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Government restraints on competition

In a recent address to a Washington audience, Commissioner Mario Monti remarked that, on the basis of Article 86, the Commission had adopted a series of Directives to ensure the respect of competition rules by State owned undertakings. Directives require state owned undertakings to have transparent accounts enabling the Commission to identify the precise nature of their cost and revenue allocation as well as their financial relationship with the States controlling them. Decisions has also been addressed to States or local authorities whose legislation was, among other things, hampering sound competition between postal companies and mail preparation firms, was setting up discriminatory landing fees for locally established airline companies or was establishing discriminatory discounts on pilotage fees in some of Europe's most important ports.

Commission policies directed against government imposed monopolies or private bodies attempting to secure continued benefits from historic monopolies constitute only one of the cornerstones of action against undue government restraints. The Commission is also concerned by government actions that replace or strengthen private anti-competitive behavior. As the Chairman of the US Federal Trade Commission pointed out recently, it is a pyrrhic victory to break a cartel if its members successfully lobby for the authority to set prices collectively. The Court of Justice of the European Communities has, with this concern in mind, created a doctrine designed, in essence, to tackle certain types of state measures reinforcing cartels. It is apparent that classical antitrust rules are exclusively addressed to undertakings. Nevertheless, according to the Court, these antitrust rules on restraints of trade or monopolisation should be read in conjunction with the "loyalty clause" (Article 10 of the EC Treaty) obliging States to abstain from measures which jeopardise the attainment of the objectives of the Treaty. The Court has therefore concluded that States are prohibited from introducing measures which may deprive the antitrust rules of their "useful effect" by requiring or encouraging anti-competitive conduct, reinforcing the effects of such conduct, or delegating to private traders responsibility for taking key decisions affecting the economic sphere.

Airline Mergers

In the same address, Mr Monti referred to the trend in the airline industry towards acquisitions and mergers. From the Commission's point of view, no preference towards any specific institutional design or airline size should be given. It is for the market to find the optimum structure and for competition policy to make sure that liberalised markets remain accessible for competitors and that consumers can take full advantage of the benefits of liberalisation. In assessing acquisitions and mergers the key question to be answered is how much competition remains in the market. To answer it, the Commission looks both to the market shares of the parties and to barriers to new entrants. ■

PRICING POLICY (ARCHITECTS): THE BELGIAN ARCHITECTS CASE

Subject: Pricing policy
Associations of undertakings
Professional bodies

Industry: Architects
(Implications for other professions)

Parties: Belgian Architects' Association (Ordre des architects / Orde van architecten)

Source: Commission Statement IP/03/1500, dated 5 November 2003

(Note. The Commission's Statement of Objections, directed at the Belgian architects' fee scales, is the latest move in the Commission's campaign to extend the long arm of competition law to professional, in addition to commercial, activities. This is a specific case; more generally, the Commission is seeking cooperation from the professions in a review of professional practices in the light of competitiveness among professional firms.)

The Commission has sent the Belgian Architects' Association a warning that its recommended minimum fee scale could constitute a violation of European Community's competition rules. The Commission's Statement of Objections reflects the preliminary view of the Commission and does not prejudice the final outcome of the case. The Belgian Architects' Association now has two months to reply to the Commission's preliminary objections and can also ask for an oral hearing.

In the Commission's view, fixed or recommended fee scales can harm both the consumers and the professionals. It is highly doubtful whether these fee scales really contribute to guaranteeing a high level of quality. On the contrary, they can prevent consumers from finding the best match to their needs in terms of value for money. The professionals have no incentive to innovate and become cost efficient.

According to the Commission's preliminary view a recommended minimum fee scale, as established by the Belgian Architects' Association, may constitute an infringement of Article 81 of the EC Treaty for the following reasons. A recommended fee scale is likely to provide a price floor preventing efficient service providers from competing on price if their efficiency allows them to produce the service at lower cost. Price floors also protect less efficient competitors and reduce the incentive to improve quality and price of professional services.

The recommended fee scale lays down the architects' fees as a percentage of the value of the works realised by the entrepreneur. In the Commission's preliminary

view, fees charged for professional services should reflect the architect's skills, efficiency and his costs and perhaps his fame or notoriety and should not be dependent solely on the value of the works or the price of the entrepreneur. In any event, the architect should determine his fee independently of competitors and in agreement with the client only.

The Belgian Architects' Association may have abused its regulatory functions by adopting a rule whose object is the restricting of competition under the guise of a "deontological rule". The Association's fee scale dates back to 1967. This fee scale was never formally endorsed by the State. The recommended minimum fee scale is meant to apply to all architectural services provided in Belgium, regardless of whether the intervention of an architect is legally required or not.

According to the Commission's preliminary investigation the fee scale is frequently used in architects' contracts. The economic importance of architectural services in Belgium is considerable. In 2000, the turnover achieved in the provision of architectural and engineering services and related technical consultancy amounted to €4.4 billion. This corresponds to 15% of the turnover achieved in the Belgian construction sector.

Ten years after its first decision condemning the fixed tariffs for professional services in that case those provided by Italian customs agents, the Commission is disappointed to see that such minimum price agreements still persist. This is why it has now sent the Belgian Architects' Association a Statement of Objections informing it that its recommended minimum fee scale could constitute a violation of the European Community's competition rules and that a fine could be imposed.

In the context of the Commission's stocktaking exercise on professional rules, the Commission invited all the professions to examine fee scales and other restrictive regulations and to reconsider whether they were truly necessary to guarantee proper practice of the profession.

Recommended fee scales have already been scrutinised by the French competition authorities and by the Office of Fair Trading (OFT) in the United Kingdom. The French Competition Council prohibited the French Architects' Association from further elaborating and distributing fee scales. The OFT came to the conclusion that the Royal Institute of British Architects' (RIBA) indicative fee guidance could facilitate collusion. It then accepted the RIBA's new fee guidance based on historical information and the collation of price trends that did not provide a lead on the current year's prices.

