

Competition Act 1998

Investigation relating to supplies of impulse ice cream ‘No grounds for action’ decision

1. This decision is structured as follows:
 - Section A provides a summary of our decision.
 - Section B sets out some background to the CMA’s investigation.
 - Section C sets out the legal test applied by the CMA, and explains the CMA’s conclusions based on its assessment of the evidence gathered during the course of the investigation.
 - Section D sets out the CMA’s decision.

A Summary

2. In February 2017, the CMA opened an investigation (the ‘Investigation’) under the Chapter II prohibition in the Competition Act 1998 (the ‘Act’) and Article 102 of the Treaty on the Functioning of the European Union (the ‘TFEU’) into a suspected abuse of a dominant position by Unilever plc (‘Unilever’) in the supply of single-wrapped impulse ice cream in the UK¹. In particular, the CMA has considered whether Unilever has abused any such dominant position by offering deals or prices for impulse ice cream to retailers in the UK which were likely to have an exclusionary effect, restricting competition in the supply of those products.²
3. The primary focus of the Investigation related to promotional deals offered by Unilever from 1 January 2013 to 16 February 2017 (the ‘Relevant Period’) under which Unilever supplied to retailers single-wrapped impulse ice cream products free of charge or at a reduced price if they purchased a minimum number of single-wrapped impulse ice cream products from Unilever – for

¹ The CMA considers that there are reasonable grounds for suspecting that there is a national market for the supply of single-wrapped impulse ice cream. However, it has not investigated or reached any conclusion on the definition of the market (see further below).

² Section 25 of the Act provides, amongst other things, that the CMA may conduct an investigation where there are reasonable grounds for suspecting that the Chapter II prohibition in the Act or the prohibition in Article 102 TFEU (that is, the prohibitions on conduct which amounts to an abuse of a dominant position), or both, have been infringed.

example, 'buy 2 cases get 1 case free' or 'buy 8 cases get 4 cases free'. These deals are referred to in this decision as 'Package Offers'.

4. At the time of opening the Investigation, the CMA had reasonable grounds for suspecting that Unilever's Package Offers were, or might have been, likely to produce an exclusionary effect. The CMA considered that, if the Package Offers were constructed to offer the retailer a significant rebate for purchasing single-wrapped impulse ice cream products from Unilever (by way of additional products supplied free of charge or at reduced price if the retailer purchased a minimum number of cases of single-wrapped impulse ice cream from Unilever), Unilever's Package Offers may have been likely to produce an exclusionary effect, by providing incentives to retailers to purchase a large proportion of their total requirements from Unilever with the likely effect of filling (or nearly filling) retailers' freezers, and so of restricting competition in the supply of single-wrapped impulse ice cream products. Such incentives would be more likely to arise to the extent that:
 - (a) Unilever had an assured base of sales because of the strength of its 'must-have' (or non-contestable) products in its ice cream portfolio and its reservation of capacity in the freezers it supplies;
 - (b) Unilever's Package Offers included both Unilever branded products regarded by retailers as particularly important to stock (referred to in this decision as 'must-have' or non-contestable products)³ and contestable products, and the rebates on Unilever's Package Offers effectively applied without distinction to retailers' purchases of both 'must-have'/non-contestable products (i.e. the products that help to confer its assured base) and contestable products;
 - (c) Retailers' freezer capacity for single-wrapped impulse ice cream was constrained; and
 - (d) the Package Offers were made available to retailers during periods in which significant volumes of sales were made.
5. As explained in Section C below, the CMA has concluded that, although Unilever is likely to have had an assured base of sales during the Relevant Period, and retailers' freezer capacity was constrained, nevertheless the structure and availability of Unilever's Package Offers, taken together with the

³ Such 'must-have' products may include, at least, Magnum Classic, Magnum White, Calippo Orange and Twister.

purchasing patterns of retailers, were such that Unilever's Package Offers were unlikely to have had an exclusionary effect.⁴

6. As a result, the CMA has decided to close the case on the basis that there are no grounds for action in relation to Unilever's Package Offers in the UK.⁵

