clad in the old style logos and were to be changed as a matter of course, again, giving the impression that the only way to ensure getting a better freezer was through Wall's Direct.

This list was illustrative and not exhaustive. The whole style of operating was to cause a climate of uncertainty to tempt retailers into dealing with Wall's Direct.

7.62. Harlech said that a number of direct accounts informed BEW that they wished to continue to take their supplies from the ex-dedicated distributors. BEW did not address this problem until 1 March 1999 and issued a document that was unsatisfactory in that the burden of the debt and credit risk was put on to the wholesaler. It was pointed out to BEW that if the ex-dedicated distributor were to carry the debt, then the account had to be reclassified as an indirect account, and as such qualify for bonuses. The basis of this argument was custom and practice, and the definition in the undertaking resultant from the last inquiry. A second draft of the document for handling the direct business had been received, but it still did not address this point. The timing of the document was designed to be obstructive, so as to gain business for Wall's Direct. Furthermore, the paperwork for the direct business was being handled manually. The delays and capacity for queries and disputes could only seriously delay payment for the wholesaler. This was a cynical tactic designed to put financial pressure on the wholesaler, by causing serious

cash-flow problems so that it could not afford to do this business, thus putting it into the hands of Wall's Direct. There could be no excuse for this manual approach. A tried and tested computer link had worked well for many years, and even if it had never existed, modern computer technology could solve the problem in a very short time.

7.63. Harlech said that it had been pointed out to BEW that the value of the £1.06 distribution deduction (1998 figure), which represented approximately 10.5 per cent discount on GSV, would be much reduced if BEW increased the box quantity without a corresponding increase in the distribution deduction. BEW gave the assurance that should a box quantity increase, or if a box price increased above the rate of inflation, then the distribution deduction would be increased accordingly. Cornetto, however, which was a large-volume-selling line, had had its box quantity increased from 20 to 24. No increase in the deduction had been made. This had reduced profit on this line to less than 8 per cent.

### *Terms*

7.64. Harlech argued that:

- (a) The distribution deduction was totally inadequate to cover basic operating costs. It equated to approximately 10.5 per cent of GSV, when operating costs were nearer 18 per cent. Harlech was effectively funding BEW's business in the hope of a reward later in the year. This caused cash-flow problems.
- (b) The 4 per cent dedicated distribution deduction had been removed by BEW and not passed on to the wholesalers. They were therefore doing BEW direct business for 10.5 per cent. Harlech interpreted the Commission's recommendations resulting from the last inquiry as being a requirement that BEW should bring all wholesalers up to a level that included the 4 per cent dedicated distribution deduction.
- (c) The maximum 5 per cent that could be earned under the sales growth target still barely covered operating costs when added to the distribution deduction. The targets took no account of the weather or other factors beyond the wholesaler's control and, furthermore, were imposed and not negotiable.
- (d) The maximum 2 per cent that could be earned on strategic brands again took no account of factors beyond the wholesaler's control. It was an imposed target. BEW could change the products halfway through the year, to manipulate the plan so that the target could not be achieved.
- (e) The maximum 2 per cent that could be earned under the seasonal extension target was to some degree beyond the wholesaler's control; it was also an imposed target. It was, however, the most welcome of the terms elements if BEW could find the right products to increase winter business.

7.65. Harlech also said that it was baffled by the OFT's acceptance of the £7.5 million turnover ceiling above which BEW standard terms did not apply. Many dedicated distributors had formed ICW, which, in 1998, had a combined turnover of over £7.5 million. But BEW had refused to recognize that ICW would enjoy that volume.

7.66. Harlech said it should also be noted that this year BEW had removed the supply of products in the spring on terms which provided an incentive to build up stocks. This could again be an attempt to create cash-flow problems. Harlech was concerned that the stock levels in the country were lower than normal due to the fact that the wholesalers' cold stores were not holding high stocks; thus the factory could not produce because its own stores were full, but Wall's Direct could get stock at the expense of the wholesaler if there was a heatwave.

7.67. Harlech therefore believed that:

- (a) The terms might have been introduced to facilitate the introduction of Wall's Direct by forcing independent wholesalers to stop selling BEW's products due to their unprofitability. Some wholesalers had taken this course, and BEW's products did not form a major part of their portfolio. In the case of ex-dedicated distributors who serviced the main part of the market, BEW's products formed a major part of the business, or the whole of the business in most instances.

Harlech could have survived on its remaining wholesale business at the cost of ten jobs. As a responsible company operating in a rural area (North Wales), that option was not acceptable to it, without examining all the options.

- (b) Contract terms should be fair to both parties, and whilst it was healthy for them to be transparent, they should be volume-related and negotiable. The Commission should recommend to the Secretary of State that BEW's terms should be at least brought back into line with the rest of industry in order to safeguard wholesale companies and the jobs that they generated. In general, Nestlé and Mars offered up to 25 per cent off GSV, which was what BEW offered before the advent of the new contract. Other companies offered up to 40 per cent.

### *Freezer exclusivity*

7.68. Harlech's experience in the short time that it had been a wholesaler revealed that there was a strong demand for a multi-brand approach within a single freezer. The reasons for this were:

- (a) customer-driven retail demand for more choice;
- (b) the persistent pestering by BEW, coupled with the retailers' desire to remain with their original wholesaler, increasing this demand; and
- (c) for retailers, the prospect of increased sales driven by increased choice.

7.69. A number of factors were holding this desire back:

- (a) the lack of sufficient alternative freezers on free loan that could accommodate a multi-brand approach: Mars provided some freezers and did not demand more than 40 per cent of the space. Given time, and if the BEW terms were amended, Harlech would provide its own freezer fleet to service the need;
- (b) lack of space allowing more than one exclusive freezer in a shop; the majority of retailers only wanted, or had space for, one freezer;
- (c) the bonus system that meant the retailer changing to a multi-brand freezer at any point other than the end of the year might not achieve any bonus: Harlech believed that the bonus system played a part in maintaining freezer exclusivity, or at least in the timing of any change; and
- (d) the fear that a free or low-cost loan freezer might not be provided to the lower turnover accounts.

7.70. Harlech acknowledged that the removal of freezer exclusivity could be detrimental to the market, if manufacturers stopped providing freezers, although this would not affect larger organizations, such as Woolworths or Forbuoy, which provided their own, stocking all brands. However, Harlech believed that freezer exclusivity must be banned. In its opinion this would:

- (a) allow the market to grow with the increased choice to the retailer and consumer; and
- (b) remove the undue influence of the manufacturer in controlling its market share by the exclusive use of freezers for its product.

7.71. Harlech believed that this could be achieved by:

- (a) requiring manufacturers to give up part of their cabinet space to competing brands: Harlech suggested a figure of 30 per cent;
- (b) encouraging manufacturers to fund industry freezers through the wholesaler by a contribution to the cost, in exchange for space; and
- (c) addressing the issue of bonus payments.

### *Bonus and discount payments*

7.72. Harlech said that the system for bonus payments for retailers used by the three main manufacturers started when Nestlé and Wall's did their own distribution, presumably as a loyalty bonus. It made payment on a published scale at the year-end. There were also unpublished terms for seasonal accounts which were much higher than the published terms. The reasoning behind these enhanced terms was that they were for sites which had a high turnover in a short time frame such as beach sites, and could be justified by the high-volume drop size giving economies of scale. A discount off-invoice was the normal way that most wholesalers rewarded a larger customer for its volume, but it was mainly the manufacturers who used this practice in the ice cream industry. Harlech argued that:

- (a) The practice of bonuses and discounts created a burden of administration on the manufacturer and wholesaler and led to disputes over the payment level. This had been further exacerbated by the Commission's last inquiry when the bonus system was widened to include all wholesalers.
- (b) It also provided the manufacturer with privileged customer information which could be used to the wholesaler's disadvantage.
- (c) The retailers' account status had been changed by the manufacturer from indirect to direct without the agreement of the wholesaler, which in Harlech's case caused the wholesaler to lose 6 per cent of its margin.
- (d) Discounts had been offered to trade sectors such as garages and garden centres with no justification on volume.
- (e) Discounts were offered to buying groups which were generally small retail outlets. The economies of scale were lost to the wholesalers because of small drop size and they generally were reclassified as direct, losing the wholesaler a further 6 per cent margin.
- (f) The bonus system was calculated on trade list price (GSV in BEW's case). This provided no incentive for the retailer to drive the price down to the public.
- (g) The practice of the manufacturer publishing an RRP did little to drive pricing down to the end-consumer.
- (h) The distinction between direct and indirect accounts caused abuse and created an unhealthy market.

7.73. Harlech believed that the potential solution was to ban the practice of manufacturers offering bonuses and discounts and to increase BEW's wholesaler margin in line with industry practice to 35 per cent. This would allow the wholesalers to discount as the market and competition dictated. It would have a number of advantages:

- (a) It would open the market to genuine competition and would drive down prices.
- (b) There would be no need for direct and indirect customers. The wholesaler would be in control of the market and the unhealthy practices (such as up-front marketing payments) would largely disappear.
- (c) It would remove the ties that bound the customer to the manufacturer, so that the customer could change from one brand to another midway through the year with no loss of bonus or margin.
- (d) Along with non-exclusivity, it would open the market to the small manufacturers by virtue of the fact that the wholesaler could discount its product or apply bonuses.

7.74. Harlech, however, expected that, even given any acceptance of the fact that the bonus paid by manufacturer to retailers be banned, the manufacturer would use the opportunity to enhance its profit,

rather than to operate a pricing structure to open the market to a truly competitive state. The Commission could therefore recommend that:

- (a) There should be no distinction between direct and indirect accounts. Any discounts offered to retailers should be provided through a reclaim system with the wholesaler. The wholesaler would then discount the account. This system currently operated with BEW on certain accounts, and was in the new system for direct accounts recently received from BEW.
- (b) If the end of year or seasonal bonuses were retained, then the wholesaler should be given a cheque to cover all bonuses on production of the necessary evidence (Mars operated such a system). The wholesaler then distributed the bonuses to the retailer in whichever form was required.
- (c) In addition, if the bonus system were retained, differential bonuses dependent on who owned the freezer should be retained. This would:
  - (i) help with the spread of multi-brand freezers; and
  - (ii) help remove the disincentive to retailers to switch freezers and brands mid-year.

7.75. Commenting on the statement of possible remedies, Harlech believed that they should apply equally to all the companies concerned. It felt that the threshold of £10 million was too low and suggested it should be raised to £20 million, so that it would not retard the growth of smaller manufacturers. Given its experience through operating with a number of ice cream manufacturers as the inquiry progressed, it suggested that space allocation in freezers should be left to the discretion of the retailer and dictated by changing market forces. It believed that outlet exclusivity should be prohibited and that control of discounts to retailers, which BEW in particular used to maintain market share, should apply equally to all manufacturers and wholesalers.

### *Distribution*

7.76. The recent liquidation of two former dedicated distributors-turned-wholesalers (Midlands and Icetag Ltd) was proof that the current terms offered by BEW were not viable. Harlech suggested that the appropriate level of discount for independent wholesalers should be 22.5 per cent, not 17.5 per cent, to give some profit margin, as it believed the lower figure only covered costs. However, since Harlech believed that it was impossible to expect BEW to treat it fairly whilst it was in direct competition for sales, it would support a total prohibition on sales and delivery by any relevant manufacturer to retail outlet controllers. As to the definition of a national account, this should be confined to accounts owned by a single large parent company, but not independent companies that were part of a franchise operation, buying group or trade association. It also fully agreed with the suggestion in the statement of possible remedies that the relevant manufacturer be restricted in the use it might make of information provided by distributors; and that enforcements of existing agreements not complying with a prohibition be not permitted.

### *Icetag Ltd*

7.77. Icetag Ltd (Icetag) said that its contract as a BEW dedicated distributor had been terminated on 27 February 1999. One-half of its customer base were 'direct customers'. Icetag transmitted detailed sales information to BEW which enabled it to invoice and monitor its sales and product data. These customers had stated that they wished to continue receiving deliveries from Icetag, but this would not be possible as BEW had withdrawn its electronic transmission facilities.

7.78. BEW had told wholesalers that they would be supported by its Wholesaler Management Team. However, BEW had offered a free stock deal to customers which used Wall's Direct, but had not made the same offer to wholesalers. Mars, on the other hand, would be offering a start-of-season free stock incentive, which was available to customers through their preferred suppliers.

7.79. Icetag said that since the termination of the dedicated distribution network its neighbouring ex-dedicated distributor had become a Wall's Direct delivery agent, but was continuing to trade as a wholesaler as before, retaining all its customer base. This gave it an advantage over other distributors, which Icetag believed to be a breach of the undertakings BEW had given to the OFT.

7.80. Icetag had told its customers that it would trade as a wholesaler, and many were remaining loyal to it. However, they felt restricted because they had no room for additional freezers but were unable to stock other brands in their BEW freezer. (Icetag subsequently informed us that it had gone into provisional liquidation.)

### ***King Bros (Lady Lodge) Ltd***

7.81. King Bros (Lady Lodge) Ltd was an ex-dedicated distributor which acted as an independent wholesaler last year. It supplied some outlets with 'non-exclusive' freezers, requesting the retailer to purchase from itself. It believed that its sales and industry sales would certainly increase if manufacturers were not allowed to supply exclusive freezers, commenting that most manufacturers were willing to subsidize wholesalers towards the cost of freezers which were offered to the retailer on free loan as industry cabinets; its sales and industry sales would probably increase if only BEW were not allowed to supply exclusive freezers. King Bros (Lady Lodge) Ltd saw the advantages of industry freezers as offering freedom of product choice, wider range of products, competitive pricing, greater promotional activity, product quality and value improvements, and competitive pressure on manufacturers to introduce innovative products.

### ***L Lewis***

7.82. L Lewis (Lewis) was a manufacturer, ex-dedicated distributor and mobiler based in Chester. It said that, were freezer exclusivity to be banned altogether, its sales would initially probably decrease, as would BEW's sales, but other manufacturers' sales would increase. The large manufacturers would probably want to charge a rent for freezers and reserve a percentage of space for their own products, and might invest less money in new freezers; smaller manufacturers might invest more in freezers as they saw an opportunity. Were BEW only not to be allowed to supply exclusive freezers, then Lewis said that its own sales would probably decrease initially, but later on would probably increase; the volume of BEW's sales would probably decrease, but other sales would increase and there would be a great advantage to independent wholesalers due to increased variety and availability. Lewis believed the advantages of cabinet exclusivity were that the customer had the use of freezers free on loan and without charge for moving freezers, or for repairs or advertising, and freezer models were updated from time to time; the disadvantage was that the customer could not stock a range of ice creams from other manufacturers, but could purchase its own freezer for that purpose.

7.83. Lewis said that in setting up its own delivery service, BEW was undermining all the good work done by the dedicated distributors/concessionaires. Lewis's contracts had been abruptly terminated with two years to run. It had, as had other dedicated distributors, invested and fallen into debt to develop its sites to BEW's specifications and requests. It said that it was very surprised at the tactics adopted by BEW, such as its sales personnel not identifying themselves as Wall's Direct but telephoning or van selling as 'Wall's'. As at close of business on 26 February 1999, no operating procedure for direct accounts had been set up by BEW to invoice products delivered. This was widely seen as a stalling tactic.

### ***Midlands Ice Cream Supplies Ltd***

7.84. Midlands said that its contract as a dedicated distributor of BEW's ice cream had been terminated on 26 February 1999. Midlands had dealt exclusively in BEW products so this presented huge problems. The drawback to selling other brands of ice cream was the exclusive freezer. A retailer with a BEW cabinet could use it only for BEW's ice cream: any other brands had to be in a separate freezer. This was not always possible as many shops were either too small to have more than one freezer or the owners did not want more than one. Midlands believed that it would be in the public interest to have freezers that could be used for any brand of ice cream. (Towards the end of the inquiry, Midlands informed us that it had gone into liquidation.)

### ***N W Levers Ltd***

7.85. N W Levers Ltd (Levers) said that its contract as a dedicated distributor of BEW ice cream had expired at the end of February 1999, and that to remain in business it had become an independent wholesaler. Nine of the former dedicated distributors had been able to join BEW's new in-house distribution system, Wall's Direct. BEW had also approached Levers' customers, asking them to use its new service. Levers had access to other manufacturers' products, but it still had a reputation as a BEW distributor, and competing brands were not as strong as BEW products.

7.86. Levers told us that BEW offered different terms to wholesalers whose annual purchases from it exceeded £7.5 million. This permitted the large multiple wholesalers, who were able to include all sales of BEW products, to hold unfettered negotiations with BEW on the price of its ice cream. Levers wished to see this turnover limit removed; it thought wholesalers with lower turnover would need their terms with BEW to be restored to previous levels if they were to achieve a sensible return on ice cream.

7.87. Levers said that freezer exclusivity did give the independent retailer an opportunity to have a free freezer, and although tied to one brand the retailer was still able to offer customers a large range of ice cream. Many of Levers' customers had BEW freezers but would like to stock competing products. However, Levers had no record of the location of BEW's freezers once its contract was terminated, and BEW was intending to employ staff to ensure exclusivity.

### ***Northampton Ice Cream Ltd***

7.88. Northampton Ice Cream Ltd said that contracts between BEW and the dedicated distributors were terminated on 1 March 1999. This coincided with the commencement date of undertakings following the Commission's 1998 report, and with the launch of Wall's Direct.

7.89. Northampton Ice Cream Ltd believed that BEW was operating unfairly in its approach to retailers; some thought Wall's Direct was the only supplier of BEW ice cream and its associated benefits, others thought if they did not trade with BEW they would be disadvantaged either financially or through the loss of other benefits such as freezer availability. These issues were not explained clearly in BEW's contract terms, and by not doing so, BEW secured an unfair advantage over wholesalers and continued to restrict competition.

### ***Tolsurge Limited***

7.90. Tolsurge Limited (Tolsurge) told us that it was a wholesaler solely of ice cream, operating in the South Wales area. It had been a BEW concessionaire/dedicated distributor for 14 years, but now acted as an independent company, and was not part of, or member of, any group or trade association. It expected its turnover to be about one-third lower than in the previous year. It had not bid to be part of Wall's Direct, since this would have required it to contract the scale of its activities. Its role as a distributor for BEW's ice cream had therefore been discontinued by BEW, even though it was among the lowest cost of the former dedicated distributors. As an independent wholesaler, it found the terms offered by BEW to be significantly below its costs and totally inadequate to run a wholesale operation. Its ability to earn BEW's additional bonuses was dependent on the weather and there being no new competition. Also, BEW would not contribute to the cost of industry freezers provided by wholesalers, further disadvantaging the wholesalers' ability to place a variety of products in the market. It subsequently had experience of retailers being offered free products only if they were supplied by Wall's Direct.

7.91. Commenting on the statement of issues, and first the definition of impulse ice cream, Tolsurge said that there was considerable competition within the scoop ice cream market, probably due to the low cost of entry. It believed scoop sales, however, to be a small proportion of the market, and that they should be excluded. All its competitors in the sale of scoop ice cream had a policy of freezer exclusivity, but because of the small number of retailers involved, refrigeration in this area of the market did not pose a barrier to entry by the independent manufacturers. If freezer exclusivity were abolished in this part of

the market, moreover, it would have a detrimental effect on the existing competitive market due to the high cost of scooping cabinets. Tolsurge did not feel that any company had approached the monopoly situation in the scooping market. Tolsurge also believed that soft ice cream should be excluded from an analysis of the market, and believed that the estimated market size previously quoted was likely to be too high rather than too low.

7.92. Tolsurge also believed that confectionery, packed snacks and soft drinks, although impulse products, differed from impulse ice cream since sales of the products were not weather-related, they did not require the cold chain to be maintained in distribution, and market shares were significantly lower. Similarly, Tolsurge believed that the catering trade did not sell large quantities of ice cream, and what was sold was either specialist or of low price from a large number of manufacturers or on an own-label basis, and was also therefore irrelevant. In Tolsurge's view, slush should not have been brought into the debate, as it consisted primarily of water. Additionally, Tolsurge believed that most multipacks were bought for home consumption by the public, although some were purchased within the trade and broken down into individual units to be sold on.

7.93. On the issues set out in the statement of issues, Tolsurge confirmed that, when originally approached to be part of Wall's Direct, it was told that all BEW vehicles would be solely for the use of BEW products, and, initially, that the business operation had to be exclusive to BEW. Tolsurge believed that it was now impossible to compete on the margins offered by BEW, while BEW's operation was being run regardless of cost, including also the significant increase in sales staff to serve Tolsurge's area. BEW's sales staff actively encouraged Tolsurge's traditional customers to purchase only from Wall's Direct by suggesting that freezers, bonuses and special offers were only available from Wall's Direct and stock availability could be guaranteed only by Wall's Direct.

7.94. The loss of Tolsurge's business had nearly all been in direct accounts, and Tolsurge believed that many barriers had been imposed to prevent Tolsurge from dealing with direct accounts. These included the delay in BEW's informing Tolsurge how such accounts could be served, the closing of computer links with Tolsurge, the complicated administrative systems subsequently set up for dealing with such accounts, and Wall's Direct continuing to canvass that business even when customers wished Tolsurge to continue to serve them. Direct customers and some traditional customers who had always received off-invoice discounts from Tolsurge, which Tolsurge had reclaimed from BEW, had been classified as sales not eligible for sales target bonuses.

7.95. Tolsurge also felt that BEW's refusal to recognize buying groups of ex-dedicated distributors (although it was not itself a member of a group) was a misuse of BEW's market position, since those groups would have enabled their members to deal with national accounts in the same way as buying groups, many of whom were recognized by BEW and given preferential terms. Tolsurge also believed that both the BEW and Nestlé systems for the provision of discounts to customers supplied by distributors was so complex that this probably precluded all but the very determined from getting involved, and were designed to assist Wall's Direct and Nestlé respectively.

