



## Mars and Unilever

For years, Unilever's Wall's ice cream had dominated the European market, with popular brands such as Cornetto. Then in the late 1980s Mars, one of the world's largest confectioners, decided that if you can sell chocolate you can also sell chocolate ice cream. This was no small threat to Unilever, who at the time initiated a series of exclusive agreements with retailers: essentially, these stated that "if you want to sell our ice-cream products you cannot sell any rival ice-cream products." Mars felt the squeeze; what was it to do?

### Mars

Mars is ranked by Forbes magazine as the sixth largest privately-held company in the US.<sup>1</sup> It is also one of the world's largest family-controlled firms, currently in the hands of the Mars family's fourth generation (recently the company's leadership was assumed by non-family members). Known for its secretism — some call Mars "the silent planet" — the company employed 70,000 in 2008, and its revenue was then estimated to be in the neighborhood of \$30 billion.<sup>2</sup> Also in 2008, Mars (together with Berkshire Hathaway) acquired the Wrigley Jr. Company, the world's largest chewing gum producer, thus unseating Cadbury as the world's largest confectioner.

### Unilever

Unilever is one of the world's largest multinational consumer product firms. Created in 1930 by the merger of the British Lever and the Dutch Unie companies — a soap and a margarine producer, respectively — in 2008 Unilever employed 174,000 and had a revenue of \$40.5 billion. Its portfolio includes famous brands in foods (Heartbrand, Knorr), beverages (Lipton), cleaning agents (Omo, Surf), personal care (Dove, Lux, Rexona), and many other — a total of more than 400 brands.

### Mars attacks

One of the many initiatives of the Mars family's third generation, which took over the company in 1973, was expanding into the impulse ice-cream market, that is, ice cream purchased at stores in individual units.<sup>3</sup> In September 1989, Mars launched the ice cream version of the Mars bar; soon after, it followed with Snickers and several other Mars chocolate-turned-ice-cream brands.<sup>4</sup>

In Europe, impulse ice cream was Unilever's turf. In 1989 its Wall's brand commanded a 68.5 percent market share. The Mars move was not taken lightly, a Unilever executive

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Beta version: August 2009. Professor Luís Cabral prepared this case for the purpose of class discussion rather than to illustrate either effective or ineffective handling of an administrative situation. The author thanks Adriano Navarro for excellent research assistance. © 2009 Luís Cabral.

describing it as “the largest threat to Unilever anywhere in the world today.”<sup>4</sup> In fact, Mars was able in some cases to persuade retailers to stock its ice-cream bars inside Unilever’s own freezers, thus displacing some of Unilever’s ice-cream products.<sup>5</sup>

In the first half of 1989 Mars was the best selling branded ice-cream product in the UK, selling around £70m units — more than Wall’s popular Cornetto.<sup>4</sup>

## **Freezer and store exclusivity**

Wall’s reaction to Mars was to lower prices and launch rival products — Bonanza, Sky and Dream. More importantly, Unilever stepped up its enforcement of freezer exclusivity agreements.<sup>6</sup> Under these agreements, Unilever provided the outlet with a freezer for free or at a very low cost. The retailer in turn had to agree only to store and display Unilever products in such freezer. These contracts typically had a term of two to five years (on average two years and a half). In some cases, Unilever also imposed store exclusivity, that is, the inability of the retailer to sell non-Unilever products even if not kept in Unilever’s refrigerators.

Under store exclusivity, saying yes to Unilever implied saying no to Mars. Moreover, many stores have no room for more than one freezer, in which case freezer exclusivity effectively implied store exclusivity. Mars felt the impact of Unilever’s move. In the Irish market, Mars’s share dropped from 42 to 20 percent.

## **Mars goes to court**

Mars continued its intense marketing campaign, installing Mars freezers at numerous stores (10,000 in the UK in 1991) and sending sales reps on store visits with unusual high frequency.<sup>7</sup> Many stores switched away from Unilever exclusivity. As an analyst put it, exclusivity “worked for nearly two decades, but then the God of War threw caution to the winds.” (Research at the time showed that shifting away from exclusivity increased sales on average by 24%.<sup>7</sup>) Moreover, the “silent planet” became uncharacteristically talkative in its public opinion campaign against Unilever’s exclusivity tactics.

But Mars’ actions were not limited to the market. It also started a legal campaign alleging that Unilever’s actions violated competition law. The effort would spread over many European countries and over many years, with important decisions as recently as in 2006. In 1990, when Mars started the legal campaign, the precedent was not in its favor, at least not in the UK: in 1979, the UK Monopolies and Mergers Commission had let Unilever off the hook as it concluded an investigation into freezer exclusivity.

## **The economic debate**

The claim against exclusivity is that it restricts competition as well as consumer choice. According to Mars, ice-cream displays should be treated like chocolate displays. In it, rival brands are presented side by side in the same stand, allowing consumers complete freedom of choice and allowing retailers the freedom to stock the best selling and most profitable brands.

If that can work in chocolate, why can't it work in ice-cream? Because, most corner shops don't have the room for more than one freezer and Unilever's anti-competitive exclusivity arrangements bar retailers from displaying competitors' lines in them.<sup>7</sup>

Not so fast, said Unilever: retailers are free to agree or not to agree on exclusivity contracts. As an alternative, they can purchase their own freezer or install a second freezer to carry non-Unilever products. If they choose to place a Unilever-paid freezer then they should also recognize Unilever's property rights: since Unilever owns the freezers, it should have the right to choose how they can be used.

More importantly, Unilever pointed to the service it provided with its freezers. For example, Unilever often changes freezers to suit market needs and sometimes removes them during the slow-selling winter months.