B Background

7. Impulse ice cream refers to ice cream which is purchased for immediate consumption, as distinct from ice cream purchased for consumption at home. It includes single-wrapped impulse ice cream, which was the subject of the Investigation, and which refers to wrapped ice cream products sold individually at the point of sale. Other types of impulse ice cream are soft serve, scoop and slush ice cream.
8. Manufacturers supply impulse ice cream to retailers through wholesalers, including both specialist frozen food wholesalers and generalist wholesalers. These may be primary wholesalers, who purchase ice cream from the manufacturers, or secondary wholesalers, who purchase ice cream from other wholesalers. Retailers can be distinguished primarily by whether they form part of the 'retail' sector (e.g. supermarkets, corner shops) or of the 'leisure' sector (e.g. outlets within a leisure or tourist attraction). Within the retail sector, there are differences between the routes to market for larger retail multiples and smaller independent retailers. In particular, manufacturers are likely to have specific contractual arrangements in place with the larger retail multiples, whereas the terms of supply for small independent retailers are typically governed by their relationships with the wholesalers that supply them.
9. Manufacturers may offer a variety of different incentives to wholesalers and retailers to encourage them to purchase and stock Unilever products. One of the principal incentives that manufacturers provide to retailers is supplying stock free of charge, or at reduced-price, if the retailer concerned purchases a minimum volume of products from that manufacturer, by means of Package Offers. It is the CMA's understanding that Package Offers are principally sold to smaller independent retailers. In recent years, all the principal

⁴ During the course of the Investigation, the CMA gathered evidence from Unilever, Froneri and Mars (its largest competitors) and a number of Unilever's wholesaler customers representing [70-80]% of Unilever sales by value. The evidence gathered consisted of data, information and internal Unilever documents.

⁵ As described at paragraph 10.1 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases (March 2014, CMA8), CMA investigations can be resolved in a number of ways. The CMA can issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law. Rule 10(4)(c) of the Schedule to the Competition Act 1998 (CMA's Rules) Order 2014 provides for the CMA to give notice of a decision that there are no grounds for action where the conditions of Chapter II of the Act or the prohibition in Article 102 TFEU are not met.

manufacturers of single-wrapped impulse ice creams have made available Package Offers of this kind.⁶

C Legal and economic assessment of the conduct

Legal framework

10. Section 18(1) of the Act and Article 102 TFEU prohibit a dominant undertaking from abusing a dominant position.
11. The holding of a dominant position is not itself prohibited under competition law. Rather, it is the abuse of such a dominant position which is prohibited. A dominant undertaking has a special responsibility to ensure that its conduct does not impair genuine competition on the market.⁷ The scope of that responsibility must be considered in the light of the specific circumstances of each case, reflecting the fact that competition is weakened as a result of the very presence of that undertaking on the market.⁸
12. An abuse of a dominant position is an objective concept.⁹ The Chapter II prohibition and Article 102 TFEU list examples of abuses that are prohibited. This list is illustrative and not exhaustive.¹⁰ It is well-established that a dominant undertaking must not resort to methods falling outside the scope of 'competition on the merits' and must not adopt a strategy of using its economic strength or its strong market position to impair undistorted competition.¹¹
13. Guidance from the European Commission¹² identifies certain specific types of exclusionary conduct which, based on its experience, appear to be the most common. The types of price-based exclusionary conduct identified include exclusive dealing (through use of exclusive purchasing obligations or rebates), tying and bundling, predation, refusal to supply and margin squeeze.

⁶ Manufacturers also offer different terms and incentives to wholesalers to purchase their products for onward supply to retailers. These terms and incentives are offered independently of any Package Offers.

⁷ Judgment in Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* EU:C:1983:313 ('*Michelin I*'), paragraph 57.

⁸ Judgment in Case C-333/94 P *Tetra Pak v Commission* EU:C:1996:436, paragraph 24. See also *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, at [219].