7.96. Tolsurge believed that the greatest misuse of BEW's market position, however, related to its use of customer information. If a new account was opened that requested BEW refrigeration, all information was sent to the BEW sales person, who then visited the site to approve the request. When the freezer was delivered, Wall's Direct was telephoned to inform it that the freezer had been delivered, and customers were given a Wall's Direct brochure. If Tolsurge opened a new account which justified special terms, the same system applied. Also, if customers decided that they no longer wished to use a BEW freezer, BEW refused to move the freezer until a BEW representative had called, which would take up to four weeks,<sup>1</sup> with the effect of keeping out the competition by occupying the only retail space available.

7.97. The offering by Wall's Direct of a seven days a week delivery service within 24 hours of any quantity of product was also very expensive to operate in an area such as South Wales. But since BEW had offered that service, Tolsurge now also had to do so but on the basis of the much smaller margins available to it. BEW had also initially withdrawn single 24-ton pallet loads of extra deliveries, claiming

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<sup>1</sup>BEW had pointed out to Tolsurge that under its terms the supply of refrigeration the retailer was obliged not to give up possession of a cabinet without BEW's prior consent. Also the wholesalers did not have BEW's authority to make cabinet moves without BEW's prior agreement, the removal or movement of ice cream cabinets/equipment being managed for BEW solely by Total Refrigeration Limited. These requirements applied to ex-dedicated distributors as well as to other wholesalers.

that this was a result of the previous Commission ruling that similar services had to be offered to all wholesalers.

7.98. On freezer exclusivity, Tolsurge believed that, as practised by BEW and Nestlé, this was a definite barrier to choice for the public since most retailers did not have the space available for more than one freezer, and that availability of retail freezer space was now the one factor constraining the market, which had otherwise become more open with ex-dedicated distributors and other new distribution avenues available. Tolsurge itself now supplied many new brands including one of a smaller specialist manufacturer. Tolsurge believed that supply of exclusive freezers by distributors could similarly affect competition, but the trade would still have the choice of variety of brands from one source. Tolsurge also believed, however, that if the rights of distributors to have freezer exclusivity were upheld, there might be the danger of BEW indirectly controlling this exclusivity by placing its financial muscle behind chosen distributors who might offer BEW the greatest share of a freezer.

7.99. Tolsurge also believed that the volume-related discounts offered by BEW, Nestlé and Mars, of up to 33.3 per cent of GSV, worked against a competitive market, since it was in the interests of the retailer to maintain the highest GSV, and to sell only one brand to enhance profits. It was the combination of the structure of discounts, which bore no relationship to the costs of production, marketing or distribution, together with freezer exclusivity, that restricted access to the market and competition between manufacturers. On advertising, Tolsurge felt that BEW spent probably the same in percentage terms as any other company, but given its market share could afford to spend large amounts in doing so. However, if competitors were excluded from the market due to volume discounts and freezer exclusivity, customers could not buy products irrespective of what was spent on advertising, as Mars had found.

7.100. Tolsurge agreed that there was little or no price competition within the ice cream market, and only recently had BEW prices remained at or below the rate of inflation. Tolsurge also noted that where there was no freezer exclusivity, there was greater product choice, price discounts and promotional offers. Tolsurge believed that the trade preferred RRPs, and that price competition was discouraged by manufacturers (BEW and Nestlé) producing priced point-of-sale information. Premium prices tended to be charged by retailers who enjoyed maximum discounts from their suppliers, and who had little incentive to look for more competitive products.

7.101. Tolsurge therefore believed that the combination of distribution control, freezer exclusivity and direct discounting by the manufacturers to the retailer discouraged competition and created barriers to entry. Where these factors were absent, namely within supermarkets, there was greater diversity of brands and competition.

7.102. On possible remedies, Tolsurge believed that no manufacturer should be allowed to pay bonuses directly to retailers and that discounts must relate only to the cost savings of the manufacturer or the distributor. Secondly, freezer exclusivity must not be allowed. On other possible remedies, Tolsurge believed that without freezer exclusivity and control of the market by direct discounts, exclusive arrangements for distribution would not be cost-effective and would no longer be viable, and further remedies on distribution would not be necessary. In such circumstances, for example, it saw no reason why manufacturers should not be allowed to make what arrangements they wished to distribute their own products. Discrimination between retailers and between distributors should be allowed only in terms of savings on volume and cost of distribution. Finally, Tolsurge believed that manufacturers should neither recommend prices or advertise prices on point-of-sale material, but that wholesale prices should be based on the manufacturer's cost of production, marketing cost, cost of distribution plus profit margin, and the retail trade and public could decide the retail price in a market free of tied freezers and discounts. (Towards the end of the inquiry, Tolsurge told us that it was in liquidation.)

## **Contractors to Wall's Direct**

### ***Exel Logistics***

7.103. Exel Logistics (Exel) is part of NFC plc, a global logistics and moving services provider. It said that it had worked for BEW over a number of years providing logistics services; currently, it was not involved in carrying out any independent wholesaling of BEW or any other impulse ice cream products. In the context that Exel operated, it felt that it was relevant for it to comment on the proposed remedies in so far as they related to distribution only.

7.104. Exel said that the basis of an economically viable discount for independent wholesalers would vary according to the scale and efficiency of each individual operator. Furthermore, the process of equalizing payments between direct distributors and wholesalers would prevent additional services being provided to the market place.

7.105. The practicality of opening up the Wall's Direct network to other manufacturers needed to be examined in some detail. The network operators would need a significant increase in scale to cope with the additional storage and picking process associated with the additional volumes and additional number of selling units. Furthermore, common computer systems to control stock, take orders and prepare invoices would also be required. In particular, van selling would be challenged to cope with the additional space required to hold more than one manufacturer's product range.

7.106. Exel said that controls on contracts between manufacturers and retail outlet controllers would presumably mean a loss of volume through the network and could potentially lead to Wall's Direct being dismantled, with associated job losses and a large redundancy liability for Exel. Also, there was no guarantee of an equivalent level of service provision being provided in its place. Dismantling the network would have severe financial implications for Exel.

7.107. With regard to the wider public interest, Exel was currently of the opinion that the Wall's Direct network had brought innovation in customer service for the impulse trade sector, which had been well received by customers and would ultimately grow the impulse ice cream market.

### ***FMCG Ltd***

7.108. FMCG is a supplier of outsourced field sales teams to a number of major manufacturers including BEW. It said that it believed BEW's approach to the impulse trade was designed to grow the impulse ice cream category to the benefit of the industry and in particular the retail trade. FMCG field personnel made no attempt to influence the retailers' chosen source of supply. All ice cream manufacturers were aiming to ensure that retailers gave appropriate space and emphasis to ice cream in relation to other product categories, and to grow the market by encouraging retailers to stock and display the product on a year-round basis; if ice cream manufacturers were prevented from providing retailers with such a service, then the market would suffer and the jobs of the 300 personnel employed on the BEW operation and those of the other major ice cream manufacturers would be lost.

### ***Gocold Limited***

7.109. Gocold Limited (Gocold) said that, since March 1999, it had been operating both as an independent wholesaler and as a contractor to Wall's Direct. (However, towards the end of the inquiry we were informed that Gocold had ceased operating as an independent wholesaler.) These two parts of its business operated completely separately and had different cost centres. Where resources were shared, the cost was apportioned appropriately. Both operations were commercially viable on their own and there were few benefits to operating both from the same site. For example, Gocold's lorry parking area was partially given over to Wall's Direct vehicles for which it received an income. However, this did restrict the space within which its wholesaler vehicles operated. Most of the costs relating to Wall's Direct were fully attributable to Wall's Direct and had no additional benefit to Gocold. Wall's Direct operated on a cost plus basis which provided Gocold with low income but with low risk, as opposed to the previous dedicated distributor system where the risk was higher but margins were maintained regardless of volume.

7.110. As a wholesaler, Gocold said that it had retained almost all of its independent business, including many major seasonal and leisure sites; it no longer had access to national multiple business. In the light of its recent experience, both as a wholesaler and a contractor to Wall's Direct, the overriding effect appeared to be that the retailer was confused and bewildered by the current situation. The splitting up of distribution meant that many wholesalers were having to look at ways of cutting costs or diversifying into other areas. Ultimately this could result in a decline in service standards to the retailer in what was a very volatile industry. Gocold believed that its success had been built on the fact that it specialized in ice cream and was therefore completely focused on the industry thus enabling it to provide total service to the customer.

7.111. Gocold said that since the demise of the dedicated distributor system, it had embraced most manufacturers and stocked a much wider range of products. Despite the availability of higher margins to both retailers and itself, and the provision of industry cabinets both from some manufacturers and itself, the bulk of demand was still for Wall's products.

7.112. The current distribution arrangements provided very little additional benefit to the retailer over and above the previous systems other than the Wall's Direct delivery promise which was nationally consistent. Gocold could not see that the Commission's proposed remedies regarding distribution would be of ultimate benefit to the consumer, but, ideally, it would wish to see both systems being allowed to continue on completely open and published terms with wholesalers able to earn viable margins enabling them to provide the customer with a consistent service.

7.113. Gocold commented on the proposed remedies as follows:

- (a) *Freezer exclusivity.* It was not sure if the current practices operated against the consumer interest. It believed that the provision of free-on-loan ice cream cabinets by manufacturers had probably widened ice cream distribution and availability to consumers in the past. Alternatively, industry refrigeration had been available to retailers for some time and in many cases free on loan from multi-brand wholesalers; a choice had therefore been available for some time. Gocold's primary concern was that if manufacturers could not access reasonable returns on their investment in refrigeration, then this choice might ultimately be withdrawn. This could result in poorly-maintained or unsuitable ice cream cabinets being employed in smaller retail outlets with an obvious knock-on effect on the consumer. As an independent wholesaler, the ability to sell higher margin products into manufacturers' cabinets was attractive in the short term, but it was doubtful whether this situation would benefit the consumer or the market in general in the longer term.
- (b) *Outlet exclusivity.* Gocold said that in its limited experience of this practice, the only retail outlets that involved themselves in this type of agreement tended to be larger multiples and seasonal leisure sites. These outlets generally preferred a much more simplified range and it believed that they would largely deal with one manufacturer with or without an exclusivity agreement.
- (c) *Discounts to retailers.* It believed that all discounts from all manufacturers should be non-discriminatory and openly published.
- (d) *Distribution.* Gocold said that it would welcome a terms structure enabling wholesalers to distribute on an economically viable basis but this should be related to the type and quality of service provided to the retailer. Services such as merchandising support and representative cover should be taken into consideration as well as response times to orders etc. If a full and efficient service was provided then a 20 per cent margin was not unreasonable.

### ***Scunthorpe Cold Stores Ltd***

7.114. Scunthorpe Cold Stores Ltd (SCS), a logistics service provider, wrote to express its concern about the proposed remedies. It said that if restrictions were imposed on Wall's Direct this could seriously jeopardize jobs at SCS. SCS was contracted to supply a range of services for BEW, namely cold storage, receipt, dispatch, case picking, trunking and administration. This operation was a major part of SCS's business, which employed almost 120 staff—20 of whom were directly employed on the Wall's Direct operation.

### ***Sunnyside Distribution Ltd***

7.115. Sunnyside Distribution Ltd (Sunnyside) provides services to Wall's Direct. It said that it did not operate as a wholesaler of ice cream, and all its resources were used by Wall's Direct. Until February 1999 Sunnyside had for 11 years operated as a concessionaire/dedicated distributor on behalf of BEW, selling and distributing Wall's ice cream. Its last contract had been terminated by Wall's after only three months' notice, with two years still to run. The termination of the contract followed two years of

major investment with the encouragement of BEW and left Sunnyside with a number of options. It competed in open tender with a number of national logistics providers to become a Wall's Direct distribution centre and was successful. Its Weston-super-Mare depot operated as a distribution centre for Wall's Direct for the South-West of England. Another option was to become a wholesaler or run a wholesaling business alongside its Wall's Direct contract. This option was dismissed because Sunnyside was convinced that if it were to sell and distribute Wall's ice cream for £1.10 a unit, then that was a quick way to insolvency. It believed that if it had not become a part of the Wall's Direct system it could not have continued trading as the current margin paid by BEW to wholesalers trading solely in ice cream was insufficient to cover costs, let alone provide a profit. This had been confirmed by recent cases of ex-dedicated distributors going into liquidation.

### ***Tibbett & Britten Applied Limited***

7.116. Tibbett & Britten Applied Limited (TBA) operates a distribution centre covering central Scotland for Wall's Direct. It said that it was awarded the contract which started in March 1999. At Darnley it provides logistics services in the form of cold storage and transport, but it has no wholesale operation. Wall's Direct retains the title of the product at all times. The operation was set up to provide a next-day delivery service, seven days a week, without a minimum order. Most of the retailers which purchased impulse ice cream did not have large premises or back-up low-temperature storage facilities. The delivery service allowed them to obtain the product for sale when required and without having to install additional cabinets which used up valuable sales space. The continued support by both independent and national retailers reinforced the positive attitude towards this distribution network.

7.117. TBA said it was self-evident that sales of impulse ice cream were directly weather-related and as such were variable. Wall's Direct had a contract with a vehicle supplier which enabled the distribution centres to call on additional vehicles to meet demands and this enabled TBA to meet the next-day delivery requirement. These vehicles were de-hired as volumes fell.

7.118. TBA said that, as a cold store operator, open access to the storage and distribution systems would be of interest to it. Wall's Direct currently occupied 12 per cent of TBA's capacity storage space. Other ice cream manufacturers such as Treats and Camps Brothers also occupied space as TBA provided storage, order picking and distribution services for them. TBA also provided services for non-ice cream customers and its normal occupancy was 85 to 95 per cent. It would therefore not be practical for it to have an open-ended arrangement with manufacturers as its cold store capacity would be a limiting factor.

7.119. The very nature of the operation required efficient order capture systems and Wall's Direct operated such a system for both van sales and van select. TBA operated a bespoke computerized system for all cold store stock movements. Open access would require a complete review of the method of order capture and stock control. Of necessity, the vehicles used for both van sales and delivery had to be small and they would not be capable of taking the full range of products from a number of manufacturers, which would reduce customer choice.

7.120. TBA added that it did not consider itself to be in competition with the former dedicated distributors, but instead working alongside and complementing the existing distribution of impulse ice cream to retailers.

### **Other manufacturers and distributors**

7.121. We received questionnaire responses from about 150 other manufacturers and/or distributors and from about 80 larger retailers; detailed points made are summarized below. 'Small' manufacturers/distributors are those with total ice cream sales of £100,000 or less and 'medium' £100,000 to £1 million; others are those with sales of over £1 million or whose sales were not specified.

7.122. In the questionnaire to manufacturers and distributors, we asked how their sales or industry sales of all impulse ice cream would be affected were freezer exclusivity to be banned altogether, or were BEW alone not allowed to supply exclusive freezers. The responses are summarized in Tables 7.1 and 7.2.

TABLE 7.1 **Manufacturers' and distributors' views on effects of disallowing freezer exclusivity altogether\***

<i>Effect on company</i>		<i>Effect on total sales volume</i>						<i>Total</i>
		<i>Don't know</i>	<i>Certainly decrease</i>	<i>Probably decrease</i>	<i>Stay the same</i>	<i>Probably increase</i>	<i>Certainly increase</i>	
Don't know	% of respondents	13	-	-	1	-	-	14
	% of T/O impulse	10	-	-	0	-	-	10
Certainly decrease	% of respondents	-	2	1	-	-	-	3
	% of T/O impulse	-	1	6	-	-	-	6
Probably decrease	% of respondents	-	-	6	1	-	-	7
	% of T/O impulse	-	-	10	4	-	-	14
Stay the same	% of respondents	2	1	2	18	1	1	25
	% of T/O impulse	1	3	0	11	4	0	18
Probably increase	% of respondents	2	-	1	4	12	1	20
	% of T/O impulse	0	-	0	1	16	0	17
Certainly increase	% of respondents	1	-	1	2	7	21	31
	% of T/O impulse	0	-	0	0	2	31	34
Total % of respondents		19	4	9	26	20	22	100
Total % of T/O impulse		11	3	16	16	22	31	100

Source: The Commission.

\*The question put was as follows: Suppose ice cream suppliers were no longer allowed to insist on exclusivity for their freezers. A likely effect is that the ice cream suppliers no longer provide freezers free-on-loan to retailers. What do you think the effect would be on your company's sales volume and on the total sales volume of all companies in the ice cream market?

Notes:

1. The table shows responses from all manufacturers and distributors responding to our survey, except BEW, Nestlé, Mars and Treats.
2. T/O=turnover.

TABLE 7.2 **Manufacturers' and distributors' views on effects of disallowing freezer exclusivity by BEW\***

<i>Effect on company</i>		<i>Effect on total sales volume</i>						<i>Total</i>
		<i>Don't know</i>	<i>Certainly decrease</i>	<i>Probably decrease</i>	<i>Stay the same</i>	<i>Probably increase</i>	<i>Certainly increase</i>	
Don't know	% of respondents	20	-	-	1	-	-	21
	% of T/O impulse	11	-	-	0	-	-	11
Certainly decrease	% of respondents	-	-	-	-	-	-	0
	% of T/O impulse	-	-	-	-	-	-	0
Probably decrease	% of respondents	-	-	4	-	2	-	6
	% of T/O impulse	-	-	9	-	11	-	20
Stay the same	% of respondents	2	1	1	23	1	1	28
	% of T/O impulse	0	3	0	8	0	0	11
Probably increase	% of respondents	1	-	-	4	17	2	23
	% of T/O impulse	1	-	-	18	7	0	26
Certainly increase	% of respondents	1	-	1	2	5	13	22
	% of T/O impulse	0	-	0	0	4	28	32
Total % of respondents		24	1	6	29	24	16	100
Total % of T/O impulse		12	3	9	26	22	28	100

Source: The Commission.

\*The question put was as follows: Suppose those suppliers with a market share over 25 per cent were not allowed to supply freezers on exclusive terms, but no restrictions were placed on other companies which could continue to insist on exclusivity. What do you think the effect would be on your company's sales volume and on total sales volume of all companies in the ice cream market?

Notes:

1. The table shows responses from all manufacturers and distributors responding to our survey, except BEW, Nestlé, Mars and Treats.
2. T/O=turnover.

### ***Federation of Wholesale Distributors***

7.123. The Federation of Wholesale Distributors said that it represented the majority of wholesale distributors of grocery and related products to retailers throughout the UK. It said that BEW was a major supplier providing well-established products under brand names that received substantial marketing support. The Federation believed there should be fair trading across the market, and that discriminatory practices were unacceptable.

### ***A Tortolano***

7.124. A Tortolano, a medium manufacturer and distributor, said that since the bulk of its business was from mobilers, it was unaffected by freezer-supplying manufacturers, but if there were no freezer exclusivity it would have the option of supplying shops which at the moment it did not.

### ***Appleby's Ices Ltd***

7.125. Appleby's Ices Ltd, a medium distributor, believed that the labelling of ice cream freezer packs was very unfair as it was quantified by volume. It should be done by weight. Ice cream could contain enormous percentages of air of which the consumer had no idea.

### ***Artisan Foods***

7.126. Artisan Foods, a small manufacturer of mainly non-impulse ice cream products, said that extra choice at the point of sale if freezer exclusivity were banned altogether would stimulate extra interest. Medium-sized companies would benefit to the detriment of smaller manufacturers if only BEW were not allowed to supply exclusive freezers. It said that there was no such thing as free freezers: companies which had the financial strength to buy freezers in large quantities were really preserving their margins by limiting price competition against established brands. They had the advantage of both brand recognition through promotion and exclusive outlets. This also applied to the catering trade where BEW and Schöller Mövenpick were starting to dominate. The supply of free freezers into outlets where exclusivity was not required also occurred, but if the recipient did not buy sufficient quantities of product then the freezer was withdrawn (ie the presence of the threat of withdrawal was a covert way of guaranteeing exclusivity); this occurred also in catering establishments. Recently, Artisan Foods had supplied ice cream to a retailer who stored it in a BEW freezer, and BEW had insisted that the products be removed or the freezer would be withdrawn; since sales had increased as a result of selling Artisan Foods' products, the retailer preferred to have an alternative freezer, which Artisan Foods supplied, but in which the BEW impulse products also had to be sold in order that the retailer's sales were not adversely affected.

### ***Ben & Jerry's***

7.127. Ben & Jerry's, a US manufacturer of ice cream which provides partially exclusive and non-exclusive freezers, told us that it did not currently contribute to any industry freezers but would be prepared and was actively seeking opportunities to do so. It said that its sales would certainly increase and industry sales probably increase if freezer exclusivity were banned altogether, commenting that this would open up new channels of distribution and access to industry freezers for impulse products, and that sales might increase as a result of broadening the choice. For the same reasons, it said that its sales and industry sales would probably increase if BEW alone were not allowed to supply exclusive freezers. It believed that without freezer exclusivity the retailer would have more choice and therefore there would be greater choice for the consumer.