Now that the Commission is taking up the case of the Belgian architects, it is also to be interpreted as a strong signal that similar rules in other countries should be reviewed as well. In his speech at the Liberal Professions Conference on 28 October, Commissioner Mario Monti encouraged professional associations to review their rules and warned them that "using antitrust instruments is always possible where necessary". ■

ABUSE OF A DOMINANT POSITION (LINERS): THE TACA CASE

Subject: Abuse of a dominant position

Industry: Liners; shipping

Parties: Parties to TACA (See the list in the text below)
Commission of the European Communities
European Council of Transport Users ASBL (Intervener)

Source: Judgment of the Court of First Instance, dated 30 September 2003, in Joined Cases T-191/98 and T-212-4/98, (Atlantic Container Line and Others v Commission); Court Press Release 78/03

(Note. In this case, the Court of First Instance set aside record fines totalling €273m imposed by the Commission for abuse of a collective dominant position on shipping companies forming a conference, the Transatlantic Conference Agreement or TACA. It was an odd case, inasmuch as the Commission Decision covered infringements of both Articles 81 and 82 of the EC Treaty. However, while no fine was imposed in respect of the restrictive agreements, heavy fines were imposed in respect of the abuse of a dominant position. The Court left intact the part of the Commission's Decision relating to the former and struck down the part relating to the latter. The report below sets out:
- the operative part of the contested Commission Decision;
- the Court's Ruling; and
- the Court Summary of the judgment.
The Court's judgment itself comprised a record-breaking 1400 paragraphs, a reflection of the complexity of the case and of the large number of pleas.)

Operative part of the contested Commission Decision

Article 1

The undertakings listed in Annex I have infringed the provisions of Article 85(1) [now Article 81(1)] of the EC Treaty, Article 53(1) of the EEA Agreement and Article 2 of Regulation EEC/1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America. The conditions of Article 85(3) of the EC Treaty, Article 53(3) of the EEA Agreement and of Article 5 of Regulation EEC 1017/68 are not fulfilled.

Article 2

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by fixing the amounts,

levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 3

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by agreeing the terms and conditions on and under which they may enter into service contracts with shippers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 4

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 1, 2 and 3 and are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreements referred to in Articles 1, 2 and 3.

Article 5

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce the dominant position of the Transatlantic Conference Agreement.

Article 6

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by placing restrictions on the availability and contents of service contracts.

Article 7

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 5 and 6 and are hereby required to refrain in future from any action having the same or a similar object or effect to the infringements referred to in Articles 5 and 6.

Article 8

In respect of the infringement of the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement referred to in Articles 5 and 6, the following fines are imposed: A.P. Møller-Mærsk Line, €27.5m; Atlantic Container Line AB, €6.88m; Hapag Lloyd Container Linie GmbH, €20.63m; P&O Nedlloyd Container Line Limited, €41.26m; Sea-Land Service Inc, €27.5m; Mediterranean Shipping Co, €13.75m; Orient Overseas Container Line (UK) Ltd, €20.63m; Polish Ocean Lines, €6.88m; DSR-Senator Lines, €13.75m; Cho Yang Shipping

Co Ltd €13.75m; Neptune Orient Lines Ltd, €13.75m; Nippon Yusen Kaisha, €20.63m; Transportación Maritima Mexicana SA de CV/Tecomar SA de CV, €6.88m; Hanjin Shipping Co Ltd, €20.63; Hyundai Merchant Marine Co Ltd, €18.56m.

The Court's Ruling

The Court hereby:
1. Annuls Article 5 of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - Trans-Atlantic Conference Agreement);
2. Annuls Article 6 of Decision 1999/243 in so far as it applies to mutual disclosure by the applicants of the availability and content of their individual service contracts;
3. Annuls Article 7 of Decision 1999/243 to the extent required by the annulment of Articles 5 and 6;
4. Annuls Article 8 of Decision 1999/243;
5. Dismisses the remainder of the applications;
6. Orders the applicants and the Commission each to bear their own costs;
7. Orders the European Council of Transport Users ASBL to bear its own costs.

Court Summary of the Judgment

The annulment is based partly on lack of evidence and infringement of the rights of the defence and partly on the immunity conferred by notification to the Commission. Further, the Court of First Instance has upheld the Commission's refusal to grant exemption to the agreement establishing a transatlantic liner conference (TACA).

A liner conference is a group of vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route and which operates under uniform or common freight rates. The Court of First Instance of the European Communities has today delivered a judgment which brings to an end a series of cases brought before it concerning the legality of the commercial practices of liner conferences in the light of the detailed rules for the application of the competition rules laid down in a 1986 Community regulation.

In 1994, 15 shipping companies initially party to an agreement concerning transatlantic liner services between northern Europe and the United States of America, the Trans-Atlantic Agreement (TAA), which was challenged by the Commission, entered into a new agreement establishing a liner conference, the Trans-Atlantic Conference Agreement (TACA) covering the same shipping trade. Two other companies, Hanjin and Hyundai joined the conference at the end of 1994 and in 1995. Amongst other provisions capable of infringing the Community competition rules, that agreement: fixed the rates for transatlantic maritime transport services themselves and for inland transport services provided as part of intermodal transport in the Community, set the terms and content of service contracts entered into with shippers and fixed the remuneration of freight forwarders in certain circumstances.

The Court has upheld both the Commission's finding that the TACA infringes the competition rules and its refusal to grant exemption to the member companies.

The TACA was notified to the Commission with a view to obtaining an exemption in respect of those provisions restricting competition. The Commission considered that the necessary requirements were not met and objected to it and required the member companies of the TACA to put an end to that first series of infringements (with the exception of the fixing of the maritime transport rate) without imposing a fine on them in that respect.

The Court has essentially upheld the Commission's finding that the restrictions in relation to service contracts constitute an abuse (the first abuse), but has set aside for lack of evidence and infringement of the rights of defence that part of the decision concerning the measures inducing competitors to join the conference (the second abuse).

The Commission considered that, between 1994 and 1996, the TACA parties had committed a second series of infringements constituting an abuse of a collective dominant position on the market for containerised liner shipping between northern Europe and the United States. The first abuse, according to the Commission, concerned certain restrictions on the availability and content of service contracts (in particular a prohibition on member companies entering into individual contracts, and restrictive clauses applied to individual service contracts from 1996, in particular the ban on multiple contracts and contingency clauses). The second abuse concerned measures seeking to induce potential competitors to join the TACA rather than take part in the transatlantic trade as independent lines.

The Commission penalised those two abuses and imposed fines on each of the member companies of the conference totalling €273 million, the highest amount ever imposed on undertakings in a collective dominant position. [See the list in Article 8 of the Commission's Decision, reproduced above.] The fines imposed in respect of the second abuse make up approximately 90% of the total amount.

The Court has confirmed the incompatibility of the practices which the Commission found constituted the first abuse, with the exception of the exchange of information between companies in the conference, which the Court did not find to be abusive since that information was published in the United States.

Furthermore, since the TACA had been notified to the Commission as imposing restrictions likely to constitute an abuse, the Court found that the rules laid down by the 1986 regulation relating to immunity apply, thereby protecting the undertakings from potential financial penalties. It therefore set aside the fines determined on the basis of that regulation.

