

COMPETITION COMMISSION REPORT ON THE SUPPLY OF IMPULSE ICE
CREAM (CM 4510)

UNDERTAKINGS GIVEN TO THE SECRETARY OF STATE BY BIRDS EYE
WALL'S LIMITED

Birds Eye Wall's Limited ("BEW") hereby gives the following undertakings to the Secretary of State pursuant to section 88(2) of the Fair Trading Act 1973 to take action requisite in the opinion of the Secretary of State for the purpose of remedying or preventing adverse effects specified in the above Report: -

Interpretation

1. (1) The Interpretation Act 1978 shall apply to these undertakings as if they were a statute to which that Act applied.

(2) In these undertakings: -

"the Act" means the Fair Trading Act 1973;

"Agreement" includes any agreement or arrangement whether or not intended to be enforceable in legal proceedings;

"BEW" means Birds Eye Wall's Limited;

"BEW Wrapped Impulse Ice Cream" means Wrapped Impulse Ice Cream manufactured by BEW or a member of the same Group of Interconnected Bodies Corporate as BEW;

"the Director General" means the Director General of Fair Trading;

to "Distribute" goods to a Retailer means:

(a) to deliver those goods to the Retailer; or

(b) as seller to enter into a contract of sale (as defined in section 2 of the Sale of Goods Act 1979) of those goods to the Retailer;

and "Distribution" shall be construed accordingly;

"Distributor" means a person who Distributes Wrapped Impulse Ice Cream in the course of business;

"Gross Sales Value" means the value of Wrapped Impulse Ice Cream at list price before the addition of value added tax;

"Group of Interconnected Bodies Corporate" has the same meaning as in section 137(5) of the Act;

"Ice Cream" includes:

- (a) water ices, ice lollies, frozen yoghurt and ice cream to which fruit, fruit purée, fruit juice, chocolate, nuts or any substance is added,
- (b) (except in relation to retail supply) soft ice cream mix and syrup for the production of slush by retailers, and
- (c) any similar frozen product;

"National Account" is a Retailer either: -

- (a) that controls or manages at least 50 different premises or Sites at which Wrapped Impulse Ice Cream is sold and in respect of whom at least one of the following conditions is satisfied, namely: -

(i) that that Retailer collects all its supplies (other than top-up supplies) of BEW Wrapped Impulse Ice Cream for sale in Great Britain directly from BEW's premises; or

(ii) that BEW delivers, whether or not through an agent, all that Retailer's supplies (other than top-up supplies) of BEW Wrapped Impulse Ice Cream for sale in Great Britain to that Retailer's central or regional distribution depot or depots and final delivery to the relevant premises or Sites is the responsibility of that Retailer; or

(b) in respect of which the Director General, on application by BEW, has decided is:

(i) controlling or managing leisure premises or a leisure Site with adequate cold storage facilities; and

(ii) purchasing sufficient quantities of BEW Wrapped Impulse Ice Cream to justify economically central delivery in bulk by BEW;

"Promotional Activity" with regard to a Retailer does not include Distribution to that Retailer but does include: -

(a) making arrangements for the transmission of that Retailer's orders for BEW Wrapped Impulse Ice Cream to a Distributor;

(b) making arrangements for the promotion of BEW Wrapped Impulse Ice Cream in co-operation with that Retailer or on the premises or Site of that Retailer;

(c) offering or giving payments, bonuses, rebates or discounts to a Retailer on its purchases of BEW Wrapped Impulse Ice Cream other than those prohibited by clause 6 of BEW's undertakings accepted by the Secretary of State on 7 April 2000; and

(d) as agent for a Distributor, arranging to invoice that Retailer in relation to sales of BEW Wrapped Impulse Ice Cream by that Distributor;

"Retailer" includes a person who controls or manages premises or a Site at which Wrapped Impulse Ice Cream is sold;

"Site" means any land controlled or managed by a single undertaking;

"Walls 5099 Distributor" means a Distributor who immediately before these undertakings were given was taking part in the Walls 5099 scheme;

"Wrapped Impulse Ice Cream" means Ice Cream: -

(a) which is purchased by consumers for immediate consumption except as part of a meal;

(b) which is: -

(i) wrapped; or

(ii) packaged in individual portions not exceeding 150 millilitres; and

(c) which is intended to be eaten hand-held.

(3) Any provision of these undertakings that requires BEW to do, or not to do, a thing, shall include an obligation on BEW to procure that members of the same Group of Interconnected Bodies Corporate as BEW shall do, or not do, that thing.