7.128. It told us that it was currently seeking to expand in the UK by targeting local independent retailers in order to ensure that its products were widely available and to build consumer awareness for its brands. Freezer exclusivity would hamper this strategy of expansion and introduction of new impulse products. The introduction of a restriction on manufacturers with a market share of over 25 per cent supplying freezers on an exclusive basis would increase Ben & Jerry's sales volumes by allowing small

independent retailers to stock a variety of products, giving greater choice to the consumers. Similarly, it believed that the major players' continued use of dedicated distribution systems was likely to mean that they would retain control of the independent ice cream distribution channels in the UK, which would also have the effect of preventing or strongly disincentivizing independent distributors from stocking other products. This would be at the expense of smaller companies such as Ben & Jerry's, since use of national distributors would not benefit its strategy of achieving further penetration in smaller retail outlets. The combination of these factors meant that consumers were currently faced with a lack of choice in many small retail outlets such as corner shops, local stores, petrol stations and theatres. These concerns had been only partially remedied by the findings of the Commission in its previous report.

### ***Bestway Cash & Carry Limited***

7.129. Bestway Cash & Carry Limited (Bestway) said that to include cash and carry within the definition of a wholesaler who delivered was causing difficulties in its trading relationship with BEW. It accepted that cash and carries were a route to the market for the independent retailers, but its cost structure was very different to that of a wholesaler who delivered. Bestway's current trading terms impaired its ability to sell BEW ice cream, against the terms it received from Mars and Nestlé; as a result of these terms there had been a sharp decline in sales.

7.130. Bestway said that BEW had built up its business as a result of innovation, good delivery and marketing support. Cash and carries relied on the support of the small retailer. Bestway believed that BEW had consistently supported the sector with merchandising advice, free freezers and point of sale, and had also invested in resource with increased collage on Bestway's depots and retail customers.

### ***B Sidoli & Sons Ltd***

7.131. B Sidoli & Sons Ltd, a medium-sized manufacturer and distributor of ice cream, which provides freezers to about two-thirds of the outlets it supplies, said that its sales, and industry sales, would certainly decrease if freezer exclusivity were banned altogether, but would certainly increase if only BEW were not allowed to supply exclusive freezers. It commented that 99 per cent of retailers would not invest in cabinets for ice cream so for hygiene and display purposes the only way it could offer its products was by supplying a cabinet. It further commented that it was in favour of fair competition, based on service product and trading terms, but it was impossible to compete when the large companies offered cash inducements (which could be as much as £5,000 or more) to clients and retailers to change over to them.

### ***Blackburn & Haynes***

7.132. Blackburn & Haynes, a medium-sized manufacturer, said that it could not afford to supply freezers as a general rule, but had supplied some second-hand freezers which were also used for other manufacturers' products. It said that its sales, and industry sales, would certainly increase if freezer exclusivity were banned altogether or by BEW alone. Discounts on volumes, supply of posters and signboards also affected competition.

### ***Bob's Ices***

7.133. Bob's Ices said that it operated three ice cream vans under contract to Nestlé. Nestlé terminated the contract at very short notice in 1998 and offered a new contract with less favourable conditions. The new contract required that the delivery vans were painted in the Nestlé livery and sold only the Nestlé impulse range of ice cream. It was offered a discount of 35 per cent with a further discount of 5 per cent over a period of time, which would bring the total discount to 40 per cent. The new contract also guaranteed an area where no other Nestlé vans would operate, allowing one business to monopolize the area.

7.134. As Bob's Ices wanted to keep its vans and did not want to comply with the above conditions, Nestlé agreed to keep supplying it, but at a lower discount of 20 per cent. If Bob's Ices had only one van

in the Nestlé livery it would be allowed to have Nestlé products under the new discount scheme. It did not think Nestlé should dictate to private businesses how they should operate.

### ***Bond's of Elswick***

7.135. Bond's of Elswick, a medium-sized manufacturer and distributor, said that its sales and industry sales would certainly increase if freezer exclusivity were banned altogether or if only BEW were not allowed to supply exclusive freezers. It said that as a small company it found it difficult to compete in franchise leisure facilities because of the incentives given by BEW and Nestlé. Its own sales were primarily of ice cream cornets and the increase in impulse ice cream sales was primarily in ice cream on sticks. The traditional scoop ice cream was slowly disappearing with major sites being dominated by wrapped products, the scoop ice cream market declining by approximately 10 per cent a year.

### ***Boots Frites Ltd***

7.136. Boots Frites Ltd, a medium-sized importer of Mio and other brands, said that it did not know what the effect on its sales would be were freezer exclusivity to be abandoned, since it did not supply that type of market, but expected industry sales to stay the same. It said that it had one exclusive contract with a retail outlet controller, as part of which it supplied freezer cabinets and three different manufacturers' ice cream: but the exclusive use of the cabinets for its ice cream products was entirely at its clients' discretion to suit their businesses operationally.

7.137. In its response to the statement of remedies, Boots Frites Ltd said that freezer exclusivity could be managed if the major freezer providers (BEW, Nestlé, Mars and Treats) were given a reasonable capacity within freezers, and thought that a 60:40 per cent split would be fair. However, within the independent sector freezer exclusivity would be meaningless if it were not linked to outlet exclusivity (excluding national accounts).

### ***Brake Bros Foodservice Ltd***

7.138. Brakes attended a hearing. It is a national frozen food distributor, whose sales of impulse ice cream represent 3.5 per cent of its turnover.

7.139. Brakes submitted that it seemed that part of BEW's strength in terms of market share was based on its penetration of the market through freezers. The placing of bespoke BEW freezers was set to continue with products to be supplied wherever possible via Wall's Direct. BEW was becoming a vertically integrated business and retailers were encouraged to deal direct with BEW rather than a third party. BEW's terms in 1999 had made the handling of its products more unattractive for the frozen food industry; the retailer customer for impulse ice cream was now in a position where it could work on more than twice the percentage margin enjoyed by the distributor/wholesaler. BEW's strategy was clearly to develop its own route to market and to inhibit the offer of an industry range of products, by placing distributors at a distinct disadvantage. This would restrict the customers' ability to purchase products other than from BEW as other distributors like Brakes would find it uneconomic to remain in the market.

7.140. Brakes said that its impulse ice cream business offered little in the way of margin. It negotiated prices of Mars and Nestlé products with its retail customers, but was not able to do so in the case of BEW, as BEW preferred to keep control of pricing. The effect of this was that Brakes found it difficult to negotiate with retailers, as there was always the danger that the retailer would do a deal with BEW which Brakes did not know about.

7.141. One of the reasons that Brakes continued to provide impulse ice cream to certain customers, for example forecourts, was that it complemented deliveries of a wider range of frozen products; but Brakes also delivered impulse ice cream on its own to certain large retailers. It was a large distributor to schools and during the summer holidays it found it convenient to deliver impulse ice cream in place of the deliveries to schools during term time. One reason why Brakes continued to deliver BEW's impulse ice cream was that it would not be a credible operator if it did not include BEW's products in its range.

7.142. Brakes offered next-day delivery, like Wall's Direct. Brakes' strength was that it could offer one delivery of all ice cream brands, but sometimes customers preferred to negotiate a higher-volume discount with Wall's Direct and lose the benefits of stocking all brands. There was no doubt that BEW products were 'must-stock' items. Brakes provided industry freezers and a range of products under an offer called 'World of Ice Cream' but the majority of space in industry freezers tended to be given over to BEW's products. In Brakes' view, the impact of freezer exclusivity was in reality small, because even if industry freezers were the norm, BEW's products were likely to predominate. Furthermore, it was to retailers' advantage to increase their sales of BEW's ice cream, because end-year bonuses were linked to volume. Brakes added that it found it hard to match the service and delivery standards of Wall's Direct. It was also competing with Snowking.

7.143. Brakes felt that ideally it should be able to earn a margin which would enable it to match the service of Wall's Direct with regard to frequency of drop and drop sizes. Customers should be able to acquire BEW's ice cream either from Wall's Direct or from other distributors on the same terms.

7.144. Brakes also considered that the abolition of RRP's might stimulate a more competitive market.

### ***C J Lang & Son Ltd***

7.145. C J Lang & Son Ltd (Spar Convenience Stores), a medium-sized distributor of ice cream, said that its sales and industry sales would probably decrease if freezer exclusivity were banned altogether, or if BEW alone were not allowed to supply exclusive freezers. It saw the advantage of freezer exclusivity as enhancing the most effective use of cabinets and promoting brands, the disadvantage being the manufacturer monopoly in allocation of space. As a result of exclusivity a manufacturer would dictate to a retailer the products it was allowed to stock within its freezer; in a greater number of instances, retailers might not be able to afford to allocate floor space to another freezer: therefore it could be said that exclusivity encouraged unfair competition between brands. Although there could be increased benefit for retailers with an industry layout, there could be problems in deciding on the allocation of space between brands, and it might also be difficult to undertake strong promotions and to display products effectively.

### ***Camps Bros Café Ltd***

7.146. Camps Bros Café Ltd, although no longer involved in the impulse ice cream market, considered exclusivity deals on freezer cabinets as being restrictive. It had products unique to itself which it would like to sell to retail outlets and which retail outlets would like to buy to add to their range of products, but this did not happen because the extra cost of supply or buying another freezer was not justified for adding one or possibly two of its products. There was no question that its sales would increase if freezer exclusivity did not exist.

### ***Capaldi's of Brora***

7.147. Capaldi's of Brora, a medium-sized manufacturer and distributor, said that its sales and industry sales would certainly increase if freezer exclusivity were banned; as a small company it could not compete with those major manufacturers who offered free cabinets. This seriously affected its trade. Its sales and industry sales would probably stay the same if only BEW were not allowed to supply exclusive freezers. It believed that as a small company it was shut out from being accepted as a supplier to wholesalers. Despite repeated attempts to break into this market it felt that there was pressure being put on the wholesalers by the larger companies to exclude any competition.

### ***Carlo & Antonio Ice Cream Ltd***

7.148. Carlo & Antonio Ice Cream Ltd, a small distributor and manufacturer, told us that it was disadvantageous to smaller manufacturers to be excluded from freezers with exclusivity contracts, just as it was disadvantageous to the consumer because (often) the consumer had no access to better-quality products than the manufacturer demanding exclusivity could offer.

## ***Chase Ices***

7.149. Chase Ices (Chase), a medium-sized distributor which supplied a small number of non-exclusive freezers, said that its sales and industry sales would certainly increase if freezer exclusivity were not allowed, commenting that the best products would then be available in all outlets, regardless of manufacturer, and would probably increase if only BEW were not allowed to provide exclusive freezers. It added that exclusivity currently restricted customer choice, thus holding back the market. It prevented Chase from selling to exclusive Nestlé cabinets as back-of-price-list discounts would not be paid on purchases from Chase.

7.150. BEW's off-invoice discounts to retailers were proving a stumbling block as Chase encountered problems in breaking into the system, especially regional and national multiples, theatres and some leisure sites. BEW's end-year bonus payments were less contentious. Nestlé would not fund end-year bonus payments to customers supplied via Chase. Nor would it allow Chase to have refrigeration for its Nestlé customers, but were allowing BEW ex-dedicated distributors this privilege.

7.151. BEW's new deal to wholesalers was not, Chase believed, as good as the previous one. Chase was currently (1998) on £1.06 per box with all other monies dependent on targets set by BEW. This had seriously affected cash flow and Chase was the exception in hitting its targets to receive an end-year bonus. Without this bonus Chase would have been distributing BEW products at a loss. Chase wondered whether BEW wanted all distributors out of business to promote its new in-house distribution, and believed the wording on some of its mail shots was less than fair.

7.152. Chase commented on specific remedies as follows.

### *Freezer exclusivity*

7.153. Chase said that suggestion of a general prohibition in the remedies statement would give the public the widest choice and enable retailers to sell the best products from several companies' ranges.

### *Outlet exclusivity*

7.154. Chase said that the suggestion of a general prohibition was the most sensible.

### *Discounts to retailers*

7.155. Chase said that the suggestion of banning unpublished price and other incentives would help clear up the current doubts felt about how discounts were provided.

### *Distribution*

7.156. Chase believed that a discount of 22 to 22.5 per cent was necessary for the sale, storage and distribution of impulse ice cream to be viable. The current deals offered by BEW had resulted in distributors suffering losses, a theory borne out by the number which had recently ceased trading. Chase said that all wholesalers should be given an equal opportunity to supply ice cream within all sectors of the trade. If the level of wholesalers ceasing trading continued at the present level, BEW would achieve a monopoly in distribution. As independent wholesalers were part of the distribution chain for Mars, Nestlé, Treats and some regional manufacturers, the decline of the independent wholesaler would further restrict consumer choice.

## ***Chris's Ices***

7.157. Chris's Ices, a small distributor, believed that its sales would stay the same if freezer exclusivity were banned altogether or by BEW alone. It appeared from its recent experiences that Nestlé in particular and smaller companies generally were continuing where BEW had left off, ie by restricting top discounts to so-called 'agents' in each area, and using the promise of exclusivity to attract customers.

### ***Coronato Bros***

7.158. Coronato Bros, a medium-sized manufacturer and distributor, said that its sales and industry sales would certainly increase if freezer exclusivity were banned: the public would have a far greater choice of product, and smaller manufacturers could sell to a wider market. Its sales would probably increase if BEW were not allowed to supply exclusive freezers, and industry sales certainly would. Coronato Bros said that smaller companies could not compete with the major manufacturers due to freezer exclusivity. Small manufacturers could not enter this sector of the market until freezer exclusivity was changed. Even if this meant that the company supplying the freezer required 50 per cent of capacity to be used to stock its product, this would be a big help.

### ***Coronato's Ice Cream***

7.159. Coronato's Ice Cream (Coronato's), a small distributor, said that its sales and industry sales would certainly increase if freezer exclusivity were not allowed, and probably increase if only BEW were not allowed to supply exclusive freezers, but said that this would not be fair on the bigger companies. It commented that the public had a very restricted choice. Other than BEW and Nestlé, other companies found it very difficult, if not impossible, to enter this sector. Coronato's had tried in the past to enter the wholesale distribution sector (supplying independent shops, newsagents and off-licences). Coronato's found it very difficult due to customers having space for only one freezer and the supplier of this freezer, normally BEW, insisting that only its products were to be stored in the freezer. One solution would be for the company supplying the freezer to supply 50 per cent of all products stored and the other 50 per cent to be of different companies' products if the shopkeeper so wished.

### ***Country Dairy Products***

7.160. Country Dairy Products, a small manufacturer, believed that its sales and industry sales would certainly increase if freezer exclusivity were banned altogether, or only for BEW, but queried whether this would be fair. With BEW supplying exclusive freezers, every corner shop expected a freezer, which as a small business Country Dairy Products could not do: it therefore supplied freezers only to shops which could guarantee a certain turnover.

### ***Coventry Ices Ltd***

7.161. Coventry Ices Ltd, a distributor of ice cream, said that its and industry sales would certainly decrease if freezer exclusivity were banned altogether. It commented, however, that everybody still had problems with BEW; it did not want to sell any BEW ice cream, but people only wanted to buy that ice cream.

### ***Cream O'Galloway Dairy Co Ltd***

7.162. Cream O'Galloway Dairy Co Ltd, a medium-sized manufacturer which supplies some exclusive freezers, said that its sales would certainly increase but industry sales would stay the same if freezer exclusivity were to be banned altogether. Small companies like itself would be able to supply shops where previously its products were banned from their freezer, while large companies would concentrate the money saved from freezer investment on other marketing. Its sales would certainly increase and industry sales probably increase if only BEW were not allowed to supply exclusive freezers. Mars was already leading the way by allowing its freezers to be used by others; therefore outlets were keen to take its freezers and also sell some local products. Cream O'Galloway Dairy Co Ltd said that freezer provision and exclusivity had become the standard, making it almost impossible for a small company to enter the market. If shops provided their own freezer, then only those retail outlets who found it significantly profitable to sell ice cream would do so. Consequently more would be sold at these outlets instead of the volume of sales being spread over other outlets as was currently the case.

### ***Cricketer Foods***

7.163. Cricketer Foods (Cricketer), a medium-sized distributor, which supplies some exclusive freezers, said that its sales, and industry sales, would probably decrease if freezer exclusivity were banned altogether. It thought it highly unlikely that retailers would bear the full cost of a freezer; the likely solution for suppliers like Cricketer was that they would supply a freezer and charge for it, the freezer remaining Cricketer's property. If only suppliers with a scale monopoly were not allowed to supply freezers, its sales, and industry sales, would probably increase. Cricketer said that to supply freezers at no cost to the retailer was historically the norm in return for gaining business. To a small distributor like Cricketer this cost could be prohibitive and, in some outlets, recovery could take over one full season. However, it was the one key element to capture the business once the customer had decided to move. It therefore believed that the practice of suppliers offering freezers to the trade and expecting the customer to stock only their products was fair, and since this was a major investment the supplier was entitled to expect exclusivity for a period, until the investment was recovered: Cricketer believed a three-year period was appropriate. If the practice was ended, the problem of who bore the cost of the freezer would remain.

7.164. Cricketer agreed with the undertakings that had been given to the Secretary of State following the previous report and said that it expected its business to grow substantially now that the BEW ex-dedicated distributors were free to buy on the open market. One particular ex-dedicated distributor now listed Cricketer's products and supplied them to sites that previously stocked only BEW products. It was itself also now able to wholesale BEW's impulse lines, and some scooping customers who had previously bought BEW's impulse products from dedicated distributors now did so from Cricketer. Also, as a result of being able to wholesale BEW's impulse lines, it had found new BEW impulse business from its scooping customers who previously did not handle impulse products. Many seasonal outlets selling scoop ice cream also welcomed the opportunity of handling a local brand as well as the national BEW brands. However, Cricketer believed that BEW would exploit every loophole in order to maintain market share. Cricketer therefore believed it right and proper that the monopoly situation of BEW in distribution be broken and a level playing field should operate.

### ***D Corbett***

7.165. D Corbett, a small manufacturer, believed that its sales and industry sales would certainly increase if freezer exclusivity were banned altogether or only for BEW. It said that, for a small manufacturer, the cost of supplying freezers was quite high as it had not got the financial resources of the larger companies. If a retailer had a freezer supplied from one of the larger manufacturers it was unlikely that it would want another from a smaller company due to space constraints. However, it might still wish to stock a wider range of products but would be prevented from doing this if tied into an exclusive freezer deal. D Corbett also believed that loss-leader deals such as 10p cones supplied by McDonald's which obviously hoped to make profits on their mainstream products were very unfair for those who had most of their business based on ice cream.

### ***Dalby & Sons***

7.166. Dalby & Sons, a small manufacturer, said that its sales and industry sales would certainly increase if freezer exclusivity were banned, and would probably increase if only BEW were not allowed to supply exclusive freezers. It believed that most shops were restricted in space and that if freezers were used exclusively there would be no room for other manufacturers. Dalby & Sons were farmers who had diversified into the production of quality ice cream. It was a small-scale enterprise which often found it difficult to find outlets because of the influence of major manufacturers.

### ***Dale Farm Ice Cream Ltd***

7.167. Dale Farm distributed Mars and Häagen-Dazs ice cream through its freezer base in Northern Ireland. It no longer manufactured ice cream since a management buyout in March 1999, but the Dale Farm brand is produced for it by manufacturers in Northern Ireland, the Republic of Ireland and Belgium. It said that since the management buyout it had been able to broadly maintain sales through the CTN sector and symbol group stores, but as it no longer manufactured ice cream, it had lost the own-label business of some multiple customers.

7.168. Dale Farm continued to supply freezers into the market and it recommended that a range of Mars, Häagen-Dazs and its own products be stocked. It did not have any exclusive outlet agreements. It believed that exclusive distribution, freezer exclusivity, outlet exclusivity and terms to retailers applied to a lesser extent in Northern Ireland because, with BEW and Dale Farm having approximately equal market shares, it had not been denied the opportunity to compete; and the fact that it already distributed products on behalf of other ice cream manufacturers had allowed it access to the market.

### ***De Roma Ice Cream Ltd***

7.169. De Roma Ice Cream Ltd, a manufacturer, said that it was very difficult to increase impulse ice cream sales; it supplied very few freezers, commenting that siting freezers was difficult as most retailers were given freezers by larger manufacturers and distributors of impulse products, and did not have room for two freezers. It said that its sales would certainly increase and industry sales probably increase if freezer exclusivity were banned altogether; its sales, and industry sales, would probably increase if only BEW were not allowed to supply exclusive freezers. It believed that freezer exclusivity restricted manufacturers like itself from entering the market with competitive products on a selected basis.

### ***Devonshire Farmhouse Ice Cream Co***

7.170. Devonshire Farmhouse Ice Cream Co (Devonshire), a medium manufacturer and distributor which provides some exclusive and other freezers, said that its sales would probably increase if freezer exclusivity were banned altogether although industry sales would probably stay the same. Although exclusive freezers might cause difficulties for shops with limited space, it was unreasonable to expect expensive freezers to be supplied for any manufacturer to use. Its sales and industry sales would probably increase if BEW alone were not allowed to supply exclusive freezers, which would help Devonshire. It believed that the larger companies would probably cut the massive discounts to offset the capital investment, which would help it a lot more. Devonshire also said that supply of ice cream was a closed shop in certain areas. It had many catering establishments which would like its farmhouse ice cream, but were controlled by national buying. Where it did have good outlets, it got forced out by 35 per cent discounts being offered, which it could not compete with.

### ***Ebor Ice Cream Co Ltd***

7.171. Ebor Ice Cream Co Ltd (Ebor), a medium-sized distributor which supplies some exclusive cabinets for which it supplies national brands, said that its sales and industry sales would probably decrease if freezer exclusivity were banned altogether or only by BEW. Its sales, and industry sales, would certainly increase if only BEW were not allowed to supply exclusive freezers. It said that it competed extremely well with the manufacturers in supplying cabinets because it offered multi-brand stocking; hence it did not suffer on the existing system. It also commented that £1.10 per case (in 1999) to deliver BEW's products did not allow the wholesaler to make a reasonable profit: it had to stock BEW's products at the expense of more profitable lines because market forces required it to do so.

