**AKZO CASE (IV/30.698 - ECS/AKZO; C-62/86, AKZO Chemie BV v the Commission)**

AKZO Chemie and its subsidiaries form the specialty chemicals division of the major Dutch multinational chemical and fibres group AKZO NV. AKZO NV's annual report for 1984 states that process chemicals for the polymer industry (mainly organic peroxides) made an "outstanding" contribution to earnings growth. AKZO UK is a wholly owned subsidiary of AKZO Chemie.

ECS is a small privately owned company founded in 1969 ECS's principal activity was originally the manufacture and marketing of flour additives including benzoyl-peroxide-based bleaching agents but from 1979 onwards it has also produced benzoyl peroxide for use as an initiator in the polymer industry (the "plastics" application).

Organic peroxides are specialty chemicals produced by the reaction of the relevant starting product with hydrogen peroxide (H2O2) ; AKZO does not itself manufacture hydrogen peroxide but is one of the largest customers in the European Economic Community for this product. The major uses of organic peroxides are related to the polymer industry. Organic peroxides act as "initiators" in various operations : unlike true catalysts they are entirely consumed in the chemical process.

There are only three suppliers in the United Kingdom and Ireland of a full, or nearly full, range of flour additives : AKZO UK, ECS and a third supplier, Diaflex. AKZO UK and ECS both produce their own concentrated benzoyl peroxide (for use as an initiator in plastics as well as for flour) from benzoyl chloride and hydrogen peroxide. For the specialized flour use they then add the inert filler. AKZO UK is the largest supplier of flour additives in the United Kingdom and Ireland. In 1982 it estimated its United Kingdom market share for bleaching agents (the major flour additive product) at 52 %, with ECS at 35 % and Diaflex only 13 %.The principal customers for flour additives in the United Kingdom are the three major milling groups : RHM, Spillers and Allied Mills (part of Associated British Foods). RHM was until its recent closure also one of the two large milling customers in Ireland. These three groups are of roughly comparable size and until Spillers abandoned baking in 1979 were also the three most important bakers of white bread on an industrial scale ("plant bakers") in the United Kingdom. They account for some 85 % of UK sales of bleaching agents. The "large independents" (i.e. mills independent of the "big three") take another 10 % with the "small independents" taking the balance.

Before the dispute between ECS and AKZO in late 1979, prices of flour additives in the United Kingdom rose steadily in regular increments of 10 %. AKZO itself states in its reply to the statement of objections that "during the period before the High Court proceedings prices in the United Kingdom flour additives were steadily rising" and it describes the market before 1980 as one characterized by "stable, steadily rising prices".

AKZO’S CONDUCT

An appointment had already been made with Provincial Merchants, the central buying agency for ECS's major customer Allied Mills, and it was proposed to offer benzoyl peroxide 16 % at £ 395 per tonne, potassium bromate 10 % at £ 250 per tonne and vitamin mix at £ 430 per tonne plus cost of flour. At the time AKZO UK's own prices for the first two products to its major customers were £ 556 and £ 372 respectively and it had been planning a 10 % increase from the following month.

Appointments were also planned with six named large independent mills then being supplied by ECS. They were to be offered prices approximately £ 55 above those for Allied, i.e. BP 16 % at £ 456, PB 10 % at £ 305 and vitamin mix at £ 590 (including flour), in a special "package deal" if they took all their requirements of flour additives from AKZO UK. The "small independent" mills amongst the clientele of ECS were also to be contacted, with a proposed package deal for their total requirements at prices some £ 50 above those to be offered to the "large" independent, i.e. BP 16 % at £ 506 per tonne ; PB 10 % at £ 367 and vitamin mix at £ 635. It was recognized that these low price offers to ECS customers would necessarily involve some decrease in the prices offered to AKZO's own two major customers, RHM and Spillers : they would in future be given prices of £ 495 for BP 16 % (£ 600 for BP 20 %) and £ 312 for PB 10 %, a drop of some £ 60 per tonne. The effect on AKZO UK's profitability of these low price offers was analyzed. If all the Allied and "large independent" business were captured from ECS, a total loss to AKZO of some Fl 170 000 per annum on the business was foreseen.