(4) These undertakings apply in Great Britain only and shall not affect BEW or members of the same Group of Interconnected Bodies Corporate in relation to activities in relation to Wrapped Impulse Ice Cream outside Great Britain.

No in-house distribution of Wrapped Impulse Ice Cream save to National Accounts

2. Subject to clause 3(3) and 3(4) below, BEW shall not Distribute any Wrapped Impulse Ice Cream to any Retailer other than a National Account.

No engagement of contractors or agents to distribute Wrapped Impulse Ice Cream save to National Accounts

3. (1) Subject to paragraphs (3) and (4) below, BEW shall not engage as its agent any person to Distribute Wrapped Impulse Ice Cream to any Retailer other than a National Account.

(2) Subject to paragraphs (3) and (4) below, BEW shall terminate within one month of the date of these undertakings any Agreement to the extent that it is an agreement under which an agent is engaged on its behalf to Distribute Wrapped Impulse Ice Cream to any Retailer other than a National Account.

(3) Notwithstanding clause 2 and paragraphs (1) and (2) above, BEW may until 31 January 2001 continue to Distribute Wrapped Impulse Ice Cream to Retailers where: -

(a) BEW uses a Walls 5099 Distributor to carry out that Distribution on its behalf; and

(b) BEW does so pursuant to an Agreement with that Walls 5099 Distributor entered into before the date of these undertakings.

(4) Notwithstanding clause 2 and paragraphs (1) and (2) above, BEW may Distribute, or engage or continue to engage as its agent any person to Distribute BEW Wrapped Impulse Ice Cream to Retailers on the Isles of Scilly and on the Scottish islands of Barra, Colonsay, Gigha and Tiree, unless a Distributor offers to Distribute to any of those islands for a reasonable cost.

No exclusivity

4. (1) BEW shall not enter into any Agreement with a Distributor under which it directly or indirectly restricts the Distributor from using any vehicle to deliver, or from supplying, any other manufacturer's Wrapped Impulse Ice Cream.

(2) BEW shall not enforce any Agreement entered into before the date of these undertakings to the extent that it contains provisions falling within paragraph (1) above.

Variation by the Secretary of State

5. Notwithstanding clauses 2 to 4, BEW may take any action forbidden by those clauses (or not take any action required by those clauses) if the Secretary of State has varied the undertakings in accordance with section 88 of the Act.

No refusal to supply

6. (1) BEW shall not on grounds other than permitted grounds (defined in paragraph (2) below) withhold, or threaten to withhold, supplies of any BEW Wrapped Impulse Ice Cream from any Distributor who requests such supplies.

(2) For the purposes of paragraph (1), permitted grounds are: –

(a) that BEW does not have, and could not reasonably be expected to have in the near future, in stock sufficient quantities of the BEW Wrapped Impulse Ice Cream requested;

(b) that the Distributor requesting supplies refuses to enter into an Agreement on:

(i) any terms notified to the Director General pursuant to clause 7 below; or

(ii) only certain of such terms which BEW has offered to a particular Distributor (where BEW has objectively justifiable reasons for so doing and such reasons are given to such Distributor in writing on request);

(c) that the Distributor is unable to meet objective quality standards for cold storage and transport facilities, such standards being specified by BEW and being necessary in order to preserve the quality of BEW Wrapped Impulse Ice Cream;

(d) that the Distributor does not have in place an objectively effective procedure for any recall of BEW Wrapped Impulse Ice Cream which may be required from time to time for health and safety reasons; or

(e) that BEW, in any case where it is not reasonable to ask the Distributor to pay in advance: –

(i) has reasonable cause to believe that the price for the supplies requested may not be duly paid; or

- (ii) has not had sufficient opportunity to conduct reasonable checks on that Distributor's ability to pay for those supplies.

(3) BEW shall, in any case where it withholds supplies from a Distributor on grounds permitted by any of sub-paragraphs (2)(c), (d) or (e) above, forthwith notify the Director General.

Terms on which BEW deals with Distributors

7. (1) BEW shall notify to the Director General on the day after the date on which the Secretary of State announces that he has accepted these undertakings, and thereafter on or before 28 February in each year, the terms and prices (expressed in terms of a percentage of the Gross Sales Value of BEW Wrapped Impulse Ice Cream from time to time) on which it shall supply Distributors with BEW Wrapped Impulse Ice Cream during the forthcoming season.

(2) BEW shall be entitled to change its terms or prices during the season but any change in the terms and prices previously notified to the Director General under paragraph (1) above shall not come into effect earlier than the fourteenth day after the day on which such change is notified to the Director General.