7.172. Commenting on the possible remedies (see Appendix 2.4), Ebor said that it was essential to its business that it could continue to loan industry cabinets to its retail customers at their request. Without the cabinets the inclusion of the new Cadbury's range this year would not have been as successful as it had. During July this year it had been selling a pallet of Cadbury's Flake Cones every week. The range of five lines currently represented approximately 8 per cent of total sales.

7.173. Ebor received a payment of £1.10 to deliver a case of ice cream for BEW; this was all it got for 40 per cent of its sales of Wall's ice cream, and it did not think anyone could make a profit under these conditions.

### ***Freezer exclusivity***

7.174. Ebor said that it would welcome a general prohibition on freezer exclusivity as being a fair solution within the industry. Mars already had many industry cabinets on loan to retailers. It would be

helpful if wholesalers' multi-brand cabinets were excluded from any controls as, by their nature, they were for all brands stocked by the wholesaler.

### *Outlet exclusivity*

7.175. Ebor said that it would be pleased to see a general prohibition on outlet exclusivity introduced.

### *Discounts to retailers*

7.176. Ebor would like to see introduced the proposals that non-volume-related and retrospective bonuses be prohibited, for BEW. If the prohibition were applied to all, this would inhibit those larger manufacturers that supply the trade through wholesalers giving higher margins in the process. These margins of up to 40 per cent allowed wholesalers to pass on some of this to the retailer, and so compete with the major brands.

7.177. As a wholesaler, Ebor said that it discounted by the size of the delivery to independent outlets and also gave a settlement discount for early payment to larger retailers. The buying groups that it supplied had a settlement discount and guaranteed the accounts of their members. Some of its customers also benefited from volume overrides.

### *Distribution*

7.178. The proposal to supply on an economically viable basis was essential to a wholesaler and any retailer volume discounts should be separate and provided by the manufacturer. Ebor said that the proposal for the relevant manufacturer to separate manufacturing and distribution was essential. The idea that other manufacturers be allowed access to the Wall's Direct distribution system did not affect it at present, but Ebor would prefer manufacturers to use wholesalers for sales and distribution.

7.179. Ebor believed that it would benefit the industry and be good for competition if wholesalers were responsible for sales and distribution to outlets other than national accounts. This should include sales and deliveries by buying groups for independent retailers, for example Bridewell Group, which nominate regional wholesalers. A national account could be defined as an account financially owning all its outlets with branches in England, Wales and Scotland. Anything less than this would be regional and should be open to wholesalers.

7.180. Ebor supported all the other proposals for remedies; it also thought that manufacturers with a turnover threshold of £10 million in impulse ice cream should be exempt from the remedies.

### *Frank's Ice Cream Ltd*

7.181. Frank's Ice Cream Ltd (Frank's), a medium-sized manufacturer and distributor which supplies some exclusive freezers, said that its sales would certainly increase, but industry sales probably decrease, if freezer exclusivity were not allowed at all. It said that BEW and Nestlé, which operated exclusive freezers, would lose market share. Wholesalers would gain because of the supply of an industry range. The total ice cream market would probably decrease due to retailers not wishing to purchase freezers. On the possibility of only BEW not being allowed to supply exclusive freezers, it said that it would strongly oppose that since the danger of such a system would be that Mars and Nestlé would operate very similarly to the way BEW had operated in the past. All national firms, ie those with above 5 per cent share, should operate the same non-exclusive policy. On the advantages of freezer exclusivity, it encouraged the sale of ice cream in that outlet, because retailers did not have to purchase a freezer. For an independent regional manufacturer, the cost of the freezer was a large investment; so for it to be economical it needed to be exclusive, for example as regards scoop ice cream. As to the disadvantages, there could be a monopoly supply situation as with BEW and its dedicated distributors in the past. This limited choice for the consumer and for the retailer because often there was space for only one freezer in the outlet.

7.182. Frank's strongly opposed the sum of £1.10 as the distribution payment from BEW. This represented an average of 8 to 10 per cent of GSV to wholesalers. Frank's questioned whether it was fair and reasonable for a wholesale operation to be required to trade at such low margins when BEW expected such a high level of compliance with factors such as computer systems, up-to-date vehicles and up-to-date cold stores. Frank's believed that BEW should offer a reasonable discount of approximately 20 per cent in line with the other companies, ie before any sales growth target was given. Frank's was also concerned that BEW through Wall's Direct might now offer retailers special deals, such as one free case in ten when goods were purchased through this source. This would in effect make published terms meaningless for wholesalers.

7.183. Frank's commented that the 1999 Nestlé price list clearly stated that retailers wishing to benefit from their bonus structure must purchase their products through Nestlé direct. Frank's believed this was anti-competitive since there was no incentive at all for a Nestlé account to purchase its goods from any other source, for example a nominated wholesaler. It was important that all wholesalers and distributors were offered similar basic terms from each manufacturer. Obviously quantity discounts and bonuses based on turnover should then be applied. BEW was now the only manufacturer of the major national companies to offer retrospective discounts to the retailer on all its purchases in that year from any recognized distribution source.

7.184. Frank's also felt it was unfair that certain manufacturers were able to buy their way into accounts to win new business and influence the time they must remain exclusive to them.

### ***Frederick's Dairies Ltd***

7.185. Frederick's, a manufacturer, said that it had launched in 1999 a range of Cadbury's branded wrapped ice cream products (see paragraph 4.104). It hoped to secure distribution to independent wholesalers giving distribution to independent shops and some impulse sales as well as to its existing multiple retailer distribution base. Frederick's believed that its company's sales volume would certainly increase if freezer exclusivity was banned altogether or for BEW, but industry sales would stay the same. It said that freezer exclusivity stifled competition and innovation in the market as the impulse sector was reduced to one or two major players only. BEW's exclusive distributor and freezer cabinet arrangements clearly restricted the brand choice in independent and small stores. It was also evident that BEW's substantial market share to UK multiples enabled it to offer and obtain exclusive arrangements in the multiples in certain categories in return for overrider payments or other discounts which could also restrict competition and consumer choice.

7.186. On possible remedies, Frederick's believed that major changes needed to be made to ensure effective competition and provide consumer choice, but they should be kept simple and enforceable, and should let market forces find their own level through eliminating restrictive practices.

### ***Freezer exclusivity***

7.187. Frederick's agreed with the proposal prohibiting exclusivity of capacity in any freezer for any manufacturer's products. It said that shopkeepers, driven by consumer demand, should choose what was sold without any restrictions placed on them by manufacturers, irrespective of whether the manufacturer supplied a freezer or not. Following discussions with wholesalers, Frederick's believed that many wholesalers would prefer to supply and maintain their own freezers provided their gross margin was adequate in the first place. Freezers could be leased as well as purchased. Freezer funding did not need a product manufacturer to supply a capital sum as long as there were adequate margins to wholesalers, distributors and retailers; ownership and management by wholesalers or distributors was the most economic method. Freezer exclusivity by all manufacturers in any form should therefore be ended immediately, or, if such a remedy was to be phased in, a 50 per cent limit should be imposed immediately, declining to zero in four years.

### ***Outlet exclusivity***

7.188. Frederick's supported a general prohibition on outlet exclusivity and did not think there should be any exclusivity of ice cream supply through any given outlet.

### *Discounts to retailers*

7.189. Frederick's considered that discounts and bonuses should be related to volume. Such discounts and bonuses should be minimal and basic gross margin should be adequate for a distributor or retailer to operate a viable business including funding of its own freezers, should it wish to supply freezers. Any 'bonus' should be just that. Alternatively, Frederick's could supply freezers without restrictions or arrange for competitive leasing terms on a national basis from a leading freezer manufacturer.

### *Distribution*

7.190. Frederick's did not believe that turnover thresholds in the possible distribution remedy were necessary. It thought that exclusive arrangements and control or ownership of distribution by manufacturers should not be necessary, or allowable, with immediate effect. It also thought that the market should be open to all and that no exceptions should be made. There needed, however, to be freedom for price promotions by manufacturers to distributors and wholesalers.

7.191. Frederick's believed that it could increase its sales to a worthwhile share of the wrapped impulse market only if freezer exclusivity, existing heavily-distorted 'retrospective' bonuses and other discounts and distribution exclusivity were to be ended. To leave the current monopolistic situation unchanged would continue to prevent the profitable entry of new brands that provided increased consumer choice, and a freely competitive distribution network.

### *Frutina Ltd*

7.192. Frutina Ltd, a manufacturer of slush, believed that its company sales and industry sales would certainly decrease if freezer exclusivity were banned. It told us that its business suffered as a result of onerous freezer contracts used by its major competitor. It also believed it was unfair that the large customers were bought by marketing budgets (including capital expenditure budgets, retrospective discounts, promotional giveaways and holidays to key staff) in return for exclusivity.

### *G Portelli*

7.193. G Portelli, a distributor, said that its sales, and industry sales, would certainly increase if freezer exclusivity were to be banned either altogether or for BEW alone; it said that freezer exclusivity was restrictive, did not allow fair trading and encouraged a monopoly for larger companies. It also said that BEW was offering extra discounts to buying groups and seasonal outlets and increasing its activity in sole direct supply and freezer exclusivity, and trying very hard to squeeze out wholesale supply; its discount terms made it very hard to stock its products as a wholesaler.

### *Glasay International plc*

7.194. Glasay International plc, a non-impulse ice cream manufacturer which provided partially exclusive and non-exclusive freezers, said that it never insisted on complete freezer exclusivity as it realized the problems it caused for so many of its customers who wished to offer a genuine range of products. It said that it could not compete with BEW and other larger companies. It still had difficulties, especially in health clubs which had room for only one freezer and already had one which had been given free on loan, and was not able to enter the retail market as it could not compete with BEW and other such companies. It said that its sales, and industry sales, would certainly increase if freezer exclusivity were discontinued altogether, and probably increase if only BEW were not allowed freezer exclusivity. It also commented that in many outlets it knew it could not compete with large brand names due to their discounts, which were often provided in cash.

## ***Grant & Goose***

7.195. Grant & Goose (trading as G&G Ices), a BEW franchisee, said that if freezer exclusivity were banned altogether, its sales would stay the same, but it did not know the effect on industry sales. It said that there seemed to be a danger of penalizing the small shopkeeper further: unless it could provide his own freezer, it would lose precious trade. Most small outlets were very strapped for cash and this could work out a real hardship for many. There would be no effect on its sales, or industry sales, if only BEW were not allowed to provide exclusive freezers: it could not imagine the large suppliers accepting this, and questioned whether it was envisaged that they would have to make space available up to a certain percentage, or whether smaller suppliers would be able to find the £400 to £500 cost per freezer. Any alternative to the existing arrangements needed very careful thought if more damage were not to be caused at the retailing end of the market. It would be ideal if the big manufacturers would yield a little space without withdrawing the facility altogether.

7.196. G&G Ices also commented that being contracted to BEW was a mixed blessing. BEW's commitment to a quality image and its advertising put it in a good situation in the ice cream market place. However, some of BEW's new terms, for example the out-of-season targets, might prove to be unachievable and although business plan targets were achievable, BEW stipulated what the money had to be spent on. BEW granted a handling charge per case but if the number of items packed in the case was increased, this lowered its income. Also, BEW's insistence on G&G Ices' exclusivity restricted its takings and the service it could give its customers; its competitors could stock all makes of ice cream, but it had to tell potential customers that it did not stock particular products. It felt it should be allowed to stock some alternatives but only up to a maximum of 10 per cent of total turnover; even though its vans would be in BEW's livery, it did not think this would be unreasonable.

## ***Häagen-Dazs (Pillsbury UK Limited)***

7.197. Häagen-Dazs, a part of Pillsbury UK Limited, a Diageo company, a manufacturer and retailer of premium ice cream, which supplies exclusive freezers, said that the main reason for it providing freezers was to ensure that its products reached consumers in perfect condition. This was a particular issue in respect of Häagen-Dazs products which did not contain any emulsifiers or stabilizers and which required that they must be stored in high-quality freezers with satisfactory temperature control, capable of keeping the product at lower temperatures than were applicable to other ice creams. The freezers were designed to store and display only Häagen-Dazs products to their best advantage, and while the company insisted on its own freezers being used only for Häagen-Dazs products, it did not impose any requirement that only Häagen-Dazs products were sold at the locality where the freezer was located.

7.198. It regarded the freezer as an essential part of its strategy for the sale, marketing and promotion of its products in both take-home and impulse categories, and would be placed at a major competitive disadvantage if it were not able to offer freezers with cabinet exclusivity for its products. Hence, if ice cream suppliers generally were not permitted to insist on freezer cabinet exclusivity for their own freezers, its own sales volume would certainly decrease as some retailers (particularly independent shops) would look to single source their requirements for ice cream in both take-home and impulse categories. The consequential effect of this risk would be the destocking of its products since they did not compete on price with other brands; it also believed there would be a probable decrease in industry ice cream sales volume if certain retailers decided that it was either too much trouble to stock ice cream at all or to narrow the product range if they would have to bear their own freezer costs. By contrast, if only any ice cream supplier with a market share of over 25 per cent were not allowed to maintain freezer exclusivity, Häagen-Dazs felt that its sales would increase as retailers switched to those brands for which on-site freezer support would be provided, but without any material change in the overall market.

7.199. Commenting on the statement of issues, Häagen-Dazs told us that its sales of wrapped impulse ice cream were only a small proportion of its sales in this country, and within the total market it had always been positioned as a premium or super premium brand and consequently had a relatively low market share. However, its experience over the past nine years demonstrated that despite the presence of other long-established brands, it was possible to enter, to compete and to succeed in the market. Over that same period other new competitors, such as Mars, Ben & Jerry's and Mackie's Ltd, had become established.

7.200. On the terms of reference, Häagen-Dazs believed the market for scoop ice cream was quite distinct from that for wrapped impulse ice cream and should preferably be excluded from the terms of reference. Sales of scoop ice cream, whether for consumption on or off the retailer's premises, were driven by consumer demand in the immediate vicinity of the retailer's location for that type of product in preference for wrapped impulse ice cream; a demand for a special product which must be eaten straight away was not substitutable by standard, wrapped impulse ice cream. Ice cream served as a meal or as part of a meal would almost always be in a scoop form or individual portions which would not normally be sold wrapped for immediate consumption, and was driven by preference for this as opposed to other types of desserts. Businesses selling such ice cream, and locations predominantly serving ice cream as in the case of Häagen-Dazs cafe outlets, operated in different markets which met distinctive types of consumer demand, different from that of wrapped impulse ice cream. Ice cream sold as a meal or part of a meal or served in or from cafes, restaurants or other catering outlets should therefore be excluded from the terms of reference.

7.201. Given the volume of the sales of Häagen-Dazs wrapped individual portions of ice cream, its practice of freezer exclusivity should not be viewed as having significant impact, and in any event was neither anti-competitive nor against the public interest. Given the characteristics of its products and that the purchase cost to retailers of Häagen-Dazs products had always been higher than for mainstream standard brands, the provision of freezers had undoubtedly assisted Häagen-Dazs in influencing its retailers' decision to start and continue the purchase and resale of its products, particularly smaller independent food-orientated shops and retailers whose primary function was not the sale of food products at all. Also, the supply of freezers was only an option available to retailers, and Häagen-Dazs did not insist on retailers taking a freezer as a condition of being supplied with its products. It supplied a range of different sizes and types of freezers and did not require other freezers to be relocated or removed, and no retailer had to keep Häagen-Dazs freezers in place for any minimum period. Given its investment in freezers, it believed it was not unreasonable to require retailers to use its freezers for storage display and sale only of its products, nor did it have any complaint about any other manufacturers or distributors doing so. Were it required to share its freezers, particularly when no contribution were to be made to its costs, its brand image would suffer and in the longer term it would be uneconomic for a small brand like Häagen-Dazs to provide freezers at all, diminishing its presence in the market and consumer choice.

7.202. Since its products were at the premium or super premium end of the total UK market and had a relatively low share of the market, it did not believe that its practice of recommending retail prices should be of concern in the context of the Commission's more wide-ranging inquiry. It issued RRP's to assist retailers to understand its belief that products which did not compete with mainstream brands on price, and had a lower rate of sale, would nonetheless be capable of being sold at a price which would offer retailers a reasonable, realistic profit. They were merely indications or suggestions as to what it believed consumers were willing to pay, and retailers were free to set their own retail prices, which were frequently above and below its recommendations.

7.203. Hence, should the Commission reach any conclusion that freezer exclusivity or the recommending of retail prices was against the public interest, it believed any remedy should be confined to manufacturers or distributors with annual UK turnover in both impulse and take-home ice cream of over £75 million, and even then only if the number of freezers in place with retailers exceeded a specified maximum which could be in the order of 10,000 freezers. Among other comments on remedies, Häagen-Dazs suggested that exclusive arrangements to supply retail outlets or agreements by the retailers to stock only specified brands should be permitted, provided the length of exclusivity or brand-stocking limitation did not exceed three years and that, before any such agreement was renewed or extended, at least three manufacturers or distributors were invited to tender for the future supply of products. Franchise agreements with restaurants, cafes or other food service outlets should be permitted even if brand exclusivity or restrictions were agreed with that retailer, provided the retailer was free to source ice cream from other franchisees or from the manufacturer or manufacturer-approved distributors, and the agreement complied with EC law.

### ***Helsett Farm Cornish Ice Cream***

7.204. Helsett Farm Cornish Ice Cream, a small manufacturer, said that if freezer exclusivity were banned altogether its sales would probably increase, but it did not know what would happen to industry sales; if only BEW were not allowed freezer exclusivity, its sales, and industry sales, would stay the

same. It said that it would prefer not to supply freezers at all and to persuade customers to buy their own as it had not had very satisfactory experiences when it loaned freezers, so tended not to do it any more. It found that the practice of buying sites in an outlet could adversely affect its sales as smaller companies could not afford to do so and were squeezed out.

### ***Hill Station Ltd***

7.205. Hill Station Ltd, a medium-sized manufacturer of take-home ice cream, which supplied some exclusive and partially exclusive freezers, said that its sales and industry sales would probably increase if freezer exclusivity were banned altogether or for BEW alone. It commented that it found it a serious disadvantage when the large companies insisted on exclusivity for their freezers. It could not offer freezers the way BEW or Häagen-Dazs could, and this kept Hill Station Ltd out of some ideal outlets. In the few cases where it had supplied freezers, it asked for only limited exclusivity—ie certain brands were all right, others were not, such as BEW. It also commented that it had found it hard going to sign up wholesalers and distributors, but did not believe that this was due to anti-competitive practices. However, the fact that BEW had cancelled its exclusive distribution arrangements meant that there were now many more freezer trucks and vans on the road looking for business, which could be a help.

### ***Hippo Campo Ltd***

7.206. Hippo Campo Ltd, a medium-sized distributor, said that its sales would stay the same if freezer exclusivity were banned altogether, but sales to smaller businesses would be likely to decrease if their owners were required to supply their own refrigeration, with manufacturers still controlling the retail selling prices and retailers with poorer buying power receiving smaller discounts. If only BEW were not allowed to supply exclusive freezers, it did not know the effects on its sales or industry sales volumes, but thought this would possibly help minor manufacturers' sales given space restrictions in many premises for freezers, and the loss of exclusivity would help increase customer choice. It thought freezer exclusivity to be a restrictive practice, many retailers being prepared to accept it for supply of free refrigeration; control of margin by manufacturers ensured that the retailers' profit element was restricted. Hippo Campo Ltd said that ex-dedicated distributors of BEW were now selling all brands of ice cream and were more pro-active in the market place. Frozen food wholesalers, like itself, were not concentrating on ice cream sales and were reducing their market share. It said that all the national ice cream manufacturers were controlling retail prices, having no regard for the wholesaler's distribution margin.

### ***Ice Patrol***

7.207. Ice Patrol, a small distributor, said that its company sales, and industry sales, would stay the same if freezer exclusivity were stopped altogether, but would certainly increase if only BEW were not allowed to supply exclusive freezers. It said that freezer exclusivity should be stopped. It also commented that if a mobiler signed up with BEW or Nestlé to receive maximum discount, although the mobiler owned the van, the manufacturer would pay for the vehicle livery and insist that only its brand be sold. Additionally the mobiler was tied to a five-year contract.

### ***Icefresh Foods Ltd***

7.208. Icefresh Foods Ltd, a distributor, believed that its company's sales would stay the same if freezer exclusivity ceased altogether or only for BEW, but industry sales would certainly increase. It commented that freezer exclusivity reflected unfair competition between large and small companies.

### ***J W Filshill Ltd***

7.209. J W Filshill Ltd, a cash-and-carry operator, said that its company's sales, and industry sales, would certainly decrease if freezer exclusivity were banned altogether, since with no display there would

be no sale, and would probably decrease if only BEW were not allowed freezer exclusivity. Most of its customers could not afford proper freezers: it would mean a large reduction in sales if they had to buy freezers.

### ***Jaconelli (Scarborough) Ltd***

7.210. Jaconelli (Scarborough) Ltd, a manufacturer of non-impulse ice cream, said that its sales, and industry sales, would certainly increase if ice cream manufacturers were no longer allowed to insist on freezer exclusivity, and probably increase if BEW alone were not allowed to insist on freezer exclusivity. It commented that freezer exclusivity was undoubtedly a fundamental reason as to why the market place was so distorted. It also said that the BEW pricing structure was a sophisticated tool established over many years. The power of the company was exceptional to the extent that BEW could not only dictate to its smaller customers but also to the largest users of ice cream. BEW provided freezers at what initially seemed very good terms, but the high prices of its products very quickly compensated for the relatively small one-off contribution of a freezer. Because of the vast network of freezers in place, BEW could then justify significant marketing spend on products, thus creating a strong brand and a vicious circle whereby it was impossible for the smaller manufacturer to compete and at the best extremely difficult for larger manufacturers to compete. It was only when an organization had built up significant brand recognition in confectionery that it had the strength to take BEW on. Jaconelli (Scarborough) Ltd also commented that BEW's dominance operated in every section of the ice cream industry and distortions such as its pricing policy and exclusivity appeared everywhere.