As for the inland part of the contracts for transport services provided as part of intermodal transport, in respect of which that immunity does not apply, the Court found that the cooperation of the companies in question, and the legal uncertainty

over the finding of abuse and the potential penalties constitute mitigating circumstances which justify no fine being imposed.
Two types of inducement measure constitute the second abuse found by the Commission:
- those addressed specifically to particular competitors (for example, the disclosure of confidential information, the promise of market share and of immediate participation in existing conference service contracts) and
- more general ones addressed to all competitors (the conclusion of service contracts at advantageous rates and the reservation of certain service contracts).

The Court concluded that the Commission had not demonstrated that the specific measures, rather than particular commercial considerations, had induced the only two shipping companies who joined the conference between 1994 and 1996, Hanjin and Hyundai, to become members of the conference. The Court further held that the Commission had infringed the rights of the defence by using documents in support of its complaints concerning the specific measures without giving the TACA parties the opportunity to comment on the interpretation which the Commission intended to place on them. Consequently, since those documents were the only evidence of those specific measures, the Court found that those measures were not validly proved.

The Court held that the Commission had not shown to the requisite legal standard that the general measures of inducement constituted an inducement since they had not in themselves resulted in any competitors in fact joining.

The Court therefore annulled the Commission's Decision, in so far as it found that the TACA parties had abusively altered the structure of the market, together with the fines imposed in respect of the second abuse. ■

The Altair / ENEL Case

In Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, the Court of Justice of the European Communities held, on 11 September 2003, that Articles 81, 82 and 85 EC and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that they do not preclude a national rule providing for the levy of surcharges on the price of electricity such as those at issue in the main proceedings when the electricity is used in an electro-chemical process and that Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community is not capable of preventing a Member State from levying such surcharges. The applicants in the case had claimed that the imposition of the surcharge had been an abuse of a dominant position on the market.

EXEMPTION (TECHNOLOGY LICENSING): COMMISSION PROPOSALS

Subject: Exemption

Industry: Most industries (involved in technology transfer licensing)

Source: Commission Statement IP/03/1341, dated 3 October 2003

(Note. The Commission's plan to replace the Technology Transfer regulation is now available for comment: see the website reference in this report.)

The Commission is seeking comments on changes to the competition rules applicable to the licensing of patents, know how and software copyright. Technology transfer licensing agreements currently benefit from block exemption if certain conditions are met. The Commission proposes a number of changes to the block exemption regulation designed to reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding significant market power. The proposals complement the modernisation of the European Community's competition rules coming into force in May 2004.

Licensing is important for economic development and consumer welfare as it helps disseminate innovations and allows companies to integrate and use complementary technologies and capabilities. However, licensing agreements can also be used for anti-competitive purposes, for instance when two competitors use a license agreement to divide markets between them, or when an important licensor excludes competing technologies from the market by requiring its licensees to use only the licensed technology. Competition is one of the main driving forces of innovation and dissemination and it is therefore important to find the right balance between protecting competition and protecting intellectual property rights.

Licensing agreements which distort competition fall under the Community's competition rules, in particular Article 81 of the EC Treaty. Specific rules on these agreements are contained in the 1996 block exemption Regulation. That regulation exempts agreements fulfilling certain requirements, saving them from individual scrutiny by the Commission, the courts and national competition authorities. It is, however, somewhat rigid in effect.

The proposed new rules will replace the current Regulation. They contain a more economic approach and leave companies more freedom to devise their licensing agreements according to their commercial needs. The new rules will have a hardcore list, clear and short in presentation, of restrictions which will normally be prohibited. The new rules will provide exemptions for parties below certain market share thresholds: 20% for licensing agreements between competitors and 30% for agreements between non-competitors. For those cases not covered by exemption a set of guidelines will explain the application of Article 81 to individual cases.

The Commission invites all interested parties to send their comments on the proposed new rules by 26 November 2003. The draft texts are published in the Official Journal (C 235 of 1 October). They are also available on the internet at the following address:

http://europa.eu.int/comm/competition/general_info/consultation.html

Article 81 (1) of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Under Article 81(3) an anti-competitive agreement may be exempted from the prohibition of Article 81(1) if the positive effects brought about by the agreement outweigh its negative effects. The Commission can exempt categories of agreements of the same nature and has done so in 1996 for certain licensing agreements by the current technology transfer block exemption Regulation EC/240/96 (hereafter the TTBE) which covers the licensing of patent and know how rights. In December 2001, the Commission adopted a mid-term review Report as required by the TTBE. This was taken as an opportunity to start a thorough review of its policy towards intellectual property licensing agreements.

Most of 2002 was spent consulting stakeholders on the review report. Since then the Commission has been working out the details of a new draft block exemption regulation and a set of guidelines. The draft texts for a new block exemption regulation and guidelines were adopted by the Commission for consultation purposes just before the summer break. They were discussed with Member States and are now published for consultation of industry and consumer organisations and other interested third parties. This public consultation will be concluded before the end of November. The objective is to have the revised rules in place before the application of the new antitrust Modernisation regime in May 2004.

The new rules will be firmly aligned on the new generation of block exemption regulations and guidelines for distribution agreements and horizontal co-operation agreements. This was also requested by many of those who commented on the Evaluation Report of December 2001 and will have the following advantages. The block exemption regulation will have only a "black" list. By doing away with the "white" and "grey" lists of the current regulation, rigidity is avoided and the scope of the regulation extended and made more flexible: whatever is not explicitly excluded from the block exemption will now be exempted. The scope of the new rules is also extended by covering all types of technology transfer agreements for the production of goods or services. The new regulation is to cover not only patent and know-how licensing but also software copyright licensing, as requested by many of those who commented on the Evaluation Report. Where the Commission does not have the powers to adopt a block exemption regulation, as for patent pools and for copyright licensing in general, the guidelines will give clear guidance as to future enforcement policy. The new rules will also make a clear distinction between licensing between competitors and licensing between non-competitors. In conclusion, these new rules will mean an important improvement compared to the current TTBE in terms of clarity, scope, and in protecting competition and innovation. ■

The "Steel Beams" Cases

In Case C-176/99P, *Arbed v Commission*, the Court of Justice annulled in its entirety a judgment of the Court of First Instance, which had upheld a Commission Decision finding an infringement and imposing a fine. But the Court dismissed six of the eight appeals brought by steel undertakings and their trade association, Eurofer, which had been found guilty of engaging in a cartel. It partially annulled the Commission Decision relating to Siderúrgica Aristrain.