(3) BEW shall not enter into any Agreement with a Distributor for the supply of BEW Wrapped Impulse Ice Cream except on the terms and prices last notified to the Director General pursuant to paragraphs (1) or (2) above.

No undue discrimination against Distributors

8. (1) For the purposes of this clause, BEW shall be taken to discriminate against a Distributor where it treats that Distributor materially less favourably than it treats another comparable Distributor with regard to, for example:-

(a) prices or terms or conditions as to credit, discounts, or other matters; or

(b) times or methods of delivery or other matters arising in the execution of the Agreement between BEW and that Distributor.

(2) BEW shall not unduly discriminate against any Distributor, and in particular shall not do so on the ground of: -

(a) the extent to which he supplies any other manufacturer's Wrapped Impulse Ice Cream; or

(b) the extent to which he uses any vehicle to deliver both BEW Wrapped Impulse Ice Cream and any other manufacturer's Wrapped Impulse Ice Cream.

Circumstances where BEW may offer differing discounts to Distributors

9. (1) BEW shall not offer or give differing levels of discount to Distributors where such differences significantly reduce the ability of other manufacturers of Wrapped Impulse Ice Cream to obtain distribution of their products.

(2) Subject to the overriding principle in paragraph (1) above, nothing in these undertakings shall prevent BEW from offering different discounts to different Distributors where: -

(a) the circumstances in which, and the terms on which, such discounts are offered are recorded in the terms notified to the Director General under clause 7(1) and 7(2) above;

(b) the circumstances in which, and the terms on which, such discounts are offered relate to: -

(i) the size of individual orders for BEW Wrapped Impulse Ice Cream made by those Distributors:

(ii) the level of service provided by those Distributors to Retailers including such factors as:

- the frequency of deliveries;
- the promptness of delivery;
- the scale and quality of vehicle provision; or
- the existence of a 24 hour call service;

or

(iii) the aggregate level of purchases of BEW Wrapped Impulse Ice Cream made by those Distributors provided that such discounts:

- are not contingent on an amount purchased over a retrospective period or on attaining any target increases in purchases compared with a previous period; and

- are not structured so that any price for incremental sales is less than incremental costs;

and

(c) the difference in the levels of discount offered is proportionate to a legitimate objective of BEW.

Minimum discount terms

10. (1) Subject to paragraph (2), for a period of two years from the date of these undertakings, BEW shall not supply any BEW Wrapped Impulse Ice Cream to Distributors at a price above 85% of the Gross Sales Value of that BEW Wrapped Impulse Ice Cream.

(2) Paragraph (1) does not apply to supplies to Distributors such as 'Cash & Carry' outlets that do not either themselves or through agents deliver BEW Wrapped Impulse Ice Cream to Retailers.

Agreements with Retailers

11. BEW shall not enter into any Agreement with a Retailer under which: -

(a) the Retailer is restricted as to his ability to take supplies of any Wrapped Impulse Ice Cream from any Distributor or class of Distributors; or

(b) the Retailer's receipt of any financial or other inducement depends on his taking, or not taking, supplies of any Wrapped Impulse Ice cream from any Distributor or class of Distributors.

Promotional Activity with regard to Retailers

12. (1) For the avoidance of doubt, BEW shall continue to have the right to engage in Promotional Activity with regard to Retailers.

(2) In respect of Promotional Activity with regard to a Retailer: -

(a) BEW may make arrangements for the transmission of that Retailer's orders for BEW Wrapped Impulse Ice Cream to any Distributor that the Retailer may choose;

(b) BEW shall not encourage or discourage the use of any Distributor or class of Distributors to that Retailer except in response to a request from that Retailer and unless there are objective reasons for so doing; and

(c) BEW shall ensure that an up to date list of all Distributors known to BEW that Distribute, or are prepared to Distribute, BEW Wrapped Impulse Ice Cream in the area of that Retailer's premises or Site is available to that Retailer from BEW sales staff on the ground.

(3) For the purposes of paragraph (2) of this clause 12 only, "Retailer" does not include National Accounts.

Compliance

13. BEW will promptly comply with such written directions as the Director General may from time to time give:

(a) to take such steps within its competence as may reasonably be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings, and

(b) to do or refrain from doing anything so specified or described which it might be required by these undertakings to do or refrain from doing.

14. BEW will promptly provide to the Director General such information as he may from time to time reasonably require for the purpose of monitoring compliance by BEW and its subsidiaries with these undertakings.

On behalf of BEW: -

Signed John G. Ferguson (director)

Name: IGT FERGUSON

Signed S.R. Freeman (director/secretary)

Name: S.R. FREEMAN

Date: 19 July 2000