### ***Just Rachel Quality Desserts***

7.211. Just Rachel Quality Desserts, a small manufacturer of ice cream which supplied some exclusive freezers, said that due to the fact that big companies such as BEW supplied freezers to retail outlets, retailers expected all companies to supply them. It was a much more considerable investment for a very small business, such as itself, to supply a freezer and the payback time was greater. Smaller manufacturers were more likely to supply small, independent retailers since they would not have the capacity to supply regional or national chains; such retailers, however, were generally smaller outlets with limited space and, if a manufacturer had already supplied a freezer for exclusive sale of its products, there would be no room for a second freezer to allow the end-consumer wider choice of product. The supply of freezers therefore restricted both competition and variety. On the other hand, the supply of exclusive freezers had probably increased the number of outlets selling ice cream, since many retailers would be put off selling ice cream by the large outlay involved but would do so if supplied with a freezer whether or not their outlet was suitable for sale of that particular ice cream; the supply of exclusive freezers had also increased the standard of freezer supplied. It said that its sales and industry sales would probably decrease if freezer exclusivity were to be banned altogether; its sales would probably increase if only BEW were not allowed to supply exclusive freezers, but industry sales would decrease, and it was sure the bigger companies would find a way around the restriction.

### ***Kingstonian Ice Cream Company***

7.212. Kingstonian Ice Cream Company (Kingstonian), a small manufacturer and distributor, believed that the banning of freezer exclusivity would certainly increase its company's sales volume, and would probably increase industry sales. Shops that it tried to supply were unwilling to take its products because of the exclusivity arrangement even though its products were more competitively priced. Its sales, and industry sales, would, however, remain the same if only BEW were not allowed to supply exclusive freezers—a proposal it described as useless to small companies like itself, and only benefiting medium-sized companies. Kingstonian believed that the only advantage of freezer exclusivity was to the manufacturer, since the shop owner would have to pay more in the long run and the consumer was restricted for choice. The supply of a free freezer in return for an exclusivity agreement was in effect a bribe. Kingstonian did not agree with exclusivity arrangements of any kind. If a product was good, it would outsell the others on its own merits.

## ***Landmark***

7.213. Landmark, a cash-and-carry organization in the food and drink sector, considered that it had been discriminated against by BEW. It had been offered BEW's terms to wholesalers but it believed that large convenience chains and major high street multiples were able to negotiate with BEW at will.

## ***Leechmere Ices***

7.214. Leechmere Ices (Leechmere), a medium-sized distributor, said that its sales, and industry sales, would certainly increase if freezer exclusivity were banned altogether, but would probably decrease if only BEW were not allowed to supply freezers on exclusive terms. Leechmere commented that it was unfair that the supermarkets could sell ice cream from big companies at a price cheaper than Leechmere could buy it for; also that BEW stopped supplying just before last summer which had affected its business. It felt it was badly treated by BEW after selling its products for 20 years.

## ***Loseley (Manufacturing) Limited***

7.215. Loseley (Manufacturing) Limited (Loseley, which included Bradwells), a manufacturer, told us that it supplied exclusive freezers to a significant number of the outlets it supplied because of the freezer exclusivity restrictions imposed by BEW. It said that if freezer exclusivity were banned, its sales, and industry sales, would certainly increase, as would the choice available to consumers, and there would be scope for price competition between brands within the same freezer. It believed freezer exclusivity accounted for stagnation in the market. It also believed its own sales would certainly increase, and industry sales would probably increase if only BEW were not allowed to provide exclusive freezers. It believed exclusivity anywhere in the supply or retailing of impulse ice cream was anti-competitive, but the more so when carried out by a company such as BEW with a very large share of the market.

7.216. Loseley & Bradwells believed that several aspects of the market were defective. On several occasions over the last five years it had agreed to supply particular outlets only to be told a couple of weeks later that the outlets could not deal with Loseley & Bradwells because they were being supplied by BEW. On four occasions it had put together detailed proposals for leisure outlets only to find that massive amounts of 'grant money' had been paid by BEW to the outlets mentioned. Obviously it could not afford to give places like big theatres £50,000 one-off payments to secure their business. It seemed a little unfair that BEW could just go in and 'buy' contracts. It believed BEW on other occasions offered to increase retrospective bonuses to retailers to stock BEW's scoop as well as wrapped lines, to remove the strong competition from Loseley & Bradwells' scoop products to BEW's wrapped products. Once that was achieved, the retailer was then encouraged to sell only BEW's wrapped products. (Loseley & Bradwells believed there was strong competition between scoop and wrapped ice cream in certain types of outlet, although some outlets preferred not to sell scoop.) BEW also offered to supply free soft mix machines, as a condition of exclusivity in supply also of wrapped products.

7.217. Loseley & Bradwells had been helped by the recent changes in distribution, some of BEW's ex-dedicated distributors now being both willing to distribute Loseley & Bradwells' products and able to offer a better service in delivering to smaller outlets than other independent wholesalers, who were disadvantaged by the smaller scale of their deliveries.

## ***Michael I Holdsworth Limited***

7.218. Michael I Holdsworth Limited, a medium-sized distributor of ice cream, said that its sales, and industry sales, would probably increase if freezer exclusivity were to be banned altogether or by BEW. It commented that the margins offered by BEW were totally unrealistic by comparison with other frozen products and its products were not worth selling. However, customer demands for impulse ice cream obliged Michael I Holdsworth Limited to stock and sell this range.

### ***McVitie Prepared Foods***

7.219. McVitie Prepared Foods, part of United Biscuits, currently has ice cream co-packed for it by other companies but intends to add to its range a product manufactured in its own factory. It said that its sales would certainly increase, and industry sales would probably increase, if freezer exclusivity were banned altogether, commenting that this would allow wider choice and variety for consumers. If only BEW were not allowed to provide exclusive freezers, its sales would probably increase, and industry sales would probably stay the same; this would still allow wider choice but be more restrictive. It saw the advantages of freezer exclusivity as providing the retailer with a well-maintained attractive fixture, but the disadvantage as restricting the range to the consumer and profit opportunity to the retailer. It also commented that entry costs for new manufacturers into impulse had inhibited real innovation and investment in this sector.

### ***Meols Catering Services and Clwyd Ices Ltd***

7.220. Meols Catering Services and Clwyd Ices Ltd (Meols), a medium-sized distributor which supplied some exclusive and partially exclusive freezers, said that if freezer exclusivity were banned altogether its own sales, and industry sales, would probably decrease, but that if only BEW were not allowed to supply exclusive freezers, its own sales and industry sales would certainly increase. It said that this would give the smaller companies a greater chance to compete. The larger companies advertised their products and attracted custom but the smaller companies, which often could not advertise but had better products, lost custom because of lack of advertisement and the exclusivity created through freezers. Meols also commented that distribution arrangements created exclusivity, since certain agents or wholesalers were discouraged from operating by lack of support and lower discounts. It added that BEW would group together a string of independent and different seasonal kiosks as one and offer a greater discount, thereby making it uncompetitive for another distributor/manufacturer to offer a similar discount. The problem of exclusivity had been created by BEW, Nestlé/Lyons Maid etc, who having offered these exclusive deals cornered the market. The problem lay in retailers knowing that they would get a free freezer, and if they did not they would not pay for one, hence would not sell ice cream and sales would go down. Meols suggested that if ice cream manufacturers offered better margins, retailers would buy their own freezers.

### ***Mitchell's***

7.221. Mitchell's, a medium-sized distributor, said that its sales and industry sales would certainly increase if freezer exclusivity were banned altogether, or for BEW alone. It also complained that BEW demanded names, addresses, and numbers of mobile vans of all mobilers and required evidence of the amount of sales to each before giving the mobilers discount; BEW also demanded the right to come to its premises and verify and copy all relevant information and use it for any purpose and pass it on to any third party. If a distributor did not agree, it would not be supplied.

### ***Mr Boni's Ice Cream***

7.222. Mr Boni's Ice Cream, a medium-sized manufacturer, believed that its sales, and industry sales, would probably increase if freezer exclusivity were banned, and would certainly increase if only BEW were not allowed to supply exclusive freezers. It believed there were advantages and disadvantages to freezer exclusivity. If one put a maximum percentage on exclusive freezer usage, it might solve the problem more fairly.

### ***New Forest Ice Cream Ltd***

7.223. New Forest Ice Cream Ltd (New Forest), a manufacturer which supplies freezers, some exclusive, said that its company sales might be increased but could stay the same, and industry sales probably increase or stay the same, if freezer exclusivity were banned altogether. If all companies stopped supplying so-called free freezers and retailers purchased their own, it would reduce the cost of ice cream as retailers would look after them. Its sales, and industry sales, would certainly increase if only

BEW were not allowed to supply exclusive freezers, but commented that this seemed unfair to companies which invested money in an item expensive to supply and maintain; also many retailers would and did abuse the system and put products other than ice cream in them. It said that it would also be much better from a health as well as financial point of view if customers owned and maintained their own freezers.

7.224. In commenting on whether a complex monopoly situation existed in favour of all companies supplying exclusive freezers, New Forest said that it was difficult to see how companies with a very small percentage of the ice cream trade could be regarded as part of a monopoly. Although it would prefer all customers to purchase or rent their own freezers, many expected freezers to be provided and would not invest in one; New Forest, where it considered the trade large enough to cover the cost of a freezer, provided one large enough to hold all the products it made and wholesaled, and it would be very unfair if other companies were allowed to put their products in its freezers, removing its products and not sharing in the cost. There was bound to be some restriction of choice in outlets with insufficient space to hold all manufacturers' products.

7.225. It commented that it seemed unfair that large companies such as BEW and Nestlé could offer large customers money up front for an exclusive three- or five-year contract. Smaller companies could not compete with this and the cost must be absorbed by higher prices for the products.

7.226. The ice cream trade was no different from others in publishing RRP's as a guide: even where (as with New Forest scoop ice cream) this was not done, retailers looked at other prices and charged the same. Where manufacturers such as New Forest recommended lower prices than BEW or Nestlé, retailers sold at whatever price they thought they could get. It was difficult, however, to see how this issue (or that of freezers) operated against the public interest: price levels reflected costs, for example of refrigerated distribution, and it was open to consumers to shop around for their favourite products.

### ***Northumbrian Ice Cream Co Ltd***

7.227. Northumbrian Ice Cream Co Ltd, a manufacturer and distributor, believed its sales would certainly increase, and industry sales would probably increase, if freezer exclusivity were banned altogether; its sales, and industry sales, would probably increase if only BEW were not allowed to supply exclusive freezers. It believed freezer exclusivity restricted retailers' choice and the public choice of products available. Northumbrian told us that Treats had reduced profit margins for retailers and over-rider bonuses for wholesalers. It also mentioned the impossibility of importing BEW's products from other EU countries where retail and therefore wholesale prices were lower than in the UK. All its approaches had been refused and referred back to BEW at Gloucester.

### ***Palmer & Harvey McLane Ltd (Snowking Ltd)***

7.228. Snowking Ltd (Snowking), a subsidiary of Palmer & Harvey McLane Ltd, is a national wholesaler. Since our 1998 inquiry, it has acquired the goodwill and certain assets of Booker Wholesale Foods. It has ceased trading as a separate entity and is run as the chilled and frozen division of Palmer & Harvey McLane Ltd.

7.229. Snowking said that it was difficult to earn substantial margins on ice cream. It supplied ice cream along with other frozen products; these accounted for 80 per cent of the business's turnover. Its developmental strategy largely centred on the chilled foods area. With regard to impulse ice cream, since the establishment of Wall's Direct Snowking would not be likely to make sufficient margin to be able to offer the service that Wall's Direct offered and still make money on its current terms. Snowking felt unable to offer its customers its own volume-related discounts on BEW products and indeed regarded Wall's Direct as its only competitor in ice cream distribution. Wall's Direct had the advantage of economies of scale so that it could set up a state-of-the-art telesales ordering system with vehicles operated only during the summer season. BEW was able to take the risk involved because it had 70,000 exclusive freezers in the market place and an established customer base.

7.230. Since last year, Snowking was targeting multiple retailers rather than independent grocers and CTNs as it thought it would be difficult to service the CTNs to the standard which Wall's Direct could provide. Multiple retailers tended to negotiate to receive a single planned delivery of a number of

frozen products including ice cream and not to value so highly the possibility of a single-case, 24-hour delivery.

7.231. Snowking said that BEW's competitors were using the change in the structure of the market place to gain market share, and were promoting their products fairly aggressively. Both Mars and Nestlé offered retail promotions and tried to get as much stock to retailers as possible but BEW did not engage in this sort of activity. BEW had abandoned its practice of offering distributors the chance to stock up at the start of the season. As a result, Snowking thought that BEW might lose market share.

7.232. Snowking provided industry freezers to retailers. But it recognized that the majority of retailers tended to think that freezers were linked to the source of supply and in practice that meant that retailers accepted a BEW exclusive freezer and ordered supplies through Wall's Direct. In Snowking's opinion, if Wall's Direct or a BEW distribution system of some sort did not exist, then the incidence of BEW's exclusive freezers might well reduce. Conversely, Snowking's sales, and industry sales, would certainly increase if freezer exclusivity were banned altogether, or for BEW alone.

### ***Pewsey Vale Dairy Ice Cream***

7.233. Pewsey Vale Dairy Ice Cream, a manufacturer of ice cream, said that it did not sell enough to warrant providing freezers, and if ice cream manufacturers were no longer allowed to insist on exclusivity, its sales, and industry sales, would probably increase. It said that it was not easy for the small-volume producer, and because of the freezer problems in the past it found selling to shops an unnecessary hassle, so it tended to sell through its own outlets at shows.

### ***R Rossa & Sons Ltd***

7.234. R Rossa & Sons Ltd, a medium-sized manufacturer and distributor, believed that its sales would certainly increase if freezer exclusivity were discontinued altogether, but did not know what would be the effect if only BEW were not allowed to supply exclusive freezers. It objected to Nestlé insisting that it have a mobile sales van selling Nestlé products exclusively, or Nestlé would reduce its wholesale terms from 33 to 17.5 per cent; it also objected to BEW giving large discounts to leisure sites thus preventing it from being able to compete.

### ***Rabaiotti's Ice Cream***

7.235. Rabaiotti's Ice Cream, a small manufacturer, said that its sales and industry sales would probably increase if freezer exclusivity were banned altogether or for BEW alone, commenting that it did not agree with freezer exclusivity.

### ***Regale Frozen Foods Ltd***

7.236. Regale Frozen Foods Ltd, a distributor, said that its sales would stay the same if freezer exclusivity were banned generally or if only BEW were not allowed to supply exclusive freezers: if manufacturers no longer gave out free freezers, retailers would have to buy their own.

### ***Rios Ice Cream***

7.237. Rios Ice Cream, a small manufacturer, believed that its sales would certainly increase if freezer exclusivity were banned altogether but did not know what would be the effect on industry sales: its sales, and industry sales, would be unaffected if only BEW were not allowed to supply exclusive freezers. It told us that BEW dominated almost all seaside retail points all over the country. Sales by small manufacturers would certainly increase if sales by the major companies were to decrease.

### ***Roberto Ices***

7.238. Roberto Ices (Roberto), a medium-sized distributor, believed that its sales and industry sales would be unaffected if freezer exclusivity were banned altogether, but would increase if only BEW were not allowed to provide exclusive freezers. As a BEW distributor (new this year), Roberto had found it difficult to receive information about supplying direct accounts and buying groups. It had originally heard that BEW was offering free stock to people who bought from it direct—BEW was slow to offer Roberto information. Point-of-sale advertising material was lacking for some time and again was slow in coming from BEW.

### ***Ronksley's Ice Cream***

7.239. Ronksley's Ice Cream (Ronksley's), a small distributor, said that if freezer exclusivity were banned, its sales, and industry sales, would certainly increase, and if only BEW were not allowed to supply exclusive freezers, its sales and industry sales would probably increase. It commented that it could not see any single advantage of freezer exclusivity because the retailer was usually tied to that company and was charged a higher price for its products to cover the cost of the freezer. Ronksley's had always owned its freezers and ever since being in business had been free to purchase ice cream from whom it wanted.

7.240. Ronksley's said that some years ago it sold BEW's ice cream from its van and received a 45 per cent discount off the selling price, ie goods which cost 55p sold for £1. This was then reduced to 42 per cent. Then it was told that BEW was operating a two-price system, for example the RRP of Feast would be 50p from a shop but Ronksley's was told that it had to sell Feast for 55p. Since it would not sell any product for more than the RRP, this increased the price it paid for all products by approximately 10 per cent and reduced the profit margin to 36 per cent. Currently Magnums were about £1 but mobile vans were told to charge £1.10. Ronksley's also believed that BEW's ice cream prices from shops, vans, seaside, parks and other exclusive sites were too expensive, as shown by their very low prices in supermarkets, for example three Magnums and one free usually for about £2.10 which was half the price of the above outlets. Also BEW (called Frigo) in Italy and Spain charged approximately 25 per cent less than UK prices. Companies other than BEW also sold ice cream at far too high a price usually where they had the monopoly, for example shopping centres, garden centres, beach, theme parks, historical buildings etc.

### ***Rossi (Southend on Sea) Ltd***

7.241. Rossi (Southend on Sea) Ltd, a manufacturer and distributor, said that its sales would probably increase if freezer exclusivity were to be banned altogether, or for BEW alone. It was a long-established family business and although some of its independent retailers purchased other brands of ice cream, it never objected or obliged them to buy its own goods exclusively, because its product sold by itself.

### ***S E Lane***

7.242. S E Lane, a small manufacturer which supplied a few exclusive freezers, said that its own sales volumes would probably increase either if freezer exclusivity was banned altogether or if only BEW were not allowed to supply exclusive freezers, though industry sales would stay the same in each case. It said that as a very small business in this market it obviously suffered from the competitive methods used by many of the large companies, but it had not come across any methods which it considered unfair.

### ***Schöller Ice Cream Ltd***

7.243. Schöller Ice Cream Ltd, a major German manufacturer with some sales in the UK, said that its sales, and industry sales, would certainly increase if freezer exclusivity were banned altogether or only for BEW: it believed there was an inevitable drift toward selling freezers and the use of industry freezers.

### ***Slee's of Winskill***

7.244. Slee's of Winskill, a small manufacturer and distributor, said that its sales would probably increase if freezer exclusivity were banned altogether, but industry sales would remain the same; its sales, and industry sales, would be unaffected if only BEW were not allowed to supply exclusive freezers. Mars appeared to expect every retailer to stock its products; not supplying freezers would not persuade retailers to stock Mars and Mars seemed to forget it cost money to stock frozen goods and therefore the profit margin needed to be higher than confectionery. Slee's of Winskill said that it found it difficult to compete with the larger wholesalers who had dealt exclusively in Wall's products and who were now free to sell any manufacturer's product. The smaller independent wholesalers were likely to struggle.

### ***Soave's Ice Cream***

7.245. Soave's Ice Cream, a medium-sized manufacturer which provided some exclusive freezers, said that its sales, and industry sales, would certainly increase if freezer exclusivity were banned altogether, but would stay the same if only BEW were not allowed to supply exclusive freezers. It said that certain groups such as hotels would deal with it only if it could convince their existing distributors to list its products: these distributors refused as it did not suit them to take on a new manufacturer in place of or in addition to their present manufacturer.

### ***Stratford Ice Cream***

7.246. Stratford Ice Cream, a distributor of ice cream which supplied partially exclusive and non-exclusive freezers to some outlets, said that its sales would certainly increase if freezer exclusivity were to be banned altogether or for BEW alone, and industry sales would probably increase in both cases. It commented that whilst freezers were supplied by manufacturers, there would be pressure upon the retailer to stock mostly from that manufacturer's products; the free market would not exist whilst freezers were supplied free on loan by the large manufacturers. Having in the past not been able to supply its customers with BEW ice cream, it had during 1998 been allowed to do so. The terms structure applicable was, however, so designed that it was impossible for Stratford to have a working margin. Sales targets had been set that were impossible for it to meet, and there had been demands for customer sales figures which were then used to compete unfairly against Stratford. It would not therefore be promoting BEW ice cream due to such uncompetitive terms.

### ***Styles Farmhouse Ice Cream***

7.247. Styles Farmhouse Ice Cream, a medium-sized manufacturer and distributor which supplies some non-exclusive freezers, said that its sales would certainly increase (and industry sales probably increase) if freezer exclusivity were banned altogether or BEW alone were not allowed to supply exclusive freezers. It also commented that establishments with a Wall's symbol were not worth approaching, as there was no chance that they would accept any other products even if they wanted to. Because Styles Farmhouse Ice Cream made ice cream, BEW would not allow it to sell BEW's products. Moreover, if BEW livery was used, there were better margins, which stopped firms from developing their own image.

### ***T Osborne & Son***

7.248. T Osborne & Son, a manufacturer of ice cream, said that its sales and industry sales would probably increase if freezer exclusivity were banned altogether, but would probably decrease if only BEW were not allowed freezer exclusivity, which would also be difficult to administer, and BEW would still be able to dominate the market with the same effect as now. It believed freezer exclusivity seemed to suggest a restrictive practice against competitors.