After learning in late 1980 of the ECS quote to RHM, however, the reaction of AKZO UK was more aggressive. The plan was conceived to contact Provincial Merchants and to offer standard quality BP 16 % at £ 517,90 and PB 10 % at £ 314,90, the same price as ECS had quoted to Spillers for the special cheap mixes. If this did not result in any business, AKZO UK would contact various individual mills in the Allied group offering these prices, find out which of the mill managers were not content with the existing arrangements to buy from ECS, and try to get their business from ECS. ECS's prices to Allied at the time were still £ 532 and £ 330 for these products

**Van den Bergh Case (IV/34.073, IV/34.395 and IV/35.436)**

Ice cream can be categorised according to how it is manufactured and distributed. A distinction is usually made between 'artisan` ice cream on the one hand, which is generally produced, distributed and consumed locally on a small scale, and industrial ice cream on the other, which is produced for wide-scale distribution. Almost all of the ice cream produced and sold in Ireland is of the industrial kind. Ice cream can also be categorised according to where it is intended to be consumed. This generally includes three categories: - 'impulse` ice cream, consisting of single-wrapped items (often stick products), and individual portions of 'scooped` ice cream, designed for immediate consumption at or near the place of purchase, - 'take-home` ice cream, including multipacks of single items, blocks, tubs, dessert products and so on, intended for consumption at home, - catering ice cream, which is sold in bulk to hotels, restaurants, cafés, etc., for consumption, as part of a catering service, in those places.

In Ireland, industrial impulse ice cream is distributed to consumers through a wide array of retail and other outlets ranging from grocery stores, the 'traditional` retail trade (often referred to as TSNs - tobacconists, sweetshops, newsagents), garage forecourts, and kiosks to places of entertainment and leisure. By far the most important outlets for impulse sales are the traditional retail trade, grocery stores (including symbol/franchise groups).

From the manufacturer's point of view, large-scale business in impulse ice cream is capital intensive and involves considerable business risks due to its dependence on unpredictable weather conditions. It requires high levels of working capital in order to finance manufacture in advance of the season and to hold stocks. Considerable logistical and planning demands are imposed on the business over the annual cycle in order to support the relatively short campaign season. Companies in the Unilever group are the largest ice-cream suppliers in most Member States. HB is Ireland's principal manufacturer and distributor of ice-cream products. The company traces its position as the predominant supplier of ice-cream products in Ireland back to its acquisition in 1968 of the ice-cream business of its principal rival at the time, Premier Dairies. It has, since 1974, been a part of the Unilever group of companies. The company was reformed in 1993 as Van den Bergh Foods Ltd, following the merger of HB Ice Cream Limited with other companies in the Unilever group.

HB achieved a share of the market (14), by value, for impulse ice cream in Ireland of about 85 % during the four-month period from June to September of 1996, up from 83 % for the same period in 1995, from 77 % for the summer of 1994 and from 76 % for the summer of 1993. In volume terms, HB's market share in the summer of 1996 amounted to some 85 %, up from 83 % for the same period in 1995, and from 80 % in 1994 and 1993. In the June/July period of 1997, HB's volume share amounted to 89 % and its value share was also 89 %. HB attributes this increase in its market share, at least in part, to the financial difficulties experienced by Valley, and to the termination of the joint-distribution arrangement between Mars and Valley. The remainder of the Irish ice-cream market is shared principally between Mars, Valley, Nestlé, Leadmore (Ireland) Ltd (hereinafter 'Leadmore`), Dale Farm Dairy Group Ltd (hereinafter 'Dale Farm`), and Häagen Dazs.

HB’S CONDUCT

HB has for many years made available to retailers freezer cabinets for the storage and display of impulse ice cream at the point of sale. The cabinet is either loaned to the retailer with no direct charge. HB agrees to make a freezer cabinet available to the retailer; the ownership and property in the cabinet remains that of HB, and HB undertakes to maintain it at its own cost and expense (save where damage is due to the retailer's misuse or neglect of the cabinet). - the cabinet is to be used exclusively for storing products for sale which are supplied by HB; accordingly no product manufactured or supplied by a third party is to be sold or offered for sale from the freezer cabinet, or stored therein, - the agreement is terminable at any time by either party giving two months' notice,- the retailer undertakes to keep the cabinet in a prominent position on his premises. Only HB advertising material may be displayed on top of or on the sides of the cabinet. n a Unilever internal strategy document entitled 'Frozen products coordination, Sales Directors Conference, June 1990, Vienna, highlights and follow-up action`, the importance of freezer exclusivity is underlined. Under the heading 'Exclusivity` it is stated: 'We are all too aware that in many countries one of the foundations of our success.