Steel beams are essential components in steel structures. By a decision adopted in 1994, the Commission found that 17 European steel undertakings and their trade association Eurofer had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the Community market for steel beams. The Commission then imposed on 14 of those undertakings fines of over €104m.

The principal ground of ARBED's appeal was that the Commission had failed to differentiate the parent company from its subsidiary in the procedure following the Statement of Objections. The Commission took the decision against ARBED SA as the parent company, without first informing it of its intention or its reasoning and without giving it an opportunity to make known its point of view.

The Court of Justice pointed out that, in all proceedings in which financial sanctions (fines or penalties) may be imposed, observance of the rights of the defence is a fundamental principle of Community law. That principle requires, in particular, the inclusion, in the Statement of Objections addressed by the Commission to an undertaking on which it intends to impose a penalty for infringement of competition rules, of the essential factors taken into consideration against that undertaking so that it may submit its arguments effectively. The Statement of Objections must specify unequivocally the legal person on whom a fine may be imposed and must be addressed to that person.

Similar considerations applied to the Siderúrgica Aristrain case, as regards the calculation of the fine. The Court observed that the anti-competitive conduct of an undertaking could be attributed to another undertaking where the former had not determined independently its own market conduct but carried out, in all material respects, the instructions given to it by the other undertaking, having regard in particular to the economic and legal links between them. The Court noted, however, that the Commission decision states no reasons in that regard and even contains a contradiction. The Court of First Instance therefore erred in law in upholding the position adopted by the Commission. The Court found that the Commission decision had to be annulled in respect of the surplus of the fine, that is to say, the amount which was calculated on the basis of the second company's turnover but payment of which was claimed from the first.

Source: Court Press Release CJE/03/82, dated 2 October 2003

EXCLUSIVITY (ICE CREAM): THE VAN DEN BERGH CASE

Subject: Exclusivity
Dominant position
Market share
Market entry

Industry: Ice cream
(Some implications for other industries)

Parties: Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd (HB)
Commission of the European Communities
Masterfoods Ltd (intervener)
Richmond Frozen Confectionery Ltd, formerly Treats Frozen Confectionery Ltd (intervener)

Source: Judgment Of The Court Of First Instance, dated 23 October 2003. in Case T-65/98 (*Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd v Commission of the European Communities, supported by Masterfoods Ltd and by Richmond Frozen Confectionery Ltd, formerly Treats Frozen Confectionery Ltd*)

(Note. On the face of it, this case is similar to the earlier case, Langnese-Iglo, involving the situation in which the manufacturer of ice cream supplies freezers for retail shops on condition that the shop sells exclusively the products of that manufacturer alone. But there is in fact a difference here. As the Court points out in paragraph 79 of its judgment, "unlike the clauses in the supply agreements at issue in the judgments in Langnese-Iglo v Commission and Schöller v Commission, which required retailers in Germany to sell in their outlets only products purchased directly from Langnese-Iglo and Schöller companies, the exclusivity clause in the present case does not preclude retailers from selling brands of ice creams other than HB, provided that the freezers made available by HB are used exclusively for its own products". In other words, there is still a degree of exclusivity; and the retailer is under some pressure. The questions for the Court are therefore whether the Commission has correctly quantified the extent to which that exclusivity forecloses the market and whether the foreclosure so quantified amounts to an infringement of the rules on competition. On the facts of the case, the Court answered both questions in the affirmative, upheld the Commission's Decision and dismissed HB's application.

As often happens these days, the judgment of the Court of First Instance is long and detailed. The report below therefore concentrates on the major problems which the Court had to consider. However, among the subsidiary points forming the second half of the Court's judgment, and necessarily omitted from the report below, there is a brief reference to the applicant's appeal to "the rule of reason". In paragraphs 106 and 107 of its judgment, the Court gave short shrift to this

appeal: "the Court would point out that the existence of such a rule in Community competition law is not accepted".

One further point of interest in the latter half of the judgment concerns the relationship between the doctrine of exclusivity and the doctrine of "essential facilities". Although Masterfoods were seeking access to the market, they were not seeking access to essential facilities, in the sense in which this expression is used in the Bronner case. "Furthermore," as the Court says in Paragraph 161, "HB's reference to the Opinion of Advocate General Jacobs in the judgment in Bronner, is irrelevant in the present case because, as the Commission correctly submits in its pleadings, it did not claim in the contested decision that HB's freezer cabinets were an essential facility, which is the issue examined in his Opinion, and it is not necessary for HB to transfer an asset or to conclude contracts with persons which it has not selected in complying with the contested decision".)

Judgment

Facts

1. This action is for the annulment of 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 Ltd) (OJ 1998 L 246, p. 1, hereinafter the contested decision).

2. Van den Bergh Foods Ltd (hereinafter HB), a wholly-owned subsidiary of Unilever plc, is the principal manufacturer of ice-cream products in Ireland, particularly single-wrapped ice creams for immediate consumption (hereinafter impulse ice-creams). For a number of years HB has supplied ice-cream retailers with freezer cabinets, in which it retains ownership, and which are supplied free of charge or at a nominal rent, provided that they are used exclusively for HB ice creams (hereinafter the exclusivity clause). Pursuant to the standard terms of the freezer agreements, they can be terminated at any time on two months' notice on either side. HB maintains the cabinets at no cost to the retailer, save in cases of negligence.

3. Masterfoods Ltd (hereinafter Mars), a subsidiary of the US corporation Mars Inc., entered the Irish ice-cream market in 1989.

4. In the summer of 1989 many retailers with freezer cabinets supplied by HB began to stock and display Mars products. This led to a demand by HB that they comply with the exclusivity clause.

5. In March 1990, Mars brought an action in the Irish High Court seeking, inter alia, a declaration that the exclusivity clause was void under domestic law and under Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC). In a separate cross action HB claimed injunctions restraining Mars from inducing or procuring breaches of the exclusivity clause.

6. In April 1990, the High Court granted an interlocutory injunction in favour of HB.

7. On 28 May 1992, the High Court gave judgment in the actions brought by Mars and HB. It dismissed the action brought by Mars, and granted HB a permanent injunction restraining Mars from inducing retailers to stock Mars ice cream in freezer cabinets belonging to HB.

8. Mars appealed against that judgment to the Irish Supreme Court on 4 September 1992. The Supreme Court decided to stay proceedings and to refer to the Court of Justice three questions for a preliminary ruling (see paragraph 30 below). That reference was the subject of the judgment of the Court of Justice in Case C-344/98, *Masterfoods and HB*. At the date of the present judgment, the proceedings before the Supreme Court are still pending.