⁹ Judgment in Case C-85/76 *Hoffman-La Roche v Commission*, EU:C:1976:36 ('*Hoffman-La Roche*'), paragraph 91; judgment in Case C-549/10 P, *Tomra Systems and Others v Commission*, EU:C:2012:221 ('*Tomra*'), paragraph 17.

¹⁰ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA v European Commission*, [2000] ECR 2000 Page I-01365, paragraphs 112 to 113.

¹¹ Judgment in Case C-457/10 *AstraZeneca AB and AstraZeneca plc v Commission*, ECLI:EU:C:2012:770 ('*AstraZeneca*'), paragraphs 74–75. See also *Hoffman-La Roche*, paragraph 91.

¹² *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty* [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

14. In assessing whether a rebate or discount scheme is abusive under Article 102 TFEU or the Chapter II prohibition,¹³ case law has distinguished between three different categories.¹⁴
- (a) The first category, referred to as a ‘quantity rebate’, is a scheme linked solely to the volume of purchases made from an undertaking occupying a dominant position, thus corresponding to the cost savings made by that supplier. A quantity rebate is not, in principle, liable to infringe Article 102 TFEU.¹⁵
 - (b) The second category, referred to as a ‘loyalty rebate’ or ‘exclusivity rebate’, is a scheme which involves an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from the dominant undertaking, and which by offering customers financial advantages, tends to prevent them from obtaining all or most of their requirements from competing manufacturers. Such a rebate amounts to an abuse within the meaning of Article 102 TFEU, unless it is objectively justified.¹⁶
 - (c) The third category, referred to as a ‘third category rebate’,¹⁷ relates to a scheme that is neither a quantity rebate nor a loyalty or exclusivity rebate. There is not a general presumption of abuse for third category rebates and it is necessary to consider all the circumstances to determine whether it is abusive.¹⁸
15. The CMA has assessed Unilever’s Package Offers during the Relevant Period as a form of third category rebate that is potentially anti-competitive.¹⁹
16. In order to determine whether an undertaking in a dominant position has abused that position by applying third category rebates, it is necessary to assess whether such rebates can produce an exclusionary effect. This involves assessing whether, when considering all the circumstances,²⁰ the rebates are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of

¹³ Judgment in C-95/04 P *British Airways v Commission*, EU:C:2007:166 (*British Airways*), paragraphs 57-58.

¹⁴ *Michelin I*, paragraphs 71 to 72; judgment in T-286/09 *Intel Corp v Commission*, EU:T:2014:547 (*Intel*), paragraphs 74-78; judgment in C-23/14 *Post Danmark v Konkurrencerådet*, EU:C:2015:651 (*Post Danmark II*), paragraphs 27-28.

¹⁵ *Post Danmark II*, paragraphs 27-28 citing *Michelin I*, paragraph 71

¹⁶ *Post Danmark II*, paragraphs 27-28 citing *Michelin I*, paragraph 71 and *Tomra*, paragraph 70. See also *Intel*, paragraph 81, citing *Hoffmann-La Roche*, paragraphs 89-90.

¹⁷ *Intel*, paragraph 78.

¹⁸ *Post Danmark II*, paragraphs 27-29, citing *British Airways*, paragraph 67, and *Tomra*, paragraph 71.

¹⁹ The Package Offers may also be described as bundled discounts. However, the CMA does not believe that the precise legal characterisation of the Package Offers would affect the CMA’s analysis or conclusions in this decision.

²⁰ *Post Danmark II*, paragraph 30.

making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners.^{21,22}

17. Potentially anti-competitive rebates will be abusive if they tend to restrict competition or are capable of²³ having that effect.²⁴ For a rebate to be abusive, the anti-competitive effect of a rebate must not be purely hypothetical; rather, it must be likely.²⁵
18. Evidence of the actual effect of the conduct may be a relevant factor in the assessment.²⁶ However, it is not necessary to establish a concrete anti-competitive effect, i.e. it is not necessary to establish that there is a current and certain exclusionary effect.²⁷ There is no need to show that the likely anti-competitive effect of a rebate is of a serious or appreciable nature.²⁸
19. In addition, although anti-competitive intent is also not a prerequisite to establishing an abuse, it is one of the factors that may be taken into account when determining whether a dominant position has been abused.²⁹