HB has revised its distribution arrangements. The revised arrangements include the standard-form agreement under which HB continues, on request, to supply HB-exclusive freezer cabinets to retailers as just described, as well as HB's standard conditions of sale and discount schedule; these now include a new pricing scheme for its ice-cream and the introduction of a hire-purchase scheme designed to facilitate the acquisition of freezer cabinets by retailers. HB has introduced, as an optional alternative to the acceptance of an HB cabinet under the standard-cabinet agreement, a freezer cabinet hire-purchase scheme designed to enable retainers to buy their own new cabinet. The cabinets are offered at the wholesale price at which HB purchased them, as is evidenced by an invoice from the independent cabinet supplier. Under the scheme, retailers are offered a 1 m 'visi-top` cabinet, available in respect of one cabinet per outlet at any time. Details of the scheme are published on HB price lists and relevant promotional material.

in 1995, and introduced a 'differential` or 'dual` pricing scheme. The scheme allows for the payment of a lump sum to retailers stocking HB ice cream but not taking an HB freezer cabinet, provided that retailer achieves a minimum annual turnover in HB ice cream (sales from the outlet) of IEP 650 GSV (gross sales value). This lump sum is currently set at IEP 78 p.a. and reflects the purchase and maintenance cost savings to HB in not supplying and servicing a standard 1 m cabinet to the retailer. The retail turnover threshold is set at a level which, according to HB, allows it to secure a minimum return on the sale of ice cream to a retailer.

OTHER MARKET PARTICIPANTS

Since Nestlé entered the Irish impulse ice-cream market in 1994, it has been installing freezer cabinets in retail outlets subject to a condition of exclusivity. Dale Farm provides freezer cabinets to retail outlets on free-on-loan terms, for the exclusive storage of Dale Farm ice cream, Mars ice cream and other Northern Foods frozen food products. Häagen Dazs installs freezer cabinets in retail outlets for the storage of its impulse and other ice-cream products; the cabinets are mainly small and are subject to a condition of exclusivity. All of its ice-cream products are sold through distributors. Leadmore supplies freezer cabinets to retail outlets subject to a condition of exclusivity.

RETAIL MARKET

Of all cabinets in the outlets surveyed 84 % were owned by an ice-cream manufacturer/supplier: 61 % of all supplier-provided cabinets were HB-owned; 11 % of them were Mars-owned; 9 % were Valley-owned; 8 % were Nestlé-owned; 4 % Dale Farm-owned; 2 % Leadmore-owned; 1 % Häagen Dazs-owned.

Of all cabinets 12 % were found to be retailer-owned; 2 % were on hire purchase from an ice-cream manufacturer; 1 % were owned by a retail group. 38 % of retailer-owned cabinets were purchased from HB or HB agents.

The proportion of outlets with only one freezer cabinet for impulse ice cream was 58 %; the proportion with two such freezers was 35 %; the proportion with three or more was 7 %. The average (mean) number of cabinets per outlet was 1,50.

Of all outlets selling impulse ice cream 85 % had at least one supplier-provided cabinet; 72 % (30) had at least one HB cabinet; 14 % had at least one Mars cabinet; 10 % Nestlé; 10 % Valley; 5 % Dale Farm; 2 % Leadmore; 1 % Häagen Dazs; 5 % other suppliers. Of all outlets 17 % had at least one cabinet owned by the retailer himself.

Of all outlets 56 % had a cabinet, or cabinets, from one manufacturer/supplier only (and are consequently only in a position to sell the ice-cream products of that single manufacturer/supplier); 27 % had cabinets owned by more than one manufacturer/supplier (and no retailer-owned cabinets): consequently, 83 % of all outlets have only manufacturer/supplier-provided cabinets; 17 % of all outlets had at least one cabinet owned by the retailer himself, this 17 % being composed of 12 % of all outlets which only have a retailer-owned cabinet and 5 % of all outlets which have a retailer-owned cabinet/s, as well as a manufacturer/supplier-owned cabinet/s.

95 % of HB cabinets are set up in outlets which have only got manufacturer-supplied cabinets; 58 % of HB's cabinets are in outlets where only HB's cabinets are in place. The level of sales of impulse ice cream in outlets in the latter category of outlet is almost identical to that in any outlets with HB cabinets.

47 % of all outlets are only in a position to sell the ice-cream products of a single manufacturersupplier, with a single cabinet only in each outlet; 8 % are only in a position to sell the ice-cream products of a single manufacturer/supplier, with only two cabinets. 41 % of all outlets are only in a position to sell the ice-cream products of HB, 35 % of all outlets are only in a position to sell the ice-cream products of HB, with one HB cabinet only, 6 % with two or more HB cabinets only. 15 % of outlets are only in a position to sell the ice-cream products of a single manufacturersupplier other than HB. None of these other brands is significant in terms of the number of outlets tied to the sale of its products alone.

When retailers were asked if it would be a 'viable option` for them to use up further space to install another freezer cabinet for impulse ice cream, 87 % of all outlets said that it would not; 11 % said that it would. Of all outlets 53 % considered that one freezer cabinet would be the optimal number of cabinets to have in the store during the summer (ice cream) season; 36 % said two would be optimal; 8 % said three; 1 % four or more. The average optimal number was 1,57. Lansdowne have commented that 'it is evident that the number of ice-cream cabinets currently in place in retail outlets around the country is perceived as approaching the maximum viable`.