### ***Tattenhall Dairy Products Ltd***

7.249. Tattenhall Dairy Products Ltd, a medium-sized manufacturer which supplies some exclusive freezers, believed its sales, and industry sales, would certainly increase, whether freezer exclusivity were banned altogether or only for BEW. Freezer exclusivity prevented smaller retailers from stocking a wider range of goods.

### ***Thayers New England***

7.250. Thayers New England is a manufacturer mainly of scoop and take-home ice cream, which supplies exclusive and non-exclusive freezers (although it said that in reality customers did not abide by the exclusivity rule). It said that its sales would certainly increase, and industry sales probably increase, whether freezer exclusivity were banned altogether or only for BEW. It said that BEW, Mars, Nestlé and to a lesser extent Häagen-Dazs and Mövenpick dominated the market because of their freezer supply. There were no advantages to Thayers New England, as a small company, from freezer exclusivity, but as such it was generally excluded from forecourts, motorway service stations and national multiple chains.

### ***The Coffee Pot***

7.251. The Coffee Pot, a small manufacturer and distributor, said that its sales, and industry sales, would certainly increase if freezer exclusivity were to be banned: freezer exclusivity certainly restricted any small company growth. Sales would stay the same if only BEW were not allowed freezer exclusivity.

### ***Thorne Farm Dairy Ice Cream Ltd***

7.252. Thorne Farm Dairy Ice Cream Ltd, a small manufacturer, believed its sales, and industry sales, would probably increase if freezer exclusivity were to be banned altogether, or for BEW alone: if there was an exclusive freezer in premises, it usually meant the outlet could not have another freezer for lack of room and this restricted sales very considerably. It told us that BEW's wholesalers would not take on locally made ice cream as their large storage freezers were supplied by BEW. This made it difficult for the public to be able to buy a locally-made product. Several major attractions in its area now supplied only BEW products.

### ***Trillo's of Whitby***

7.253. Trillo's of Whitby (Trillo's) is a small manufacturer and distributor which supplies some partially exclusive freezers to which it supplies its own and some other manufacturers' ice cream. It is also a retailer and said that if freezer exclusivity were banned, whether altogether or for BEW, its sales would stay the same. It commented that most independent retailers would only deal with companies who could offer a freezer on free loan, but they always put other lines in other freezers anyway unless they were really loyal customers. It commented that if manufacturers of 25 per cent or more market share were not allowed to supply freezers on exclusive terms, this would be grossly unfair to them. Commenting on the advantages and disadvantages of freezer exclusivity, it said that as most retailers had a choice of dealing with more than one supplier or having more than one freezer, and opted for the firm to supply them with products they could sell quickly taking price and margin into account, it thought things should remain as they have for years. Consumers, moreover, were not disadvantaged since other outlets nearby may sell the brands they preferred. Competition would be increased if free loan freezers were to be banned altogether, but if manufacturers were to continue to purchase freezers for a customer's use, the manufacturer should have the right to ask that customer to fill it only with stock purchased from that manufacturer.

7.254. In commenting on the statement of issues, on the scope of the terms of reference, Trillo's suggested that this would preferably exclude soft and scoop ice cream, slush, and ice cream served as part of a meal, and believed the sale of multipacks was not relevant to the impulse market. Trillo's said that the practice of freezer exclusivity existed, although other manufacturers' goods could sometimes be

stocked. The practice of end-year bonuses and RRP's did not, however, distort competition. Trillo's believed that both BEW's and Nestlé's terms to independent wholesalers adversely affected the ability of independent wholesalers to compete, and it appeared from these terms that the national companies now wanted a larger share of the independents' local trade. Terms to mobilers were also detrimental to mobilers not using BEW or Nestlé livery on their retail vans. Trillo's felt competition was distorted by the higher rate of discounts given to the leisure sector, in most cases with only one manufacturer's brand stocked. It also felt that the advertising of the three main manufacturers increased barriers to entry.

7.255. Trillo's felt that most small distributors and manufacturers offered RRP's, but altered them according to the level of competition of which there was no lack in its area. Prices would be higher without recommended retail pricing in most cases. Competition was, however, higher for non-impulse products.

7.256. On possible remedies, Trillo's suggested that manufacturers should be required to supply distributors on terms that permit wholesaling to be economically viable, and manufacturers should be required to account separately for trading activities and distribution activities, so as not to allow discrimination against supply to other distributors. A manufacturer should be allowed to subcontract for distribution to retail premises. Independent manufacturers should be allowed to advertise and retail their own manufactured products and bought-in impulse lines using their own livery, without the penalty of a reduction in discount. There should be a restriction on the information distributors were required to supply to manufacturers. On freezers, small manufacturers would be penalized the most if retailers having freezers on loan were permitted to use them for the storage of other suppliers' products. A manufacturer should not be permitted to enter into an exclusive contract to supply retail outlets, nor to discriminate between retailers or distributors. A manufacturer should, however, be allowed to recommend retail prices and normal competition should be left to take care of individual prices.

### ***Upton Farm Frozen Foods***

7.257. Upton Farm Frozen Foods, a distributor, said that its sales would probably increase if freezer exclusivity were banned altogether, but industry sales would probably stay the same; its sales would certainly increase, but industry sales would still stay the same, if only BEW were not allowed to supply exclusive freezers. It believed that whoever supplied a freezer to a site certainly had the advantage in supply. The bigger the company the more freezers it could afford to put out even in situations where they made a loss. The big nationals were able to beat the smaller independents by offering cash-back, free stock or other incentives. So even if exclusivity on freezers were stopped, there would be other incentives that the independent could never match.

### ***Valente Bros***

7.258. Valente Bros (Valente), a medium-sized manufacturer and distributor, said that its sales, and industry sales, would certainly increase if freezer exclusivity were banned; its sales would probably decrease if only BEW were not allowed freezer exclusivity, but industry sales probably increase. It commented that shopkeepers etc should buy their own freezers and should therefore be able to purchase what product they liked. Valente also said that the ice cream trade had been hit hard by BEW changing its discount scales and it was sure that small manufacturers would go out of business. BEW had been very biased against these people and Valente could now buy BEW's products considerably cheaper in supermarkets than direct. This was also the case for Mars and Nestlé products.

### ***Verrecchia Ltd***

7.259. Verrecchia Ltd, a medium-sized manufacturer, said that its sales, and industry sales, would probably increase if freezer exclusivity were banned altogether or only for BEW. It said that it had always avoided the 'supplied freezer' business, and that because of the dictatorial attitude of the larger companies, a decision had been taken to avoid as far as possible any contact with them. Verrecchia Ltd

added that if it were to invest a large sum of money in freezers, it would expect to see a return on that investment. It would not, however, expect its competitors to reap any benefit from its investment.

### ***Vinmar Ices***

7.260. Vinmar Ices (Vinmar), a medium-sized manufacturer and distributor, said that if freezer exclusivity were to be banned altogether, its sales would probably increase but industry sales would stay the same; if only BEW were not allowed to supply exclusive freezers, Vinmar's sales would probably stay the same and industry sales would probably decrease. Vinmar commented that shops should pay for their own freezers, so that any company could sell them ice cream products, and Vinmar could go to them to offer its own products. It also commented that BEW had made a considerable change to its distribution contracts and this had been to the benefit of Vinmar, which was now able to stock Wall's ice cream.

### ***West Country Dairy Products***

7.261. West Country Dairy Products, a small distributor, said that its sales would probably increase, and industry sales would certainly increase, if freezer exclusivity were banned altogether or only for BEW. It also commented that supermarkets were still too powerful and affected take-home prices of all impulse ices, making it hard for independent wholesalers.

### ***Willenmount Soft Ice Cream***

7.262. Willenmount Soft Ice Cream, a small manufacturer of soft mix, said that it believed freezer exclusivity was unfair to the small retailer.

### ***Winstones Ice Cream Limited***

7.263. Winstones Ice Cream Limited (Winstones), a medium manufacturer and distributor, believed its company sales and industry sales would certainly increase if freezer exclusivity were banned altogether, opening up far more outlets currently unavailable because of restrictions imposed by the two major manufacturers. Its sales would also certainly increase, and industry sales would probably increase, if only BEW were not allowed to supply exclusive freezers, but it believed any ban should be total. It told us that the advantage of freezer exclusivity was a total removal of competition and the ability of the manufacturer to control pricing. However, disadvantages for other manufacturers included the number of potential customers being restricted to those with non-exclusive freezers and the range of products available being restricted to those offered by the supplier of the freezer.

7.264. Winstones told us that its product range was reduced at the outlets of a certain multiple retailer, because BEW thought Winstones was given more freezer space than BEW and complained as it was the leading brand. In another instance, when trying to negotiate supply to a multiple retailer Winstones was told that in order to be considered for supply of ice cream it would have to match the cash discounts and other incentives offered by Nestlé such as holidays for directors etc.

### ***Woodlands Farmhouse Ice Cream***

7.265. Woodlands Farmhouse Ice Cream, a manufacturer, said that its sales would probably increase if freezer exclusivity were banned altogether, and would certainly increase if only BEW were not allowed to supply exclusive freezers. It was difficult to get its products into outlets which had exclusive freezers.

## **Retailers<sup>1</sup>**

### ***Association of Convenience Stores***

7.266. The Association of Convenience Stores (ACS) is a trade body for the convenience store sector. It represents the owners and managers of over 1,500 retail companies, who operate around 20,000 stores, between them employing over 190,000 staff. Members include independent retailers, multiple convenience stores and affinity groups such as symbol and buying groups. In commenting on the statement of possible remedies, ACS made it clear that this did not constitute a tacit acceptance that the impulse ice cream market operated against the public interest.

7.267. ACS believed that whatever remedies might be implemented, they should apply equally to all manufacturers of impulse ice cream over a certain size. Specifically, BEW, Mars and Nestlé should be subject to the same conditions in supplying the market. ACS acknowledged the case for smaller manufacturers being able to utilize additional freedoms in the market in order to promote local brands effectively.

### ***Freezer exclusivity***

7.268. ACS said that, at present, many convenience retailers chose to install freezers under arrangements which made a set amount of space available for specified manufacturers' products. Some retailers negotiated supply arrangements with manufacturers which included giving exclusivity within a freezer cabinet for one manufacturer's products. In this respect, impulse ice cream was similar to many other products, where manufacturers invested in display and storage fixtures on the basis of agreed space being given to specific brands. These products included soft drinks, cigarettes and newspapers.

7.269. ACS had concerns over the prohibition of these arrangements on two counts. First, convenience retailers valued the opportunity to freely negotiate deals with manufacturers, whether they included elements of exclusivity or otherwise. Retailers were free to purchase their own freezers should they wish to be subject to no manufacturers' conditions regarding brand exposure in the ice cream category. Secondly, many ACS members feared that a prohibition of exclusive arrangements with manufacturers of impulse ice cream would provide a disincentive for retailers—in particular independent operators—to stock ice cream products. Exclusive contracts were often dependent on the manufacturer supplying the freezer and agreeing to service it. This investment was a critical factor in many retailers choosing to stock ice cream, especially when the short life of the impulse ice cream market (the focus of impulse ice cream sales was a 14-week summer period) was taken into account. ACS was concerned that if retailers were denied the opportunity to negotiate for this investment, they might choose not to invest part of their own limited resource in installing and servicing freezers, and the number of outlets selling impulse ice cream might therefore decline. This in turn might adversely affect both the range of products sold by retailers and consumers' choice over the number and location of outlets in which to purchase impulse ice cream.

### ***Outlet exclusivity***

7.270. ACS members feared that restrictions on the negotiating options of the retailer would damage their trading position. ACS would support the ability of a retailer to negotiate contracts with suppliers which allowed for outlet exclusivity.

### ***Discounts to retailers***

7.271. Discounts could be and were negotiated by retailers, either independently or as part of a buying group, on the basis of a variety of factors. These might include promotional bonuses, display bonuses and overriding discounts which might be negotiated taking into account a range of these factors and sales volumes achieved. Promotional bonuses often included agreements for suppliers to produce materials

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<sup>1</sup>We also received information from a further 36 retailers about the sales of impulse ice cream, who did not provide any comments.

with the aim of improving the overall appearance of the retail outlet, and the freedom to negotiate for this promotional support was important to retailers. ACS said that it would oppose restrictions on the negotiating power of retailers, including the prohibition of non-volume-related discounts. ACS was also concerned at the impact and wider implications of a requirement for manufacturers of impulse ice cream to publish the terms on which they supplied retailers. The prohibition of unpublished terms inhibited the retailer's freedom to negotiate the best contracts available.

### *Distribution*

7.272. ACS believed that it was too early to assess the impact of enforced changes to the distribution of impulse ice cream, notably the termination of BEW's exclusive distribution arrangements with designated wholesalers. Of the proposed remedies put forward in this area, ACS was concerned that the adoption of minimum terms for independent wholesalers of impulse ice cream might unfairly reduce the margin taken by the retailer from the category.

7.273. In conclusion, ACS said that it was concerned that the proposed remedies might restrict the commercial freedoms of retailers. These retailers were bound by tight margins to meet the needs of their customers. ACS would support the retailers' right to meet these needs according to their judgment, without undue restrictions being placed on their ability to use a full range of negotiating positions with impulse ice cream manufacturers.

### *National Federation of Retail Newsagents*

7.274. The National Federation of Retail Newsagents (NFRN) attended a hearing. It represents CTNs and has about 25,000 members. It stated, as it had in 1998, that many CTNs bought supplies of impulse ice cream through independent Bridewell Newspaper Association companies which had been set up as buying groups.

7.275. The NFRN considered that wholesalers were likely to find it difficult to compete with Wall's Direct, although the terms offered by all distributors seemed to be comparable. Wall's Direct had made an offer at the beginning of the 1999 season which gave one free Taco unit with every eight units ordered. This was a powerful incentive to purchase from Wall's Direct. The Wall's Direct selling representatives were stressing the benefits of Wall's Direct on visits to retailers. The Wall's Direct promise of next-day delivery, no matter how small the order, was likely to be very attractive to retailers.

7.276. Some retailers preferred to have one delivery for all their ice cream supplies, while others preferred to have deliveries of ice cream from two or three different sources, particularly in hot weather. Preferences also varied depending on whether the retailer had one BEW freezer or one BEW freezer and one industry freezer.

7.277. Mars's arrangements were different from BEW in that Mars promoted industry freezers. Mars's representatives gave advice on freezer positioning and layout, often at the same time as giving advice on the selling of confectionery. Mars had also offered free stock at the start of the 1999 season with ice cream orders of a certain size and, in the NFRN's view, was competing effectively with Wall's. The NFRN added that Mars had been insisting that retailers reduce prices of confectionery products temporarily in connection with confectionery promotions and perhaps were anxious to regain retailers' goodwill in making desirable impulse ice cream offers.

7.278. Asked about the issue of freezer exclusivity, the NFRN said that it would prefer all freezers to stock the products of all manufacturers. It did not see why BEW could not come to an agreement with other manufacturers and with retailers to reserve a certain percentage in industry freezers for its products—perhaps 75 per cent for BEW, 25 per cent for others. In the NFRN's view, availability of choice was good business, although it did not have hard evidence to support this contention. On the question of why many retailers still used BEW's exclusive freezers, the NFRN said that the Wall's name was still synonymous with ice cream, just as Mars's name was synonymous with confectionery. A freezer free on loan was a very great convenience, and retailers could do good business and offer a suitable choice simply by stocking BEW's brands. BEW supplied freezers quickly on request and supplied ice cream efficiently once the freezer had been installed. It did not occur to many retailers to approach Mars or a wholesaler for a freezer.

7.279. We put it to the NFRN that an advantage of manufacturers' exclusive freezers might be that there were hygiene and maintenance benefits because manufacturers were incentivized to keep the freezers in a good condition. The NFRN said that, in its experience, the companies which serviced the freezers were in practice the same regardless of whether the freezers were exclusive or not, and engineers who serviced the freezers were not interested in hygiene. Under health and safety regulations, it was the retailer who was responsible for keeping the freezer in good order and he would recognize his responsibility.

7.280. The NFRN did consider that exclusive freezers acted as a barrier to entry into the market by other manufacturers. Wholesalers did promote the benefits of industry freezers and argued that industry freezers increased sales, but their sales representation was thin on the ground compared with BEW's field force. Many retailers did not switch freezers, through inertia. A relevant fact was that ice cream represented only 2 per cent of CTNs' trade. The NFRN referred to a BBC 'Watchdog' programme made a couple of years ago which portrayed a family looking for a shop which sold the ice cream of all three major manufacturers. That programme was not totally realistic. People tended to look for an ice cream in a shop and if the choice was limited they would buy some other snack or just go away.

7.281. Asked whether the very high level of advertising by BEW was of itself anti-competitive, the NFRN said that in its view the other major manufacturers could spend more on advertising if they wanted to.

7.282. We asked the NFRN about RRP's. The NFRN said that these tended to be adhered to. It said that many retailers would not think of reducing RRP's because they were selling to loyal local customers whose purchasing habits would not change in response to price changes. Children were not particularly sensitive to price.

### ***Scottish Grocers Federation***

7.283. The Scottish Grocers Federation represented independent food retailers in Scotland. It said that the average amount of freezer cabinet space available in its members' stores was between 25 and 50 cubic feet. It was not aware of any of its members receiving or being offered discounts from frozen food manufacturers for the exclusive use of freezer cabinet space. If one of the Federation's members entered into an agreement to receive discounts from BEW for exclusive cabinet space, it would expect both parties to honour that agreement.

### ***ABS Leisure Ltd***

7.284. ABS Leisure Ltd had two sites selling impulse ice cream. It sold BEW and Mars products from exclusive freezers, and said that it believed freezer exclusivity worked in the world of impulse ice cream. Each dedicated freezer could be marketed and displayed in such a way as to maximize the sales from that unit. Having freezers supplied and maintained eased the burden on the operator. ABS Leisure Ltd said that nothing should be changed and it was unfortunate that BEW had already had to change its method of distribution.

### ***Alldays plc***

7.285. Alldays plc, in its response to the statement of possible remedies, endorsed the submission of ACS. It said that current investment by ice cream manufacturers ensured that the current product range and store space was viable, and if this changed it would have to review the range of products it stocked and their availability in certain stores. In smaller stores, space was at a premium and it had to ensure that it could generate as much sales and profit from the space available while meeting the needs of customers. However, there were large costs involved with operating in smaller units and this needed to be covered by profit generation. Alldays plc added that it wished to retain the ability to freely negotiate with manufacturers in order to obtain the best possible terms so that it could continue to market the product to its customers.

### ***The American Adventure***

7.286. The American Adventure is a theme park with 11 outlets selling impulse ice cream. It recently changed from Nestlé ice cream to BEW, which it regarded as a stronger brand, and BEW offered more favourable terms and investment in the theme park. It preferred free loan appliances that had a national breakdown service, rapid response time, and no cost for parts and labour; equipment was exchanged and updated as required, there was no capital outlay, storage facilities were supplied in abundance free of charge, and customized point-of-sale material supplied as needed. It said that it had never been instructed to put only BEW ice cream into its appliances. In a former position, the Commercial Manager used to mix BEW and Mars products in the same appliance by having half of the appliances from Mars and half from BEW and they were both happy then for him to mix products together. Under the current exclusive agreement, benefits naturally applied to developing exclusive sales of BEW ice cream. The theme park had chosen to consolidate under one manufacturer partner, although this was not dictated by the manufacturer.

### ***Apollo Leisure (UK) Limited***

7.287. Apollo Leisure (UK) Limited has 86 sites selling impulse ice cream. It sells Mio ice cream and had recently changed from Mars and De Roma to take advantage of more competitive terms. It uses exclusive freezers and has an exclusive agreement for the supply of ice cream and told us that the capital cost of buying its own freezers would be too high for the company to undertake in one go. It said that companies should be free to purchase ice cream as they saw fit, and to structure the deal to suit their requirements. If manufacturers wished to include free-on-loan capital into the deal, it should be seen as an asset and any agreement to stock other people's products in these freezers should be allowed if the competitor contributed to the capital outlay of the original manufacturer.

### ***Bells Stores Ltd***

7.288. Bells Stores Ltd (Bells), a convenience retailer, said that it had never encountered any problems with freezer exclusivity, and that it had always been free to choose the manufacturers with which it wished to trade. It believed that prohibiting outlet exclusivity would remove individual retailers' choice as to how they conducted the ice cream sector of their businesses, especially in small outlets where space was a premium. Bells felt that this would impede the flexibility of retailers and could be anti-competitive.

7.289. Bells said that ice cream distribution had seen major changes in the past year and believed that any further changes or prohibitions would discourage further innovation and bring about the demise of the independent wholesaler by restricting the retailer's choice of supply. On the question of discounts, Bells believed that the remedies suggested would take away individual businesses' bargaining power, and was therefore more likely to stifle sales.

### ***Boak Ice Cream***

7.290. Boak Ice Cream, which sells BEW and Treats products plus its own ice cream from 16 mobile vans and static sites, commented that if a manufacturer supplied a freezer it was only fair that it dictated what was in the freezer as obviously it cost several hundred pounds.

### ***Brookes***

7.291. Brookes is a small retailer which sells scoop and soft ice cream from three outlets, all with exclusive cabinets supplied by a smaller manufacturer. It said that there could be no complaint about exclusivity if a freezer was supplied free. If a retailer wanted to stock every brand, then it could buy a freezer and do so. The leading brands were very popular, but provided poor margins.