Reasonable grounds for suspecting an infringement (section 25 of the Act)

20. At the time the CMA commenced the Investigation, it considered that there were reasonable grounds for suspecting that the Package Offers were potentially anti-competitive multi-product rebates which may have been likely to produce an exclusionary effect by providing incentives to retailers to purchase a large proportion of their total requirements from Unilever with the likely effect of filling (or nearly filling) retailers' freezers, and so of restricting competition in the supply of single-wrapped impulse ice cream products. The CMA considered that these incentives would be more likely to arise to the extent that:

²¹ *Post Danmark II*, paragraphs 31, citing *British Airways*, paragraphs 68-69. See further *Post Danmark II* paragraphs 29-30.

²² It has then to be examined whether there is an objective economic justification for the discounts granted: *Post Danmark II*, paragraph 31.

²³ In the context of a finding of an exclusionary effect, the expressions 'tends to', 'capable of' and 'likely' have been used variously in different abuse of dominance judgments. For the purposes of an assessment of exclusionary effect in this decision, they are treated as meaning likely.

²⁴ *Tomra*, paragraph 68.

²⁵ *Post Danmark II*, paragraphs 65, 67, 69, 74.

²⁶ Judgment in Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 39. *Streetmap.EU Limited v Google Inc & Ors* [2016] EWHC 253 (Ch), [90].

²⁷ *Post Danmark II*, paragraph 66. See also *AstraZeneca*, paragraph 112.

²⁸ *Post Danmark II*, paragraphs 70 to 74.

²⁹ Judgment in T-321/05 *AstraZeneca*, EU:T:2010:266, paragraph 359, upheld by the Court of Justice of the EU in *AstraZeneca*. See also *Tomra*, paragraphs 20, 23 and the judgment in Case C-27/76 *United Brands v Commission*, EU:C:1978:22, paragraph 189.

- (a) Unilever had an assured base of sales because of the strength of its 'must-have' (or non-contestable) products in its ice cream portfolio and its reservation of capacity in the freezers it supplies;
- (b) Unilever's Package Offers included both 'must-have' (or non-contestable) products and contestable products, and the rebates on Unilever's Package Offers effectively applied without distinction to retailers' purchases of both 'must-have'/non-contestable products (i.e. the products that help to confer its assured base) and contestable products;
- (c) retailers' freezer capacity for single-wrapped impulse ice cream was constrained; and
- (d) the Package Offers were made available to retailers during periods in which significant volumes of sales were made.

Summary of analysis

Unilever's suspected dominant position

21. At the time of this decision, the CMA has not investigated, and has not reached any conclusion on, the definition of the relevant market which consists of or includes the supply of single-wrapped impulse ice cream. Nor has the CMA investigated or reached any conclusion on Unilever's position in such a market. In view of the CMA's other findings in the initial phase of the Investigation, it has not been necessary to carry out additional work in order to reach definitive conclusions on these issues.
22. However, the CMA considers there are reasonable grounds for suspecting that there is a national market for single-wrapped impulse ice cream. Although the CMA considers that there may be some substitution on the part of customers between single wrapped impulse ice cream and other forms of impulse ice cream, these different forms of impulse ice cream are likely to be seen as less substitutable by retailers (for example, because a member of staff or additional equipment would be needed to dispense scoop or soft serve ice cream). Since the Investigation relates to the incentives facing retailers when stocking their freezers, the CMA considers it appropriate to also consider the extent of substitutability from the retailer perspective. This is consistent with the approach taken by the European Commission in *Van den Bergh Foods*.³⁰

³⁰European Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 Van den Bergh Foods Limited). The European Commission determined that there was a national market for the supply of single-wrapped impulse ice cream in Ireland in a case involving the reservation by Van den Bergh of space in the freezers it supplied to retailers

23. The CMA also considers there are reasonable grounds for suspecting that Unilever had a dominant position on this market during the Relevant Period. Unilever has had a share of the supply of such a market which has been well in excess of 50% throughout the Relevant Period, giving rise to a presumption of dominance. Further, Unilever is likely to have had a significant assured base of sales due to the strength of some of its brands and freezer exclusivity requirements. Unilever has told the CMA that it does not agree that the market is for single-wrapped impulse ice cream, that it has a dominant position in such a market, or that a proportion of its demand was non-contestable.