9. In parallel to those proceedings before the Irish courts, on 18 September 1991 Mars lodged a complaint with the Commission under Article 3 of Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The complaint related to the provision by HB, to large numbers of retailers, of freezer cabinets to be used exclusively for HB products.

10. On 22 July 1992, Valley Ice Cream (Ireland) Ltd also lodged a complaint against HB with the Commission.

11. On 29 July 1993, the Commission issued a statement of objections to HB in which it concluded that HB's distribution arrangements infringed Articles 85 and 86 of the Treaty (hereinafter the 1993 statement of objections).

12. Following negotiations with the Commission, HB, while contesting the Commission's view, proposed changes to its distribution arrangements, with a view to qualifying for an exemption under Article 85(3) of the Treaty. Those changes were notified to the Commission on 8 March 1995 and in a press release of 10 March 1995 the Commission stated that, at first sight, the new distribution arrangements might enable HB to obtain an exemption. On 15 August 1995 a notice pursuant to Article 19(3) of Regulation 17 was published in the Official Journal of the European Communities (OJ 1995 C 211, p. 4).

13. On 22 January 1997 the Commission sent HB a new statement of objections in which it expressed the view that the changes had not achieved the expected results of free access to sales outlets (hereinafter the 1997 statement of objections). HB replied to those objections.

14. On 11 March 1998 the Commission adopted the contested decision.

The contested decision

15. In the contested decision the Commission states that HB's distribution agreements containing the exclusivity clause are incompatible with Articles 85

and 86 of the Treaty. It defines the relevant product market as the market for single-wrapped items of impulse ice-cream and the relevant geographic market as Ireland (recitals 138 and 140). It states that HB's position on the relevant market is particularly strong, as is shown by its market share over many years (see paragraph 21 below). That strength is further illustrated by the degree of both numeric (79%) and weighted distribution (94%) of the relevant HB products during August and September 1995 and by the strength of the brand and the breadth and popularity of its range of products. HB's position on that market is further reinforced by the strength of Unilever's position, not only on the other ice-cream markets in Ireland (take-home and catering), but also in the international ice-cream markets and the markets for frozen foods and consumer products generally (recital 141).

16. The Commission observes that the network of HB's distribution agreements relating to freezer cabinets installed in outlets has the effect of restricting the ability of retailers who are parties to those agreements to stock and offer for sale in their outlets impulse products from competing suppliers, in circumstances where the only freezer cabinet or cabinets for the storage of impulse ice-cream in place in their outlets have been provided by HB, where the HB freezer cabinet or cabinets is or are unlikely to be replaced by a cabinet owned by the retailer and/or supplied by a competitor, and where it is not economically viable to allocate space to the installation of an additional cabinet. It considers that the effect of this restriction is that the competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market (recital 143). The Commission did not take into consideration the restrictive effect of each individual agreement, but rather the effect produced by the category of agreements fulfilling the abovementioned conditions and constituting an identifiable part of the network of HB's freezer cabinet agreements as a whole. According to the Commission, the assessment of the restrictive effect of that part of HB's network then applies equally to each of the agreements comprising that part. The assessment of this restrictive effect was made against the background of the effect of all similar networks of freezer cabinet agreements operated by other ice-cream suppliers in the relevant market, as well as in the light of any further relevant market conditions (recitals 144 and 145).

17. The Commission then quantified the restrictive effect of HB's distribution agreements in order to show their significance. It observes that the restrictive effect of the networks of agreements for the supply of freezer cabinets reserved exclusively for the supplier's products are the result of the space constraints inevitably experienced by retail outlets. The average number of cabinets in place in outlets is 1.5, according to the survey carried out by Lansdowne Market Research Ltd in 1996 (hereinafter the Lansdowne survey), while the retailers consider that the optimal number of freezer cabinets to have in place in an outlet at the height of the season would be 1.57 (recital 147).

18. The Commission states that only a small proportion of retail outlets in Ireland, 17% according to the Lansdowne survey, have freezer cabinets which are not subject to an exclusivity clause. It maintains that those outlets may be referred to as open outlets, in the sense that retailers are free to stock in them the impulse

ice-cream of any supplier (recital 148). As regards the other outlets, 83% according to the Lansdowne survey, in which the suppliers have installed freezer cabinets, the Commission considers that other suppliers cannot have direct access to them for sale of their products without first overcoming substantial barriers. It submits that newcomers to the outlet are foreclosed from them and that although this foreclosure is not absolute, in the sense that the retailer is not contractually precluded from selling other suppliers' products, the outlet can be said to be foreclosed in so far as entry thereto by competing suppliers is rendered very difficult (recital 149).

19. The Commission finds that in some 40% of all outlets in Ireland the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet has or have been provided by HB (recital 156). It observes that a supplier who wishes to gain access for the sale of his impulse ice-cream products to a retail outlet (that is, a new entrant to the outlet) in which at least one supplier-exclusive freezer cabinet is in place can only do so if that outlet has a non-exclusive cabinet ... or if he can persuade the retailer either to replace an *in situ* supplier-exclusive freezer cabinet or to install an additional freezer cabinet alongside the *in situ* supplier-exclusive cabinet/s (recital 157). It considers (recitals 158 to 183), on the basis of the Lansdowne survey, that it is unlikely that retailers will adopt one or other of those measures if they have one (or more) freezers supplied by HB and concludes that 40% of the outlets in question are de facto tied to HB (recital 184). Other suppliers are therefore foreclosed from access to those outlets, contrary to Article 85(1) of the Treaty.

20. The contested decision also finds that the agreements containing the exclusivity clause cannot be exempted under Article 85(3) of the Treaty, as they do not contribute to an improvement in the distribution of the products (recitals 222 to 238), do not allow consumers a fair share of the resulting benefit (recitals 239 and 240), are not indispensable to the attainment of those benefits (recital 241) and afford HB the possibility of eliminating a substantial part of competition on the relevant market (recitals 242 to 246).

21. As regards the application of Article 86 of the Treaty, the Commission takes the view that HB has a dominant position on the relevant market, in particular because it has for a long time had a share in volume and value of over 75% of that market (recitals 259 and 261).

22. The Commission states that HB abuses its dominant position in the relevant market ... in that it induces retailers ... who do not have a freezer cabinet for the storage of impulse ice-cream either procured by themselves or provided by another ice-cream supplier than HB to enter into freezer-cabinet agreements subject to a condition of exclusivity and that the inducement takes the form of an offer to supply the freezer cabinets to retailers, and to maintain them, at no direct charge to the retailer (recital 263).