### ***Capital Newsagents Group***

7.292. Capital Newsagents Group (CNG) believed BEW had reached its market position because of public demand for its brands, which included some market leaders. CNG said that the sale of these products was not restricted to selected outlets and believed there was a fair degree of market competition and consumer choice.

7.293. CNG believed the provision of store sales aids, such as freezer cabinets, was valued by small retailers as it was becoming more difficult to exist in the face of increased competition from the larger supermarkets. Without the support of major suppliers such as ice cream manufacturers, small independent businesses could not continue to operate.

7.294. CNG believed there was sufficient competition in the ice cream industry for consumer interest not to be prejudiced.

### ***Coastline Caterers***

7.295. Coastline Caterers, part of Eastbourne Borough Council, purchased approximately half a million impulse ice creams each year. It awarded Nestlé the contract after a tender procedure with BEW and Treats to supply ice cream to the three theatres, leisure centres, seafront cafes and kiosks and other leisure outlets in the region. The tender was based on quality of product, price, style and quality of kiosks and a joint partnership approach to develop the ice cream business and increase sales.

7.296. It believed that Nestlé should have exclusive rights to the freezers which it provided and maintained free of charge, and to an excellent standard. If another supplier shared freezer space it should pay a proportion of the cost of the freezer, service maintenance and transport and administration costs.

7.297. To deal with two manufacturers would cause problems for Coastline Caterers. It would mean generating double orders, double the amount of delivery notes, invoices, statement and cheques, and therefore extra cost in administration. There would be a waste of valuable management time dealing with two companies. A restricted range of ice creams was currently sold because of the lack of freezer space, the need to ensure that there was enough stock of each line to last the day and in order to make selection easier for the customers so that the queues moved quickly. Twice the amount of display material, for example A-boards, flags and tariff boards, would have adverse effects on the appearance of the units and of the seafront. Most importantly the value of sales from its main manufacturer would drop, van selling to cafes and kiosks would cease and there would be a major problem with orders, storage in its limited spaces to cope with the heavy demand and changeable weather. The same problems with space, advertising and extra administration costs would arise were outlet exclusivity to be prohibited.

7.298. On discounts, if Coastline Caterers purchased from two suppliers, it would get higher prices and less bonus, hence the council taxpayers would be worse off. Eastbourne Borough Council looked to its supplier to put in a substantial investment, to seek new ideas, and work together to increase sales. Prices and discounts were important, but were not the only reason for choosing a supplier.

### ***CRS Ltd***

7.299. CRS Ltd had 475 outlets selling ice cream in summer 1998. It sold BEW, Mars, Nestlé, Häagen-Dazs, Heinz and its own-label products, with sales from exclusive, partially exclusive, and its own non-exclusive freezers. It used exclusive and partially exclusive freezers because the manufacturers took full responsibility for maintaining the unit and keeping the unit stocked, thus lessening the burden on its own resource.

### ***CWS Retail***

7.300. CWS Retail had about 630 outlets selling ice cream. As regards impulse, it sold primarily BEW products. It was progressively implementing 'industry layouts' based on customer needs. Its view

was that to meet prevailing consumer demand, industry layouts which offer brands dependent on share of trade were the most profitable.

### ***Derbyshire County Council***

7.301. Derbyshire County Council sold BEW products at three sites from exclusive freezers. It said that it was limited by space and would therefore probably not gain any benefit from stocking a wider range: it did try it some years ago and found it impractical.

### ***Drusilla's Zoo Park***

7.302. Drusilla's Zoo Park (Drusilla's) had three outlets in summer 1998 which sold BEW products plus some own-brand. It told us that the nature of its business meant that the more stock it bought from one supplier the greater the discount received. Drusilla's had the turnover to be able to make agreements with suppliers on the basis of the best possible prices. No written agreement had been entered into. It believed that any decision to force BEW into non-exclusivity would hurt other companies as well: BEW's own previous dedicated distributor now faced losses of customers because BEW was taking delivery into its own company. Drusilla's looked for price, product range, delivery times to suit it, customer service and equipment service. It found suppliers on that basis; if any supplier could beat the deal currently offered by BEW it would switch. It was in a position that BEW worked for its benefit, not the other way around, and if that were to change it would swap suppliers. It believed its customers purchased whatever it supplied, since they did not come to Drusilla's to buy ice creams. If it was hot outside, they would purchase what was stocked. BEW had a good range as the brand leader, and its price and service beat any competitor it had seen.

### ***National Catering Manager, English Heritage***

7.303. English Heritage had 64 sites selling ice cream in summer 1998, using only BEW's exclusive freezers. The views expressed were personal views of the National Catering Manager and not necessarily those of English Heritage. He did not have a problem with freezer exclusivity and never had done in his time in catering/retail. It seemed perfectly reasonable that if he received a free loan of a freezer he should only stock the supplier's products. This practice occurred in other areas of business, for example free loan coffee machines for exclusively stocking the supplier's coffee. Although small retailers might wish to be able to stock all the top brands in a shared freezer, the incremental benefits of doing so were highly unlikely to be substantial. The benefits of dealing with one supplier (as in the case with BEW) would normally outweigh any benefits of a wider range, due to the additional costs of administration, handling and equipment provision. It appeared to him that BEW was being subjected to unfair pressure from its competitors and possibly the Commission concerning freezer exclusivity. Nestlé and Mars would love to be in the position of BEW. Both Nestlé and Mars used to operate freezer exclusivity terms, but their share of the market never grew. They were unhappy about this, so they chose the route of complaining to the Commission. Nestlé would now offer free loan freezers on a non-exclusive basis but would expect 70 to 80 per cent of the products to be of the Nestlé brand and its products were not market leaders.

### ***Gardner Merchant Leisure***

7.304. Gardner Merchant Leisure operated 88 sites, 80 per cent of ice cream sales being BEW products, and 20 per cent Beechdeen (which gave specialist packaging for its garden attractions). It moved to Beechdeen due to increases in BEW's prices that had been forced on it and lack of national competition from Nestlé, and Beechdeen would give a premium price with no recognized RRP. It referred to the inability of national manufacturers (in particular Nestlé) getting their act together with recognized branded products. BEW's dominance had little to do with great selling, but with Nestlé's lack of exposure or strategy, and inability to deliver. For impulse ice cream, BEW gave the best product, the best brands, best price, best support, best infrastructure and best services; competitors should stop complaining and take them on head to head by building their own competitive edge.

### ***The J Golding Group of Companies***

7.305. The J Golding Group of Companies had 22 CTNs selling ice cream in 1998. It sold BEW products from exclusive freezers under a three-year exclusive agreement, and said that it was happy with the benefits of exclusivity, and at present had no wish to stock competing brands.

### ***Gordons (Stroud) Ltd***

7.306. Gordons (Stroud) Ltd said that BEW provided an excellent service. The range of products which it offered and their availability was second to none.

### ***G T News Ltd***

7.307. G T News Ltd is a CTN chain with 95 outlets selling ice cream in summer 1998. It sells BEW and Mars products from exclusive freezers. It said that its choice was to go down the route of freezer exclusivity which had a financial benefit to the company.

### ***Hever Castle***

7.308. Hever Castle, which sells BEW products from exclusive freezers, said that it was easier to deal with one supplier administratively; there was no formal contract but it reviewed suppliers annually. The supply of freezers reduced its running costs; exclusivity did not cause any concern although it must cause great problems to smaller outlets.

### ***Home Entertainment Corporation plc***

7.309. Home Entertainment Corporation plc has 125 outlets selling ice cream. It sells Häagen-Dazs, BEW, Nestlé and Mars products mainly from exclusive freezers. It said that the supply of ice cream, like any other consumer product, should be without restrictions and readily available to all retail establishments that complied with relevant health regulations, and that supply and price should be open and fair.

### ***Kenneth Balfour Ltd***

7.310. Kenneth Balfour Ltd has about 130 outlets, selling only BEW impulse ice cream from BEW freezers. It had recently ceased selling Mars ice cream when an element of support was removed, making the brand less profitable, but it reviewed which brands to stock annually. It considered that it had a choice as to whether to take advantage of BEW freezers, to accept those of other suppliers, or use its own. It had recently moved to Wall's Direct since the relationship it developed had been with BEW and not the dedicated distributor, and as it did not consider there to be a monopoly situation, it supported the Wall's Direct initiative. It found that protracted negotiations where several meetings were spent arguing over which product from which supplier was to be stocked in its freezers were non-productive, with several suppliers insisting on minimum lines to be stocked to achieve favourable terms. Much more productive meetings could be held when a retailer was comfortable that it could satisfy all its customers with a range from one supportive supplier. It considered that there was plenty of choice within the ice cream market, and if it was poorly treated by a supplier it would not be worried about changing supplier and removing the current freezer: it would also not be as satisfied if BEW were to stop spending money on new product development and media advertising. If other players in the ice cream industry wanted to be taken seriously, they should ensure that they offered a good range of products and sensible support package to retailers, ie a range catering for all needs and with new products, a sensible retail price and reductions in price, freezers and point-of-sale information and television spend. To date, no competitors of BEW had offered any such improvements.

### ***Kuwait Petroleum (GB) Limited***

7.311. Kuwait Petroleum (GB) Limited has 25 petrol station forecourts selling BEW and Mars ice cream from partially exclusive Mars cabinets. It said that these free-on-loan freezers provided a saving in capital expenditure and the relationship gave both parties value for money relative to space used. Kuwait Petroleum (GB) Limited avoided exclusive deals as they were neither beneficial to its customers nor generally to itself.

### ***Leeds Castle Enterprises Ltd***

7.312. Leeds Castle Enterprises Ltd, which has four outlets selling impulse ice cream, sells BEW, Mars and Nestlé products. It said that it did not have freezer exclusivity on its site, and decided which ice cream was to be sold in which kiosk and could not therefore comment on the practice of freezer exclusivity. In kiosks where in 1998 it put BEW, Mars and Nestlé products, BEW outsold the others by 4-1. Its sales had nothing to do with delivery discounts or incentives, but its customers preferred Wall's. It did, however, comment on awful delivery service of national wholesalers operating a central telephone number, despite being located nearby.

### ***Leisure Parcs Limited***

7.313. Leisure Parcs Limited, which sells only BEW products at nine main leisure sites in Blackpool, said that manufacturers' freezers enabled products to be stored and displayed to their best advantage, thus maximizing sales opportunities. It had recently decided to use Wall's Direct on the basis that 18 of the top 20 best-sellers were Wall's products, according to a survey by A C Nielsen. Having chosen to stock Wall's products it was more cost-effective for it to deal directly with the manufacturer.

### ***Londis Holdings Ltd***

7.314. Londis Holdings Ltd has almost 2,000 outlets selling ice cream. It sells BEW, Nestlé, Mars, Treats and Häagen-Dazs products. Most of its members opted for a BEW exclusive cabinet, and used their own equipment to complement the range.

### ***London Zoo***

7.315. London Zoo sells mostly BEW but also Nestlé products from four outlets. It said that it used free-on-loan freezers. It was a charity and had no resources to buy equipment. All equipment supplied was serviced and replaced by the manufacturer at no cost. London Zoo found dealing with one major supplier eased the operation in terms of ordering and invoicing. It was extremely busy during the season and needed the ice cream operation to be as streamlined as possible. London Zoo believed it was fair for suppliers to expect only their brands to be stocked in their freezers, particularly if on free loan. Discounts were given according to account status and turnover, but not easily negotiable.

### ***Longleat Enterprises Limited***

7.316. Longleat Enterprises Limited said that it had sold only BEW products in 1998 from six outlets, but had changed supplier in 1999. It said that the competition in the market in 1998 and 1999 had been greatly to its advantage in terms of better service and supply terms.

### ***Mallinsons Newsagents***

7.317. Mallinsons Newsagents said that because of BEW's exclusivity arrangement, it could only sell one brand of ice cream. It welcomed any remedy which would prevent freezers supplied by BEW being exclusive as this would give retailers the freedom in future to sell a full range of impulse ice cream products.

### ***Matlock Garden Centre***

7.318. Matlock Garden Centre, which sells BEW products from four sites and from exclusive freezers, said that freezer exclusivity was not a problem for it: BEW supplied an excellent product, popular with consumers and able to generate good margins for the retailer.

### ***Merlin Entertainments Group Ltd***

7.319. Merlin Entertainments Group Ltd, with 18 sites selling impulse ice cream, said that it sold BEW products in 1998 from exclusive freezers, but had a new exclusive contract with Nestlé for 1999, following tender. It said that within a business the size of Merlin Entertainments Group Ltd, exclusivity agreements were a good tool for negotiating competitive prices and allowed both supplier and customer to give a commitment and enable them to work together closely on promotions and sponsorships. Freezer exclusivity caused its business no problems, because it fitted into its terms of contract and requirements very well. Its sites were widespread throughout the country and buying for all of them was central, and by being committed to its supplier it had tighter control over the products it stocked. It could see, however, that this might not be the case in smaller, high street businesses where the requirement was to stock high-volume sellers.

### ***Millie's Cookies Ltd***

7.320. Millie's Cookies Ltd has 61 outlets selling ice cream. It said that it sold Baskin Robbins, Häagen-Dazs and own-brand ice cream. It believed selling branded ice cream such as Baskin Robbins had a considerable positive influence on sales and store profits.

### ***The National Trust***

7.321. The National Trust had 141 sites selling ice cream in 1998. It sold BEW, Alpine and various local products: individual sites had moved to more local supply to reflect its food philosophy. It said that freezer exclusivity had no disadvantages, but small suppliers might not be able to finance freezers as well as big firms.

### ***Notcutts Garden Centres Ltd***

7.322. Notcutts Garden Centres Ltd, which sold BEW products from 12 sites, said that the main advantage of freezer exclusivity was ease of operation in relation to ordering, deliveries and maintenance.

### ***Papershop Plus Ltd***

7.323. Papershop Plus Ltd has 210 outlets selling ice cream. It sold BEW at nearly all outlets, Mars, Nestlé and Treats at a smaller number of outlets, from exclusive and some of its own non-exclusive freezers. It said that it had no objection to manufacturers' exclusive loan cabinets. It now used a local wholesaler, an ex-dedicated distributor, and had found the dedicated distributor system far preferable to the manufacturers' in-house delivery it had used in the past.

### ***Rippleglen Ltd***

7.324. Rippleglen Ltd (Rippleglen) is a CTN chain with 45 outlets selling ice cream. It sold BEW and Mars products. It said that between them, BEW and Mars provided all its cabinets; the cost to Rippleglen of buying, servicing and storing its own cabinets would be prohibitive and would probably mean that selling ice cream became a non-viable proposition. It said that at present freezer exclusivity did not pose a problem. A number of its shops were in areas where it needed the full range as provided

by BEW and therefore it had BEW cabinets. In the rest of its outlets Mars provided the cabinets which take both BEW and Mars products to an agreed planogram. The reason Mars agreed to other products in its freezers was because it could not provide a full product range. Rippleglen also found it difficult to see how a fully competitive ice cream market could ever be achieved, the main stumbling block being the cost of the cabinets and the logistics of delivering, uplifting and storing them. Any company that had a huge investment in refrigeration equipment would need to see a return for its capital outlay. With industry planograms, the minor players would have their products displayed without incurring any of the cost of supplying the refrigeration. There was a parallel with soft drinks where Coca-Cola Schweppes Beverages led the market and insisted that if it provided the cabinet, only its products were displayed in them.

### ***The Royal Society for the Protection of Birds***

7.325. The Royal Society for the Protection of Birds had over a dozen sites selling BEW's ice cream from exclusive freezers. It said that some sites bought from independent suppliers and others from Wall's Direct, in order to compare service and back-up.

### ***J Sainsbury plc***

7.326. In 1998 J Sainsbury plc (Sainsbury's) had 417 supermarket and grocery outlets and 125 forecourts which sold ice cream. It said that it sold mainly non-impulse ice cream, but also BEW and Nestlé wrapped single products. It told us that BEW and Nestlé exclusive freezers for impulse ice cream were chosen to give brand representation in line with the total market; however, a limited number of non-exclusive freezers were also used in petrol stations. Asked whether it had any information on the proportion of multipack ice cream that was purchased for immediate consumption, it said that qualitative research indicated that all purchases were for home consumption.

7.327. Commenting on the statement of issues, Sainsbury's said that it would be preferable for impulse ice cream to be defined as ice cream intended for immediate consumption, of which it believed 80 per cent was accounted for by wrapped ice cream. Soft ice cream mix was clearly intended for eventual sale for immediate consumption. Ice cream served as a meal or a part of a meal should be excluded, as should multipacks; it believed, however, that impulse ice cream should be seen as part of a wider impulse market. It said that the costs of using own or industry freezers were often high in relation to the mainly seasonal revenues that were expected, which made use of freezers supplied by manufacturers more attractive. It considered that the presence of own-label brands in the take-home market increased competition to branded products. On the practice of recommending retail prices, it believed this was the case with most branded products, and the highly fragmented nature of retailing outlets tended to support the RRP's in the impulse market.

### ***Severn Valley Railway (Holdings) PLC***

7.328. Severn Valley Railway (Holdings) PLC, which sold BEW products from exclusive freezers, said that it had five sites and recently received five calls from Wall's Direct by telephone, and five sets of literature and telesales, even though it had stated on the first call that it was staying with its wholesaler.

### ***Shakti***

7.329. Shakti told us that it was a buying group for independent retailers. It believed the interest the public had in ice cream was attributable mainly to BEW, and that other manufacturers merely followed its lead. BEW supplied and maintained freezer cabinets free of charge to independent shops and Shakti believed this justified the exclusivity that BEW required.

### ***Shell UK Ltd***

7.330. Shell UK Ltd had 826 sites selling impulse ice cream. It told us that it expected to move towards a range comprising more BEW products, due to new product developments and the depth of the

range, and to using its own new distribution facilities. It provided its own freezers in order to use them for whatever products it felt warranted the use of the space.

### ***W H Smith Ltd***

7.331. W H Smith Ltd replied in respect of John Menzies, which it recently acquired. It had discontinued ice cream sales in its high street business, including John Menzies' stores, but it would continue to sell ice cream in W H Smith Travel.

### ***Southern Co-operatives Ltd***

7.332. Southern Co-operatives Ltd said that it had 66 outlets which sold ice cream in summer 1998. It sold BEW, Mars, Nestlé, Allied and Ice Cold products from exclusive and its own freezers. It believed that given restricted space within stores it was essential that the impulse cabinet (where branded) allowed it to maximize sales through having the branded range which dominated in terms of sales, product support, margin and product innovation, ie BEW. Mars's impulse range was available to all its stores regardless of whether they had a Mars impulse cabinet or not. Its own refrigeration could be used to feature impulse lines falling outside of the branding on the impulse cabinet.

### ***Tate Gallery Restaurant Ltd***

7.333. Tate Gallery Restaurant Ltd sold New England and BEW products from its own freezer. It commented that exclusive freezers were of benefit as they were free on loan, but the image of the establishment must be matched by the one from the ice cream.

### ***T & S Stores plc***

7.334. T & S Stores plc (T&S) is a national multiple with 1,200 branches, of which 1,100 sold ice cream. It had no issue with freezer exclusivity: it believed that freezers were expensive and it would not be able to buy and replace so often if the burden fell on it. It was happy with the current arrangements which delivered good brands to its customers every day at the highest operating standards.

7.335. Commenting on the statement of possible remedies, it believed that any form of legislation or prohibition that restricted a free commercial market would inevitably lead to increased costs, a reduction in choice and increased retail prices to the public. The market should be allowed to trade in a free way, with each manufacturer establishing its own place in the market on quality, value and development. T&S commented on specific remedies as follows.

#### ***Freezer exclusivity/outlet exclusivity***

7.336. T&S did not believe that the remedies proposed were either practical or reasonable. Any form of enforcement along the lines proposed would effectively decide with whom T&S could trade, which products it could sell, and there would be a restriction on its freedom of choice and on its freedom to trade commercially. T&S chose to deal with a partner on a semi-exclusive basis as it provided T&S with first class refrigeration that would otherwise come out of its capital expenditure budget thus restricting its ability to open new outlets; each new outlet created approximately 18 new jobs. T&S said that it could not invest in the same level of refrigeration on its own and that any reduction in display would lead to less choice for its customers.

#### ***Discounts to retailers***

7.337. T&S said that a restriction on its ability to negotiate infringed on its rights to run its business on a commercial basis and would inevitably lead to an increase in its costs, which it would then have to pass on to its customers.

### *Distribution*

7.338. T&S believed that any restraints on the way in which manufacturers controlled their own supply chain would inevitably drive costs up, and again, these would be passed on to the consumer.

### *Tesco Stores Ltd*

7.339. Tesco Stores Ltd told us that the supply of impulse ice cream was a very minor part of its business. It did not consider that shoppers bought ice cream in its stores for immediate consumption, since that was not the nature of supermarket shopping. It was against the practice of industry-supplied freezers in so far as the practice restricted its capacity to offer consumers a range of quality ice cream products.

### *Texaco Ltd*

7.340. Texaco Ltd sells BEW, Nestlé and Mars products at 270 petrol station forecourts, at some of which it also sells Häagen-Dazs. It said that it owned its own freezers to be independent of supplier influence.

### *The Living Landscape Trust*

7.341. The Living Landscape Trust, which sold Treats products and a local brand supplied by a tenant farmer at one site, used its own freezer in order to retain control. It had tried other major suppliers, but found its existing suppliers offered the best service and terms including the lack of any tie; the personal service given by a local supplier was also appreciated.