Likely effect on competition

24. The CMA's conclusion is that, although Unilever is likely to have had an assured base of sales during the Relevant Period, and retailers' freezer capacity was constrained, nevertheless the structure and availability of the Package Offers, taken together with the purchasing patterns of retailers (and in particular of the smaller independent retailers who are more typically the purchasers of Package Offers), were such that Unilever's Package Offers were unlikely to have an exclusionary effect.
25. The CMA has not determined precisely the bounds of Unilever's assured base or the degree to which retailers' freezer capacity is constrained. However, the CMA considers that Unilever is likely to have had an assured base of sales during the Relevant Period and that retailers' freezer capacity was constrained, for the following main reasons:
- (a) **Assured base.** Although the CMA has not concluded on the precise delineation of the size and composition of any assured base for Unilever, its likely existence is supported by at least the following evidence, during the Relevant Period: (i) the high level of sales achieved by Unilever's best-selling single-wrapped impulse ice cream brands, which the CMA considers are likely to be 'must-have'/non-contestable products (including Magnum Classic, Magnum White, Calippo Orange and Twister) and their relatively high rates of distribution (i.e. the proportion of retailers that carry these brands) compared to other single-wrapped impulse ice cream³¹; and (ii) a requirement imposed by Unilever on those retailers to whom it

exclusively for its products. The UK Competition Commission did not reach a conclusion on market definition in its report on the supply of impulse ice cream in 2000 (Cm 4510).

³¹ In 2016, Unilever had 14 of the top 20 best-selling single-wrapped impulse ice cream brands, and eight of the top ten. Each of Unilever's five best-selling brands has a higher rate of distribution than the best-selling competing brands, based on Nielsen data.

supplied with a freezer to reserve a significant proportion of freezer capacity for Unilever products, generally for a period of three years; and

(b) **Freezer capacity.** Most independent retailers are unlikely to have had more than one single-wrapped impulse ice cream freezer. In addition, the overwhelming majority of single-wrapped impulse ice cream freezers have 12 or 18 baskets, and many retailers will generally only have stocked one product per basket.

26. As regards the structure and availability of Unilever's larger Package Offers, and the purchasing patterns of retailers, following assessment of the evidence gathered during the course of the Investigation the CMA has made the following observations:

(a) Unilever offered a variety of different types of Package Offer during the Relevant Period, which varied in their size, structure, availability and depth of discount. The larger Package Offers made available by Unilever (by which we mean Unilever's Package Offers which comprised 12 or 18 cases of ice cream, typically structured as 'buy 8 get 4 free' or 'buy 12 get 6 free'), in the CMA's view, could have been large enough to fill, or nearly fill, the freezers used by most retailers.

(b) Many of the Package Offers made available by Unilever, and in particular all of the larger Package Offers, included both 'must-have'/non-contestable products and contestable products, such that the rebate provided to retailers through the mechanism of the Package Offers applied effectively without distinction to retailers' purchases of both contestable and non-contestable products.³²

(c) The evidence gathered by the CMA shows that the larger Package Offers were offered to retailers only in February and March of certain years during the Relevant Period, whereas the greatest proportion of retailers' purchases of impulse ice cream took place in the summer months, with only limited volumes purchased in February and March.

(d) The Package Offers were standalone promotions which were available only for one calendar month.³³

³² Both Froneri and Mars also supplied products which were among the ten best-selling single-wrapped impulse ice cream products. They included these products in some of their Package Offers during the Relevant Period.

³³ The CMA notes, for completeness, that some smaller Package Offers were repeated in more than one month in a particular year and Unilever often made several smaller Package Offers available in each month.