But such service doesn't come cheap. It has cost Unilever £20m so far — why should Mars be allowed to hitch a free ride on its back? That's got nothing to do with free competition, but a lot to do with companies acting like commercial cuckoos.<sup>7</sup>

## The law

The main European legislation applicable to the case is Article 81 of the EU Treaty (formerly Article 85 of the Treaty of Rome). Article 81§1 prohibits any agreements between firms that restrict competition. Article 81§3 allows for the possibility of an exemption to Article 81§1 if a series of (cumulative) conditions are met, including that it be economically efficient, allow consumers a fair share of the benefits, and not lead to the elimination of competition.

Unilever argued that it should be granted a block exemption under Article 81§3. The idea is that exclusivity agreements lead to an improvement in the distribution of ice cream to the extent that they allow and incentivize Unilever to build an effective distribution network. In other words, if outlets were to freely choose to sell products from rival ice cream brands, the profitability of the distribution system could not be ensured, eventually leading to its demise.

Moreover, Unilever argued that Article 81§1 did not apply to the case because Unilever did not have a dominant market share. In support of this claim, Unilever defined the relevant market as including all industrially produced ice cream as well as ice cream sold by craft trade. That is, in addition to the single-unit sales the market should also include ice cream sold in multi-unit packs as well as ice cream boxes intended to be served by the scoop.

An internal Unilever memo, obtained by the EC during a dawn raid, suggests that one of the conditions for an exemption would fail:

We must retain ownership of the cabinet particularly where distribution is performed by third parties in order to retain as far as possible through exclusivity contracts, sole brand supply to the fridge and, de facto, to the outlet.<sup>8</sup>

## Keeping score

Mars' first legal strike against Unilever took place in Ireland in 1990.<sup>9</sup> But a year later Unilever obtained an injunction against Mars; Unilever was thus allowed to exclude the new entrant's products from its freezers.<sup>7</sup> Undaunted by its defeat in the Irish court, Mars took its case to the European Commission.

If Mars manages to persuade the European Commission to outlaw freezer exclusivity, it will be one of the biggest coups in recent business history. Mars will have won the right to squat in the fridges that Unilever built: a home worth £20m in the UK alone.<sup>7</sup>

In September 1991 Mars filed two complaints with the European Commission (EC) against Unilever's actions in Germany, one regarding store exclusivity, one regarding freezer exclusivity. Mars argued that exclusivity was a 'prima facie infringement' of European competition laws.<sup>7</sup> In March 1992, the EC granted an interim decision against store exclusivity, allowing Mars to place products in all outlets, including Unilever's freezers. In its decision, the EC stated that Unilever's deals "substantially restrict access to the market" and that Mars "would suffer serious and irreparable damage" from it.<sup>10</sup> In December 1992, the EC reaffirmed the ruling that exclusivity agreements violate EU law.<sup>11</sup> Unilever appealed, but in February 1993 the European Court of Justice rejected the appeal in what concerned store exclusivity.<sup>10</sup> A Mars spokesman remarked that "the fact that the EC feels so strongly about outlet exclusivity augurs quite well for us on freezer exclusivity."

But it is not clear how much "bite" the Commission's decision had. In March 1995 the same body that stated that exclusivity "substantially restricts access to the market" was ready to concede that

the possibility remained open for Unilever to propose an alteration to its distribution arrangements for impulse ice cream in the Republic of Ireland which might be capable of being granted an exemption,<sup>12</sup>

seemingly a compromise between the EC decision and the Irish courts earlier ruling. As to Unilever, the concession in Ireland was to agree to allow retailers to purchase the freezer from Unilever, whereby exclusivity would be limited to the five years of the purchase period.

But peace did not last for very long. In October 1996, Mars was again complaining with the EC, this time claiming that the Irish deal had not been adhered to by Unilever (whereas the latter maintained that it had).<sup>13</sup> An EC statement in 1997 seemed to concur with Mars:

In the light of objections made in July 1993 by the Commission to this practice, Unilever had proposed a number of modifications to its distribution arrangements but the changes have not been effective in achieving their objectives of opening up the market.<sup>14</sup>

In January 1998, the European Commission ruled in favor of Mars, forcing Unilever to share its freezers. Unilever appealed. In October 2003, the European Court of First Instance sided with the Commission's 1998 decision: it denied Unilever's 1998 appeal.<sup>6</sup> Unilever appealed again.

In 2006, more than fifteen years after the “ice cream wars” started, the European Court of Justice (ECJ) found there were no valid legal grounds to appeal the ruling. The ECJ also ordered Unilever to pay legal costs in the case, which ran into millions of euros. Finally, the ECJ decision was not subject to appeal.<sup>15</sup>

## **From Ireland to the rest of Europe**

In parallel with the Ireland case, there were numerous other cases fought by Mars and Unilever across Europe, including the UK, Germany, France, Italy and Denmark. In some cases, Mars prevailed; in some other cases, Unilever prevailed. Strictly speaking, the EC decision pertained to the Irish case only. Its application to other countries would require the analysis of that country’s particular characteristics when it comes to the ice cream market.<sup>16</sup> For this reason, Unilever played down the impact of the EC’s decision regarding the Irish case:

The decision is specific to the Irish market and it cannot be ‘read across’ into other European markets.<sup>17</sup>

But the EC decision was bound to have an influence on the Mars-Unilever relationship outside of Ireland as well, even if not to the letter of the law. In 2008, Unilever reached an out-of-court settlement with Mars

to bring an end to all claims made by Mars concerning Unilever’s distribution arrangements for the sale of impulse ice cream.<sup>18</sup>

## Endnotes

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