

TO: PETER FREEMAN
CHAIRMAN
COMPETITION COMMISSION

FROM: OFFICE OF FAIR TRADING

14 December 2005

Review of undertakings following the 1994 MMC Monopoly Report on the Supply of Condoms in the United Kingdom

1 ISSUE

- 1.1 Under Section 88 (4) of the Fair Trading Act 1973 ('FTA')¹ the Office of Fair Trading ('OFT') has a duty to keep under review undertakings given as a consequence of a monopoly report by the Monopolies and Mergers Commission ('MMC').
- 1.2 Monopoly undertakings given under the FTA were initially given to the Secretary of State. In 2004 the majority of the undertakings, including the undertakings which are the subject of this advice, were transferred to the Competition Commission ('CC').² The OFT has a duty to advise the CC if we consider that, by reason of any change of circumstances, the undertakings should be varied, revoked or superseded by a new undertaking. This is the first occasion on which the OFT has provided advice on the review of a monopoly undertaking to the CC.
- 1.3 This advice concerns undertakings given by LRC Products Limited ('LRC'), now part of SSL International plc ('SSL'), relating to the

¹ The relevant sections of the Fair Trading Act 1973 are still in force by virtue of Schedule 24 of the Enterprise Act 2002.

² As a result of SI 2004/2081, schedule 1, part 2, paragraph 8 these undertakings were transferred from the Secretary of State for Trade and Industry to the Competition Commission as of 4 October 2004.

supply of condoms in the United Kingdom. These undertakings were given as a consequence of a MMC report in 1994.³

2 RECOMMENDATION

- 2.1 We recommend that the CC releases LRC from its undertakings.

3 BACKGROUND AND ASSESSMENT

- 3.1 The OFT has reviewed the undertakings as part of its programme of reviews of Orders and undertakings under section 88 of the FTA. Our report of the review, setting out our findings and explaining our recommendations in more detail, is attached.

The MMC report and undertakings

- 3.2 The MMC in 1994 found that LRC entered into agreements with some of the larger retailers and wholesalers of condoms in the UK whereby these customers agreed to stock only LRC condoms in return for financial benefits from LRC. The MMC concluded that these agreements were likely to weaken competition and reduce the choice of condoms for consumers. The MMC recommended that LRC be required not to enter into any agreements of this type.⁴
- 3.3 In June 1994, LRC gave undertakings to the Secretary of State for Trade and Industry that it would not enter into any agreements with condom wholesalers or retailers which would give the other party a material benefit in exchange for that party's undertaking to stock only LRC condoms, or not to stock the condoms of any other named supplier. LRC further undertook to put in place arrangements to ensure that its staff comply with this requirement.

³ MMC 1994, Contraceptive Sheaths: A report on the supply in the UK of contraceptive sheaths, Cm 2529.

⁴ MMC (1994), paragraphs 8.129 and 8.159

Summary of review findings

- 3.4 The review has found that the structure of the supply of condoms in the UK remains highly concentrated. SSL, the owner of LRC and the supplier of Durex brand condoms, has a share of supply to the retail sector of around 80 per cent. This share has remained reasonably stable over the past decade.
- 3.5 However, although the structure of supply has not materially changed since the MMC reported, the structure of the retail distribution channels through which condoms are sold to consumers has changed noticeably. In particular, more and more condoms, both in terms of overall numbers and number of brands, are being sold in national supermarket chains than was the case a decade ago. This is significant, as the buyer power of these retailers has resulted in reductions in both wholesale and retail prices for condoms in recent years. Indeed, information given to the OFT shows that since 1999-2000, wholesale prices for condoms have fallen by an average of almost 20 per cent, and in some cases by up to 50 per cent.
- 3.6 The OFT has not found any evidence that LRC has breached its undertakings. SSL is now only one of a number of condom suppliers stocked in large supermarket chains and high street pharmacies (retailers which account for at least two-thirds of condom sales in the UK). In many instances, considerable consumer choice is available both in terms of brand and type of condom.
- 3.7 The OFT considers it unlikely that without the undertakings in place there would be a reversion to past practice. This is for two reasons. First, the national supermarket chains and Boots the Chemist generally seek to offer consumers a choice of condoms, in terms of both brand and type. In these circumstances they are unlikely to accept exclusivity agreements which run counter to this desire. In addition, their relative buying strength makes it unlikely that SSL would be able to impose exclusivity agreements on them.
- 3.8 Secondly, to the extent that they have anti-competitive objects or effects, the practices addressed by the undertakings are prohibited

by Articles 81 and 82 of the EC Treaty and the Competition Act 1998 ('CA98'), which has come into force since the introduction of the undertakings. In the event of a breach of the prohibition, tough sanctions are available to the OFT, including financial penalties of up to 10% of the global turnover of an offending company.

Conclusions

- 3.9 Our examination of the changes in the supply of condoms in the UK indicates that the significant shift in buyer power between suppliers and retailers has resulted in declining prices. This represents a change in the circumstances of supply of condoms in the UK since the MMC reported. The OFT also considers that it is likely that the practices addressed by the undertakings could, in any case, be covered by CA98. In light of these findings the OFT considers that the undertakings are no longer necessary.
- 3.10 Using its powers under section 88(4) of the FTA the OFT recommends that the CC release SSL's subsidiary LRC from its undertakings in full.
- 3.11 The OFT will publish this advice and our report on our website, having excised commercial information, once the CC has announced its decision.