- (e) Sales volumes of single-wrapped impulse ice cream could increase significantly during the hottest periods of the year, in particular during the summer months. The CMA understands that purchases by retailers may have been made on a weekly or even daily basis, requiring freezers to be re-filled at times when Unilever had not made larger Package Offers available to retailers.
- (f) Even where the larger Package Offers were purchased in February or March, the CMA's review of evidence from wholesalers shows that retailers' purchasing decisions later in the year were not generally determined by their purchasing decisions at the start of the year. The evidence from wholesalers indicates that retailers normally make purchasing decisions based on stocking requirements in conjunction with the individual promotional offers available from all manufacturers at the time of the order. Stocking requirements include replacement of products that have historically sold well, but also take account of a wide variety of other considerations, such as price, promotions, store demographics, category advice and advertising. This is consistent with the fact that the Package Offers available during the Relevant Period, from Unilever or from competing manufacturers, were standalone promotions.
27. In view of the above, the CMA's view is that the structure and availability of Unilever's larger Package Offers, taken together with retailers' purchasing patterns, were such that they were unlikely to have an exclusionary effect by making it more difficult or impossible for market entry or expansion to occur or for retailers to choose between different sources of supply of single-wrapped impulse ice cream in the UK.
28. It has been put to the CMA that Unilever's large Package Offers are likely to have a more significant effect than is suggested by the fact that they have been offered to retailers only in February and March (i.e. outside the months of greatest retailer purchase of ice cream), on the grounds that in subsequent months retailers replenish fast-selling ice cream lines and that unsold lines simply stay in the freezer 'clogging up' the space. However, as noted above, retailers' purchasing decisions (including stock replenishment decisions) are determined by a range of factors and not just by whether a product has historically been fast-selling or is included in a Package Offer.
29. The CMA has also considered whether Unilever's smaller Package Offers may have been likely to give incentives to retailers to purchase a large proportion of their total requirements from Unilever or to have the effect of filling (or nearly filling) freezers, either on their own or in combination with other features of the market. The CMA has concluded that the structure and availability of Unilever's smaller Package Offers were such that they were unlikely to have an exclusionary effect, for the following reasons:

- (a) The CMA has considered Unilever's smaller Package Offers, which offered deep discounts (e.g. '2+1' or '2+2' deals) and might therefore have been particularly attractive to retailers. The evidence shows that these were more likely than the larger Package Offers to be available in summer months when retailers purchased larger quantities of impulse ice cream. However, these smaller offers did not typically feature Unilever's best-selling brands, but were more likely to include Unilever's new product lines. In any event, the CMA's view is that the small size of these Package Offers entailed that they would not have been capable of filling freezers.³⁴
- (b) The CMA has also considered whether Unilever's Package Offers might have been structured so as to give incentives to retailers to purchase multiple smaller Package Offers so as to fill (or nearly fill) a freezer. For example, in some months Unilever made two '5+1' deals available, which although made available as standalone offers, if purchased together could potentially have filled a freezer. These Package Offers were also more likely than the larger Package Offers to be available in summer months when retailers purchased larger quantities of impulse ice cream. The CMA considered that, if the discount across the two Package Offers were sufficient to provide retailers with an incentive to purchase both '5+1' deals, they could potentially have filled (or nearly have filled) retailers' freezers. However, the CMA considers that the discount on two such Package Offers was not particularly deep (with only two products offered free of charge) and was comparable to (or less favourable than) the discounts provided in Package Offers promoted by other manufacturers. This would have weakened the incentive on retailers to purchase two '5+1' deals from Unilever, rather than purchasing one such deal and acquiring other products from Unilever's competitors.

30. In view of the above, the CMA's view is that the structure and availability of Unilever's smaller Package Offers, taken together with retailers' purchasing patterns, were such that they were not likely to have an exclusionary effect by making it more difficult or impossible for market entry or expansion to occur or for retailers to choose between different sources of supply of single-wrapped impulse ice cream in the UK.