### *TM Retail*

7.342. TM Retail (which comprises Forbuoys, Martin and McColl outlets) (TM) said that it had 1,400 outlets selling ice cream in summer 1998. It had wrapped impulse sales mainly of BEW and Mars products, but also of Treats and Nestlé products. It said that it was likely to rationalize to having all deliveries by Snowking. It said that Mars provided freezers in return for a proportion of space, with TM able to use the remainder for whatever it wished, hence TM used Mars freezers. It believed BEW freezer exclusivity would damage BEW commercially in the longer run. TM commented that there were far more important trading issues the OFT should investigate outside ice cream (ie the monopoly of supply in newspapers and magazines): if one did not like BEW's exclusive deal, one could use Mars instead. Hence, it had no concerns in the current case.

7.343. TM commented on the statement of possible remedies. It said that it saw no detrimental effect on itself or on its customers in the way BEW conducted its business. If retailers did not like the idea of freezer exclusivity, then they were free to use freezers supplied by Mars or Nestlé. Likewise, if they did not wish to use BEW's distribution network, they could use Brakes or Snowking.

7.344. On the proposed remedy relating to freezer exclusivity, TM said that it was neutral or even opposed. It said that if this remedy were to be implemented then BEW might decide to withdraw its offer to supply any freezers thus leaving the market to Mars and Nestlé, which would effectively reduce competition. As regards outlet exclusivity, TM was against the proposed remedy. It questioned why the Government should want to interfere in the trading arrangements between itself and ice cream manufacturers. There were many instances where TM might wish to stock Wall's ice cream only, for example small stores with little space, which were adjacent to schools (Wall's had more children's products than Mars); if the law insisted that TM should stock a range it did not want, it was absurd. TM was against the remedy relating to discounts to retailers, adding that the Government should not be restricting free trade. TM believed that none of the proposed remedies was necessary, and in the case of those proposed in relation to outlet exclusivity and discounts to retailers, would be damaging to its business.

### ***Tony's Corner Shop***

7.345. Tony's Corner Shop had sold Wall's ice cream for 46 years. It said that BEW had been an excellent company to deal with in all aspects. During its dealings with BEW it had received four replacement freezers, numerous service calls and had all spoiled ice cream credited without dispute. It had never used BEW's freezers for any other company's products. Because the premises were small, it would not be possible to install another freezer in the shop. It believed that a company which loaned and maintained freezers was within its rights to state that only its own products were stored in it. If a business wanted to sell various brands of ice cream it should purchase its own freezer. Exclusivity had worked well and there could only be disadvantages if it were to be abolished.

### ***Total Oil Great Britain Ltd***

7.346. Total Oil Great Britain Ltd provided information for its managed division which had 183 outlets selling ice cream in 1993. It sold BEW, Mars, Nestlé, Häagen-Dazs and Ben & Jerry's products (the latter two at a minority of its outlets), commenting that it did not regard the current position as anti-competitive.

### ***United Cinemas International (UK) Ltd***

7.347. United Cinemas International (UK) Ltd had 33 outlets selling ice cream. It sold BEW, Mars, Nestlé, Ben & Jerry and Baskin Robbins products. It said that it had both its own freezers and freezers supplied free on loan from Ben & Jerry's for the purpose of selling scoop/soft mix ice cream only. It said that it had always ensured that its business was based on its own decisions and not those of its suppliers: it therefore bought impulse ice cream freezers to stock what brands it liked.

### ***United Norwest Co-operatives Limited***

7.348. United Norwest Co-operatives Limited had about 230 outlets selling ice cream. It said that it sold BEW, Mars, Nestlé, Häagen-Dazs, its own brand and other products. It had exclusive freezers of BEW, Mars, Nestlé and Häagen-Dazs which were free on loan and a few non-exclusive freezers which it owned stocked all the above companies' ranges. It took the opportunity to sell products wherever store space allowed, irrespective of who supplied the freezers. It was not possible to stock every key frozen product in all its stores and ice cream was no exception. However, it could stock the key lines in multipacks where impulse was not available.

### ***Virgin Cinemas***

7.349. Virgin Cinemas had 34 sites selling ice cream. It sold BEW, Mars and Häagen-Dazs products and some scoop and soft ice cream from its own freezers. It said that its brands had changed from being solely BEW products to include other brands as a wider range had become available on the market. It said that by owning its own freezers, which were installed in all its new sites, it was under no obligation to stock any particular line from any particular supplier. In some of its older traditional sites, however, it continued to have BEW's 'front of house' freezers in which it could stock only BEW's ice cream. However, it also commented that to restrict suppliers in an exclusivity contract had the effect of limiting customer choice and ultimately controlling the market.

### ***Welcome Break***

7.350. Welcome Break had 69 stores and 11 carts selling ice cream at motorway service stations. It had mainly BEW sales with an annual contract (for which Mars also quoted) giving exclusivity to all retail and almost all forecourt shops. The reasons for this were the limited space, the requirement for excellent delivery services, and commercially the best deal.

### ***Whistlestop Food & Wine Ltd***

7.351. Whistlestop Food & Wine Ltd is a supermarket/grocer with 23 outlets selling BEW, Mars, Nestlé, Treats, Häagen-Dazs and Ben & Jerry products. It said that it was to change in 1999 to an industry freezer and welcomed the changes in the supply of ice cream, as it would enable it to sell the products it wanted to, without a large investment in freezers.

### ***F T & R Wilkinson***

7.352. F T & R Wilkinson, a retailer with one outlet, commented that the public insisted on brand leaders. It felt that if it wanted to have a freezer on free loan with free maintenance and breakdown service, it should expect to stock only the products supplied by the provider: there was nothing to stop it buying its own freezer to stock other brands. It believed that the investigation had been brought about by a competitor of BEW which had had problems since it started up with storage in retail outlets. It also commented that the company that supplied it with BEW ice cream, Consort Frozen Foods Limited, was the most efficient company it had ever dealt with in the ice cream industry. It was efficient because it specialized, there were rarely stock shortages and the delivery service was second to none, sometimes unbelievable. F T & R Wilkinson suggested that this situation should be left well alone, since it was envy of the BEW network that this inquiry was all about, BEW knowing and acting on the one golden rule of the ice cream trade that in good weather the product must be available to sell.

### ***Woolworths plc***

7.353. Woolworths plc had sales of BEW, Mars, Treats and Nestlé products all available at all 780 outlets which sold impulse ice cream. It said that it was necessary to own its freezers to provide an industry product range.

## **Members of Parliament<sup>1</sup>**

### ***Martin Callanan MEP***

7.354. Martin Callanan MEP, writing on behalf of a constituent, believed that consumer choice was being restricted because BEW supplied freezers to retailers and insisted that they were stocked solely with BEW products. Other ice cream manufacturers would also supply freezers, but small retailers—unlike supermarkets—did not have the space to accommodate more than one. Mr Callanan understood that BEW had exclusivity agreements with outlets such as motorway service areas, theme parks and the Millennium Dome, which were contracted to supply only Wall's ice cream. Again, he believed that this was a restriction of consumer choice. He said it appeared that Wall's Direct was subsidized by BEW and therefore could offer better margins to its bigger customers.

### ***Lindsay Hoyle MP***

7.355. Lindsay Hoyle MP told us that BEW was concerned about a number of the Commission's possible recommendations. BEW was currently investing £20 million in its freezer fleet and as a British company had a long-term commitment to the UK. BEW was therefore concerned that the proposed recommendations would stifle its investment in the future, which in turn would be bad for British product innovation. BEW was currently the only significant ice cream producer in the UK employing some 1,500 staff at its Gloucester factory. The uncertainty caused by the current inquiry could mean job insecurity with long-term prospects becoming fewer. Mr Hoyle also said that, with regard to the supply of freezers, retailers had the option of deciding whether they no longer wished to stock BEW products. Contracts were not binding, and there was flexibility with the arrangement with retailers giving them the freedom to set the price of the products. This resulted in the continuation of rigorous and fair competition in the ice cream market.

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<sup>1</sup>A number of other Members of Parliament drew our attention to correspondence from independent wholesalers.

### ***Bob Russell MP***

7.356. Mr Bob Russell, MP for Colchester, wrote to express serious concern about the predatory action which Wall's was taking to further tighten its stranglehold on the UK ice cream industry. Mr Russell had recently met with the Managing Director of Anglia, an ex-dedicated distributor, which was based in his Colchester constituency. The company feared that action taken by Wall's over the past few months could put it out of business, and with it the loss of 20 local jobs. While both Mr Russell and Anglia welcomed the concept of a free market and fair competition, the behaviour of Wall's by introducing direct selling to retailers had had the effect of almost doubling the number of vehicles distributing ice cream to a market which, to all intents and purposes, had the same volume as before.

7.357. It seemed to Mr Russell as if Wall's was seeking to increase its dominance of the ice cream market by eliminating—through its financial muscle—independent wholesalers in advance of the outcome of this inquiry, thus removing potential alternative suppliers to retailers who might wish to purchase ice cream products from other manufacturers. Mr Russell felt that the refusal by Wall's to allow retailers to stock items other than Wall's products in its freezers was a restraint on trade and contrary to fair competition. If companies such as Anglia were allowed fair and free market trading conditions, then he believed that the future for independent wholesalers—and thus retailers and consumers generally—was good.

### ***Brian White MP***

7.358. Brian White MP was concerned about the possible remedies, since, if companies were unable to sell direct, new ventures such as Wall's Direct could be adversely affected. Call centre technology was fast growing and would revolutionize this market place in the future. Artificial barriers such as preventing distributors selling direct could have a damaging impact on the leading position that Great Britain had established in this field.

## **Other comments**

### ***Transport and General Workers Union***

7.359. The Transport and General Workers Union (T&G) said that BEW was meeting customer needs. The company provided a diverse range of ice cream products, whereas some of its competitors had a limited range with which to compete. The T&G understood that BEW's Magnum was clearly a leading brand, but it had only a 5 per cent share of the ice cream market. It considered that BEW should not be penalized for providing a diverse range of products which enabled it to meet the requirements of customer choice.

7.360. The T&G considered that Mars would be the most likely beneficiary following any changes to the current situation which the Commission might impose. Mars was primarily involved in the manufacture of confectionery and chocolate products, and its entry into the ice cream market was based on existing confectionery being used as a model; it had one factory based in Strasbourg which supplied the whole of the European market. The range of its products was limited and it did not provide a broad spread of customer choice. Any gain in market share by Mars at the expense of BEW would ultimately lead to job losses at BEW's Gloucester factory where the T&G had over 600 members employed.

7.361. The T&G was also concerned that if the market for products manufactured by BEW at its Gloucester plant were to be undermined, it could result in Unilever deciding that it was more economical for it to manufacture its products elsewhere in Europe and then import them into the UK.

### ***Other manufacturers, distributors and retailers***

7.362. A medium-sized manufacturer of soft ice cream mix said that its independent product could not be bought by Wall's franchisees, which obviously limited it in its trading area.

7.363. A medium-sized manufacturer and distributor said that its sales volume, and industry sales volume, would certainly increase if freezer exclusivity were banned altogether, but would probably stay the same if only BEW were not allowed to supply exclusive freezers, and commented that there should not be freezer exclusivity.

7.364. A medium-sized distributor of ice cream said that its sales, and industry sales, would probably increase if there were no freezer exclusivity. Retail outlets would be able to mix and match the types of products and ranges better suited to their own area, customer wants and needs, thus promoting a better turnover. This concept had already been proved where manufacturers had allowed this practice, for example Mars and Treats. It said that freezer exclusivity provided the multinational corporations with an unfair advantage over small local wholesalers who were unable to supply freezers and were thus precluded from supplying other product to exclusive freezer outlets.

7.365. The distributor added that although BEW's turnover was down in 1998 its profits were significantly up at the expense of small wholesalers as a result of the 1998 Commission policy. Unobtainable 1998 sales targets were dictated by BEW to wholesalers which resulted under the new scheme in the wholesaler's mark-up on BEW products averaging about 8 per cent on selling before costs. For medium/small wholesalers to survive they would have to encourage or persuade their BEW customers to change to another product with a better margin and this process would take a long time. The effect of recent developments was already manifesting itself in the current number of BEW's ex-dedicated distributors and small/medium wholesalers now going into receivership or experiencing financial difficulties, with many job losses. The ability of wholesalers to meet the sales and mix targets set by BEW for 1999 was greatly influenced by many factors outside the wholesalers' control, such as weather, customer choice, retail customer taste changes (these varied from year to year and from area to area) and the extent of BEW's television advertising. BEW's targets were unrealistic and were based on averages with no wholesaler input having been considered.

7.366. The distributor also said that BEW currently gave massive direct discounts off its invoiced prices to selected large BEW customers, initially precluding local small wholesalers from servicing these customers. A BEW concession to local wholesalers during 1998 to allow wholesalers to supply customers who might qualify for the year-end turnover bonus had not opened up the market as the large customers were still being retained by BEW (due to the invoicing system) while problematic customers or customers whose turnover was not worth the cost of distribution were being serviced by the rest of industry. During the course of our inquiry, BEW had allowed the distributor to supply a few small BEW customers receiving direct discounts off invoiced prices, provided certain rigid procedures were followed. These procedures required the wholesaler to obtain 'written permission from the retailer' to allow it to supply the retailer with product. The permission letter had to be lodged with BEW which then 'allowed' the supply. It was still unclear what delivery charge would be allowed, or whether such sales would count towards the wholesaler's bonuses.

7.367. In addition, the system set up by BEW forced small wholesalers to hand over their lists of those customers with higher turnover in order that the customers of the wholesalers might receive a bonus from BEW. This disadvantaged the small wholesaler as a number of such customers in the wholesaler's area had notified it that BEW's representatives were now targeting them with promotions and promises in order to entice customers to go directly to Wall's Direct. In addition, product purchase prices and selling prices were being dictated by BEW, and with increased petrol and wage bills, the wholesaler's profit margins were being fast eroded. The enforcement of this pricing policy was implemented by BEW thus ensuring that its price lists were distributed to retailers and no discounts were added by wholesalers.

7.368. The distributor made the following comments on the statement of possible remedies.

7.369. As Nestlé often appeared to follow in the shadow of any action in the market place taken by BEW, it would be unfair to BEW if any recommendations applied only to it. It thought that any recommendations should apply to all manufacturers in the ice cream industry, including Mars and Treats.

7.370. It endorsed the following proposals and would welcome them as a measure to rectify the current situation, which it considered unsatisfactory.

7.371. On freezer exclusivity, it considered that a general prohibition would be the most fair and thought it was acceptable.

7.372. On outlet exclusivity, it supported a general prohibition and thought it should also apply to wholesalers.

7.373. On discounts to retailers, it felt that the retail discount should be capped at no more than any wholesaler was receiving, as the discount was the wholesaler's income, whereas the retailer's income was the discount plus the difference between the wholesaler's/manufacturer's price and the manufacturer's recommended retail selling price.

7.374. On distribution, it thought that the recommended discount range of 17.5 to 22.5 per cent for wholesalers was rather low. Its cost of freezers and distribution was currently running at 16.5 per cent (including obsolescence). It therefore felt that a range between 22.5 and 26 per cent would be fairer. It said that all the other suggested remedies were commendable.

7.375. It said that it was very important that the Commission came up with recommendations that would lessen the stranglehold which BEW had in monopolizing and manipulating the ice cream market.

7.376. Whilst the latest information was that BEW was moving in the direction of the Commission's recommendations, it still had a noticeable influence on market choice through the medium of television. It had noted that when Wall's advertised a particular product on television, sales in that product soared. This adversely affected its product range bonus, and it appeared that for the second year running it would not be entitled to a bonus from BEW.

7.377. It thought that BEW should be brought to account by having to pay all wholesalers, as a form of penalty, a bonus of 5 per cent of turnover on a retroactive basis (to 1998).

7.378. A small ice cream manufacturing company said that its sales would certainly increase if freezer exclusivity were banned altogether and industry sales probably increase; if only BEW were not allowed to supply exclusive freezers its sales would probably increase and industry sales would certainly increase. It commented that, having spent the last 2½ to 3 years in this very competitive sector of frozen food, it believed there were unfair practices in operation. It put the blame for this on the companies involved in sales of ice cream, driven by the desire to achieve brand recognition and ultimately market share, and on the sales personnel who were given the task of achieving the brand market share. The company believed that the larger the company the worse the problem. The premium sector of ice cream which the company was involved in had been a very difficult market place. There were instances where if it did not match rivals' offers to respective buyers it could not compete. The exclusivity problem arose not just with BEW but with other manufacturers too.

7.379. A manufacturer of soft ice cream mix said that its sales, and industry sales, would probably increase if freezer exclusivity were to be banned altogether, and would probably increase if only BEW were not allowed to supply exclusive freezers. It commented that major suppliers of impulse ice cream lines used loaned or rented soft ice cream equipment as a way of ensuring that their impulse ice cream and lollies were sold exclusively. The advantage of freezer exclusivity were the gains from locking in customers who would stock only the relevant brand; the disadvantage of freezer exclusivity was the cost of equipment, service costs and breakdowns, and staff misuse of equipment, since it was only a loaned machine. There were also questions of hygiene control arising from who was responsible for the machines, namely the user or the ice cream company. The manufacturer also referred to the use of cross-subsidization of other products to ensure that major ice cream companies' soft ice cream mix was used. It said that annual bonuses linked to impulse and soft ice cream stopped it from gaining business with its soft ice cream. Key seasonal leisure sites were also strongly targeted by major brands, which prevented fair competition.

7.380. A convenience store chain with sales from exclusive freezers said that it would like to be able to sell other products from its BEW cabinets.

7.381. A mobiler said that over time the terms from BEW had been reduced. If a mobiler did not sign the franchise agreement, it received lower discounts. Some had stopped buying from BEW as a result. It was believed BEW offered some of its franchisees 'sponsorship' to help gain outdoor special events but only if the franchisee sold only BEW products from a BEW liveried vehicle. Local mobile operators could not afford these high fees to gain such an event. It was very difficult for small companies to survive, especially in this industry which was so reliant on the weather and where costs were continually escalating.

7.382. It also said that some retailers were looked upon more favourably than others, for example supermarkets, cinemas, theme parks and councils. These were offered better discounts, free freezers, promotional material and free use of mobile units around the parks. Others had to pay more for the same products, even though they might purchase more from them.

7.383. A former dedicated distributor which provided services for Wall's Direct, and acted as an independent wholesaler, said that its own activities were entirely separate from Wall's Direct with different vehicles, stock and personnel. The Wall's Direct operation was very costly, totally unrelated to the £1.10 payment to wholesalers for both distribution and selling, and it appeared that BEW was trying to remove the independent wholesalers from the market. It commented on the statement of possible remedies as follows.

7.384. On freezer exclusivity, it said that it agreed with the proposal that any prohibition should apply not only to BEW but also to Nestlé and Mars or to all manufacturers having a turnover in impulse ice cream of more than £10 million. There would, however, need to be a minimum turnover figure achieved for the manufacturer which provided the refrigeration, otherwise it might decide to stop investing in the market.

7.385. On outlet exclusivity, it believed that the only remedy was a prohibition on all major manufacturers, which would mean the prohibition applying to BEW, Nestlé and Mars, or all manufacturers having a turnover in impulse ice cream of more than £10 million.

7.386. On discounts to retailers, it believed the only discounts to be offered by any manufacturers should be related to volume alone. A bigger discount was acceptable for any customer providing its own equipment.

7.387. On distribution, it believed BEW was now operating Wall's Direct with total disregard to costs and to customers' wishes. It agreed with the suggested discount scale of 17.5 to 22.5 per cent, as this would allow companies both to trade profitably and to reinvest in the business. It said that the only way that BEW, or any other manufacturer, should be able to sell and distribute directly to a national account would be if the account was able to accept central ex-factory deliveries. However, this type of customer (ie grocery) was less relevant to the impulse area of the business. Other national accounts such as T&S and Kenneth Balfour Ltd would not provide enough business to support a Wall's Direct system. It agreed with all the other points in the remedies statement.

7.388. A medium-sized manufacturer and distributor said that BEW had put all prices up so there was no distribution margin left. It said that its sales, and industry sales, would probably increase if freezer exclusivity were banned altogether or if only BEW were not allowed to provide exclusive freezers.

## ***Individuals***

7.389. We received written representations from 12 members of the public. They made the following points:

- (a) Restrictive agreements were leaving the consumer with less choice and higher prices.
- (b) Local corner shops were penalized as most only had sufficient space to have one freezer and were prevented from stocking more than one brand of ice cream, resulting in customers either making do or going elsewhere for the product they wanted.
- (c) BEW's exclusivity agreements affected the consumer as there was a restriction on the choice of products and the prices were very high.
- (d) The ice cream monopoly was beneficial to BEW but was against the interests of the consumer, retailers and independent wholesalers. A local pub was obliged to sell a guest beer, yet a news-agent could sell only one brand of ice cream.
- (e) BEW operated restrictive practices which benefited the manufacturer to the detriment of the consumer.

- (f) BEW had achieved its position in the market through uncompetitive practices and acted against the public interest.
- (g) BEW had manipulated the market and restricted the consumer's freedom of choice.
- (h) Lack of choice available from local retailers was a result of BEW's insistence that only BEW products should be stocked in their freezers.
- (i) It was ridiculous that BEW could dictate to small businesses what they could and could not sell to their customers. This prevented consumer choice and acted against the public interest.
- (j) Freezer exclusivity prevented retailers selling a wide variety of brands to the consumer which was against the public interest.
- (k) The UK market for impulse ice cream was restricted and appeared to work to exclude entry to new and overseas established producers. The market should be opened up and consumers given the opportunity to purchase Continental European ice cream products such as those available in French hypermarkets.
- (l) BEW dominated the market for impulse ice cream and prevented wholesalers and retailers from selling competing brands. Customers suffered as they paid over the odds for Wall's ice cream.