23. By the contested decision the Commission:
- declares that the exclusivity clause in the freezer-cabinet agreements concluded between HB and retailers in Ireland, for the placement of cabinets in retail outlets

which have only one or more freezer cabinets supplied by HB for the stocking of single-wrapped items of impulse ice-cream, and not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than HB, constitutes an infringement of Article 85(1) of the EC Treaty (Article 1 of the operative part);
- rejects the request by HB for an exemption of the exclusivity clause described in Article 1 pursuant to Article 85(3) of the Treaty (Article 2 of the operative part);
- declares that HB's inducement to retailers in Ireland not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than HB, to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice-cream, and to maintain the cabinets, free of any direct charge, constitutes an infringement of Article 86 of the Treaty (Article 3 of the operative part);
- requires HB immediately to cease the infringements set out in Articles 1 and 3, and to refrain from taking any measure having the same object or effect (Article 4 of the operative part);
- requires HB, within three months of notification of the contested decision, to inform retailers with whom it currently has freezer-cabinet agreements constituting infringements of Article 85(1) of the Treaty, as described in Article 1, of the full wording of Articles 1 and 3, and to notify them that the exclusivity provisions in question are void (Article 5 of the operative part).

[Paragraphs 24 to 40 concern the procedure after the Commission's Decision.]

Law

41. In support of its action for annulment HB raises seven pleas in law: first, manifest errors of assessment of the facts, resulting in errors of law; second, infringement of Article 85(1) of the Treaty; third, infringement of Article 85(3) of the Treaty; fourth, infringement of Article 86 of the Treaty; fifth, infringement of the right to property, by failing to observe general principles of law and Article 222 of the EC Treaty; sixth, infringement of Article 190 of the EC Treaty (now Article 253 EC); and, seventh, failure to observe fundamental principles of Community law and infringement of essential procedural requirements. The Court will examine the first and second pleas together.

The first and second pleas: manifest errors of assessment of the facts and infringement of Article 85(1) of the Treaty

[Paragraphs 42 to 74 set out the parties' arguments]

Findings of the Court

75. In its first two pleas, HB complains that the Commission committed a number of manifest errors in analysing the existence and extent of foreclosure of the relevant market resulting from the distribution agreements in question. It submits in particular that the Commission, by materially overestimating the degree of market foreclosure, infringed Article 85(1) of the Treaty.

76. HB challenges, more specifically, the Commission's principal finding in the contested decision that 40% of sales outlets in Ireland are de facto tied to HB by the exclusivity clause and that access to those outlets is therefore foreclosed to other suppliers (see in particular recitals 143, 156 and 184). It submits that this conclusion is fundamentally wrong in law and in fact, as the Commission has not correctly applied the legal test for establishing whether the relevant market is foreclosed. HB complains that the Commission made no distinction between, on the one hand, retailers who are contractually precluded from stocking other suppliers' ice creams and, on the other hand, those who are free to act in that way and have available space for that purpose, but who decide, using their own business judgment, not to do so. HB considers that retailers freely choose to stock its ice creams in particular because of the quality of its products. It submits that the fact that other manufacturers find it difficult to establish themselves on the relevant market is not due to the exclusivity clause but to the fact that their ice creams are less attractive to retailers and consumers.

77. It is apparent from the contested decision that the Commission examined not only the provisions of HB's distribution agreements, which do not formally preclude retailers from stocking other suppliers' ice creams in their sales outlets, but also the application of those agreements in the relevant market and the commercial options actually open to retailers pursuant to those agreements. After analysing the possibilities of persuading a retailer to stock the ice creams of a new entrant on the relevant market, the Commission considered that in respect of 40% of sales outlets - namely those having only freezer cabinets supplied by HB in which to stock ice creams and which do not therefore have either their own freezer or freezers provided by other ice-cream manufacturers - it was unlikely that retailers would take the necessary steps to replace HB freezers by their own freezer or by a freezer supplied by a competing manufacturer or that they would provide space in which to install an additional freezer. It concluded from this that the exclusivity clause in the HB distribution agreements in fact operated as an outlet exclusivity in those 40% of sales outlets in the relevant market and that HB had contributed materially to a foreclosure of that market contrary to Article 85(1) of the Treaty.

78. The views of the parties differ as to the correctness of the Commission's factual analysis of the particular features of the relevant market in the contested decision and of its finding, based on that analysis, that the exclusivity clause infringes Article 85(1) of the Treaty.

79. It must also be pointed out that despite the highly detailed arguments submitted in their written pleadings and at the hearing with regard to the facts of the present case and the conclusions to be drawn from them, the parties do not really disagree on various features of the relevant market, and particularly the following:

- impulse ice-creams must be stored at a low temperature and therefore in a freezer cabinet in the retailer's premises;
- in Ireland and throughout Europe, manufacturers and distributors of ice creams generally adopt the practice of supplying freezers to retailers on the basis of an

exclusivity clause. Owing to the exclusivity clause, a retailer who has one or more HB freezers only and who wishes to sell another brand of ice cream must either replace the HB freezer or freezers or install an additional freezer;
- unlike the clauses in the supply agreements at issue in the judgments in *Langnese-Iglo* v *Commission* and *Schöller* v *Commission*, which required retailers in Germany to sell in their outlets only products purchased directly from Langnese-Iglo and Schöller companies, the exclusivity clause in the present case does not preclude retailers from selling brands of ice creams other than HB, provided that the freezers made available by HB are used exclusively for its own products;
- HB has long held the position of market leader in Ireland for impulse ice-creams. Its product range in Ireland is very popular and commercially very successful. It has acquired that position following considerable investment in the development and promotion of a full range of ice creams, which enjoy a high degree of brand recognition in Ireland;
- in accordance with the provisions of the HB distribution agreements, retailers who have entered into a freezer supply agreement may terminate that agreement at any time on giving two months notice. It is common ground that in practice HB does not enforce that period of notice on retailers who wish to terminate the agreement more quickly or with immediate effect;
- for the majority of retailers in Ireland, impulse ice-creams are a marginal product (in that they represent merely a small percentage of their turnover and profit) which is sold seasonally. Impulse ice-creams compete in the outlets for selling space, with a number of other products (whether or not impulse products);
- HB is part of the Unilever group. The companies in that group are the principal suppliers of ice creams in most of the Member States. In the impulse ice-cream sector, they are the market leader in several Member States.