Actual effects

31. Although it is not necessary to establish a concrete anti-competitive effect, the CMA has also considered whether the Package Offers resulted in an actual restriction of competition. A review of data provided by wholesalers relating to

³⁴ It has been put to the CMA that these smaller Package Offers must have been sold at a loss. Although this issue has not been the focus of the CMA's investigation, the evidence seen by the CMA does not support such a conclusion.

the take-up by retailers of Unilever's Package Offers shows that sales through Unilever's Package Offers did not represent a very large proportion of Unilever's total sales. In particular, there appears to have been relatively limited take-up of the larger 12 or 18 case Package Offers in each calendar year in which they were made available during the Relevant Period. Over the season as a whole, take-up of the larger Package Offers was limited, accounting for [0-10]% of Unilever's sales in 2016.

32. The CMA has used wholesaler sales data to examine whether, when retailers did take up Unilever's Package Offers, this had any negative impact on the sales of Unilever's competitors. The CMA reviewed the level of take-up of Unilever's Package Offers with the shares of sales of Unilever, Mars and Froneri across different wholesalers, and over time. It does not appear that higher take-up of Unilever's Package Offers at any particular wholesaler in a particular month was associated with higher sales for Unilever and lower sales for Mars and Froneri at that wholesaler in the same month.³⁵
33. Sales of single-wrapped impulse ice cream fluctuated over the course of the Relevant Period as well as from month to month. For example, the total value of single-wrapped impulse ice cream supplied by manufacturers to wholesalers decreased from 2014 to 2015. Although the value of sales increased again in 2016, the increase was to a lower level than that of 2014 sales. Sales by individual manufacturers have also varied over time, but their 'market shares', i.e. each manufacturer's relative share of total sales of single-wrapped impulse ice cream, did not change materially during the Relevant Period³⁶.
34. The CMA has also examined shares of sales and take-up of Package Offers over time for individual wholesalers and there does not appear to have been any clear correlation between the take-up of Unilever's Package Offers and Mars's and Froneri's shares of sales by individual wholesalers. Although take-up of the Package Offers varied significantly, the shares of Mars and Froneri did not respond to this variation in any consistent manner.
35. Further, the CMA has found that there was no correlation between the offer of two '5+1' deals and changes in Mars's and Froneri's shares of sales in the months they were available.

³⁵ In general, take-up of Unilever's Package Offers was higher than take-up of its competitors' Package Offers. However, take-up of each manufacturer's Package Offers was broadly consistent with its market share. Further, although each of Unilever's five best-selling brands has a higher rate of distribution than the best-selling competing brands, the CMA has not seen evidence that the rate of distribution of Unilever's competitors' products is connected with the availability of Package Offers.

³⁶ Market shares by value, based on both Nielsen data and sales data obtained from manufacturers.

36. It has been put to the CMA that one would expect promotional activity by one market participant to have implications for others and that it would be irrational to run promotions otherwise. However, the CMA has not observed significant variations in market shares during the Relevant Period, whether driven by promotional activity or otherwise. The CMA notes Unilever's observations on its rationale for the Package Offers (see below).

Unilever's rationale

37. Although the concept of an abuse is an objective one, the CMA has also considered whether there is evidence that Unilever used its Package Offers to pursue a strategy of foreclosing its competitors or was aware of any potential exclusionary effect of its conduct. The CMA has reviewed a large number of Unilever's internal documents and has not identified evidence of an intent to foreclose competitors.
38. Unilever has informed the CMA that its aims in making Package Offers available were '*first, to seek to extend the IIC [impulse ice cream] season by offering retailers a higher level of discounts on stock purchased particularly early or particularly late in the season (when demand for IIC products is inherently limited); second, [redacted]*'.³⁷

D The CMA's decision concerning Unilever's conduct

39. In view of the above, the CMA has decided that there are no grounds for action in this Investigation.

SIGNED: []

Michael Grenfell, Executive Director, Enforcement, for and on behalf of the Competition and Markets Authority

9 August 2017

³⁷ Unilever submission dated 30 May 2017, paragraph 3.