80. The Court observes, as a preliminary point, that the exclusivity clause does not require retailers to sell only HB products in their sales outlets. Consequently, that clause is not, in formal terms, an exclusive purchasing obligation whose object is to restrict competition on the relevant market. The Court must therefore first examine whether the Commission has adequately proved, in the specific circumstances of the relevant market, that the exclusivity clause relating to freezer cabinets in reality imposes exclusivity on some sales outlets and whether the Commission correctly quantified the degree of that foreclosure. The Court must then ascertain, as appropriate, whether the degree of foreclosure is sufficiently high to constitute an infringement of Article 85(1) of the Treaty. Judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see, to that effect, Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 62; Case C-225/91, *Matra* v *Commission*, paragraphs 23 and 25; Case T-7/92, *Asia Motor France and Others* v *Commission*, paragraph 33).

81. The assessment in the contested decision of the degree of foreclosure of the relevant market is principally based on information and statistical data contained

in the Lansdowne survey. Moreover, the decision often refers to a survey of the relevant market commissioned by HB and completed in 1996 by Behaviour & Attitudes Ltd, a market research firm, (hereinafter the B & A survey) and a survey carried out in 1996 by Rosslyn Research Ltd for Mars (hereinafter the Rosslyn survey). Those surveys contain two types of information: first, purely factual information relating to the number of sales outlets in Ireland, the number of freezer cabinets per sales outlet and the calculation of the number of cabinets belonging to retailers or supplied by ice-cream manufacturers and, second, evaluations of statistical data supplied in a survey of a representative sample of retailers in Ireland. The Commission's finding in recital 156 of the contested decision is based on an analysis of the information and relevant data from those surveys, its conclusion being that in 40% of sales outlets in the relevant market the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet had been provided by HB (see recitals 87 to 125 and 146 to 156 of the contested decision). The parties do not contest the overall correctness of that figure and, in its observations on the 1997 statement of objections, HB confirmed that it accepted that figure.

82. When examining the correctness of the Commission's assessment of the existence and degree of market foreclosure, the Court cannot confine itself to looking at the effects of the exclusivity clause, considered in isolation, referring only to the contractual restrictions imposed by HB's distribution agreements on individual retailers.

83. In order to determine whether HB's exclusive distribution agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, in accordance with the case-law, to consider whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue, show that those agreements cumulatively have the effect of denying access to that market to new competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements cannot impair competition within the meaning of Article 85(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is then necessary to assess the extent to which the agreements at issue contribute to the cumulative effect produced, on the basis that only those agreements which make a significant contribution to any partitioning of the market are prohibited (Case C-234/89, *Delimitis*, paragraphs 23 and 24, and Case T-7/93, *Langnese-Iglo* v *Commission*, paragraph 99).

84. It follows that, contrary to HB's submission, the contractual restrictions on retailers must be examined not just in a purely formal manner from the legal point of view, but also by taking into account the specific economic context in which the agreements in question operate, including the particular features of the relevant market, which may, in practice, reinforce those restrictions and thus distort competition on that market contrary to Article 85(1) of the Treaty.

85. In that regard, it must be remembered that the exclusivity clause in HB's distribution agreements was part of a set of similar agreements concluded by

manufacturers on the relevant market and was an established practice not only in Ireland but also in other countries (see paragraph 79 above).

86. Thus, HB does not dispute that in 1996 around 83% of retail shops in Ireland had freezers supplied by a manufacturer and were subject to conditions similar to those of the exclusivity clause. The practical consequence of that network of agreements is that ice-cream manufacturers which do not have a freezer cabinet installed in one or other of those 83% of outlets are unable to gain direct access to them in order to sell their products unless the retailer either replaces an existing cabinet with his own cabinet or a cabinet supplied by the new supplier, or installs another cabinet of his own or one belonging to the new supplier. Without infringing the terms on which the freezer cabinet in question is supplied, a retailer cannot use it to stock ice cream from another manufacturer alongside those of the supplier of the cabinet, even if there is a demand for those other brands. It follows that only 17% of outlets had freezer cabinets belonging to the retailer and, consequently, had capacity to stock ice cream from any supplier. Furthermore, according to the Lansdowne survey, 61% of freezer cabinets supplied by an ice-cream manufacturer on the relevant market come from HB, 11% from Mars, 9% from Valley and 8% from Nestlé (see recital 88 of the contested decision). According to the Rosslyn survey, 64% of freezer cabinets supplied by an ice-cream manufacturer on the relevant market come from HB, 14% from Mars and 4% from Valley (see recital 107 of the contested decision).

87. It is apparent from the file that the outlets which are the most important for the sale of impulse ice-cream are generally small in area and have limited space (see recital 43 of the contested decision). The Court finds that HB's argument referred to in paragraph 47 above, namely that the Commission overestimated the space constraints faced by retailers, cannot be accepted. Even if, as HB submits in its written pleadings, the number of freezers in Ireland increased by around 16% between 1991 and 1996 that does not mean that when the contested decision was adopted there were no such constraints. The legality of the contested decision must be assessed by reference to the facts existing when it was adopted. The Court observes that HB does not dispute the Commission's finding that in 1996 (see recital 147), that is to say just after the increase in the number of freezers in Ireland on which HB relies and two years before the contested decision was adopted, the optimal number of freezers necessary in an outlet at the height of the season had almost been achieved. Furthermore, according to the Lansdowne survey, 87% of retailers consider that it is not economically viable to allocate space to the installation of an additional freezer (see recital 97 of the contested decision).

88. Furthermore, it cannot be denied that the relevant product market is characterised by the need for each retailer to have at least one freezer - either owned by him or supplied by an ice-cream manufacturer - in order to stock and display ice creams (see paragraph 79 above). Consequently, the decision that a retailer who sells products for immediate consumption, such as confectionery, crisps and carbonated drinks, has to take is different where, on the one hand, an ice-cream manufacturer offers to sell him its products, as a replacement or supplement to an existing range, and, on the other hand, where a similar offer is

made by a manufacturer of other products, such as cigarettes or chocolates, which do not require a freezer cabinet but normal shelf space. A retailer cannot simply stock a new range of ice creams alongside other existing products for a trial period in order to establish whether there is sufficient demand for that range. He must first of all take a business decision as to whether the investment, risks and other disadvantages associated with the installation of a freezer or an additional freezer, including the displacement and decrease in the sales of other brands of ice cream and other products, will be outweighed by additional profit. It follows that a rational retailer will allocate space to a freezer in order to stock ice cream of a particular brand only if the sale of that brand is more profitable than the sale of impulse ice-creams of other brands and of other products for immediate consumption.

89. The Court finds that, in the circumstances set out in particular in paragraphs 85 to 88 above, the provision of a freezer without charge, the evident popularity of HB's ice cream, the breadth of its range of products and the benefits associated with the sale of them are very important considerations in the eyes of retailers when they consider whether to install an additional freezer cabinet in order to sell a second, possibly reduced, range of ice cream or, *a fortiori*, to terminate their distribution agreement with HB in order to replace HB's freezer cabinet either by their own cabinet or by one belonging to another supplier, which would, in all probability, be subject to a condition of exclusivity.

90. Moreover, HB has held a dominant position on the relevant market for several years. When the contested decision was adopted it had an 89% share of the relevant market, both in volume and in value, the remainder being shared between several small suppliers. That dominant position is also illustrated by the high degree of recognition of the HB brand and the size and popularity of its product range in Ireland. The Court considers that the Commission, when assessing the effects of the exclusivity clause on the relevant market, could legitimately take into account the fact that HB held a dominant position on it in order to assess the conditions prevailing on that market and that the assessment was not, contrary to HB's submission, distorted. It is settled law that the finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned (see Case 322/81, *Michelin* v *Commission*, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports and Others* v *Commission*, paragraph 37).

91. Consequently, the Commission, in taking into consideration the popularity of HB's ice creams and its position on the relevant market, is not penalising it for its legitimate business success. It has merely identified the effective dependence of retailers which results from the presence in the sales outlets of freezer cabinets supplied by HB, the dominant position of HB on the relevant market, the popularity of its product range, the constraints associated with the lack of space characterising typical sales outlets, the disadvantages and risks associated with stocking a second range of ice cream, as features that all form part of the economic context of the present case.

92. The Court finds that the effect of the measures taken by HB in order to ensure compliance with the exclusivity clause is to cause retailers to act differently in regard to its products than they do in regard to the ice creams of other brands and in a way which is liable to distort competition in the relevant market. Those effects are clearly shown by the fact that the retailers do stock ice creams of other brands alongside those of HB, in the same freezer, whenever they consider that they are free to do so.

93. It is apparent from the file and from the contested decision (see recital 48) that after its entry onto the relevant market in 1989 Mars gained a share of it, but that the reaction of HB, and its insistence that retailers complied with the exclusivity clause, reversed that development. Following the injunction against Mars granted by the High Court in 1990, which prohibited it from inducing retailers to stock its ice creams in HB freezers, the numeric distribution of its ice creams for immediate consumption in Ireland fell from 42% to less than 20%. This fact in itself indicates that there was a demand on the relevant market for products manufactured by HB's competitors and that the exclusivity clause does have a bearing on the ability of its competitors to penetrate that market and establish themselves on it.

94. The B & A survey also shows that a significant proportion [...]% (more than 35%) of retailers would be prepared to stock a wider range of products if the exclusivity clauses no longer existed in the distribution agreements of ice-cream manufacturers (see recital 120 of the contested decision), which shows that the effect of those clauses may be, contrary to HB's arguments (see paragraph 51 above), to reduce not only the choice of consumers but also price competition between suppliers. Similarly, contrary to HB's submission, the fact that around 44% of sales outlets sell two brands of ice cream does not show that intra-brand competition is not affected by the exclusivity clause.

95. Furthermore, in Irish supermarkets that do not practise freezer-cabinet exclusivity, the ice creams of suppliers other than HB are sold alongside HB products. At the hearing, Richmond stated that in Ireland it supplies 65% of supermarkets and only 8% of retailers. Moreover, it must be pointed out that in the United Kingdom, where the distribution system for impulse ice-creams is different, Richmond has obtained a market share of 24%, whereas its share of the relevant market is no more than 2%. All those factors confirm that where it is possible to stock a second brand of ice cream in one and the same freezer, a significant number of retailers are prepared to do so. The fact that they do not do so is the result of the prevalence of exclusivity clauses in the relevant market.

96. The Court also notes that the Commission's conclusion that entry onto the relevant market by HB's competitors is hindered by the existence of the exclusivity clause is confirmed by HB's own assessment of the advantages of that clause. It is apparent from the contested decision that the Unilever group, upon the entry of Mars into the European market at the end of the 1980s, placed particular importance on the supply of freezer cabinets intended for the exclusive use of its companies (see recitals 64 to 68 of the contested decision) and itself took the view that this practice might have the effect of imposing exclusivity on the

sales outlets in question. In a document of the Unilever group of 1989, entitled European ice cream marketing strategy, reference is made to the importance of the exclusivity clause and to the maintenance of the scheme of retaining ownership of the freezers, in the following terms:

> 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.

97. In the light of the foregoing, the Court finds that the Commission has proved to the required legal standard that, notwithstanding the high degree of recognition of HB's products on the relevant market and the fact that it offers a complete range of ice creams, many of which are highly popular with consumers, there is objective and specific evidence demonstrating the existence of demand in Ireland for the ice creams of other manufacturers where they are available, even though those manufacturers have a smaller range of ice creams, namely the ice creams of manufacturers who, like Mars, occupy quite specific niches. The Commission has shown in that regard that a considerable number of retailers are prepared to stock impulse ice-creams from various manufacturers, provided that they may stock them in one and the same freezer and that they are not inclined to do so when they have to install an additional freezer of their own or one belonging to another manufacturer. Consequently, the Court cannot accept HB's argument that the reluctance of retailers to sell products of other ice-cream manufacturers must be attributed not to the exclusivity clause but rather to the fact that there is no demand for those products on the relevant market.

98. The Court also finds that the Commission rightly held, having regard to the specific features of the product in question and the economic context of this case, that the network of HB's distribution agreements together with the supply of freezer cabinets without charge subject to the condition of exclusivity, have a considerable dissuasive effect on retailers with regard to the installation of their own cabinet or that of another manufacturer and operate de facto as a tie on sales outlets that have only HB freezer cabinets, that is to say 40% of sales outlets in the relevant market. Despite the fact that it is theoretically possible for retailers who have only an HB freezer cabinet to sell the ice creams of other manufacturers, the effect of the exclusivity clause in practice is to restrict the commercial freedom of retailers to choose the products they wish to sell in their sales outlets.

99. However, HB submits that, if the Court were to conclude that the exclusivity clause operates as a de facto tie in regard to the sales outlets, the degree of foreclosure resulting from its distribution agreements is no more than 6% of the entirety of sales outlets on the relevant market and does not lead to an appreciable restriction of competition on that market. It therefore considers that the Commission's finding that 40% of sales outlets of the relevant market are in fact foreclosed is manifestly erroneous. HB says that this percentage is too high, in particular because it includes three categories of sales outlets which cannot be regarded as foreclosed. It states in that regard that, in order to calculate the degree of foreclosure of the relevant market, account should be taken only of sales outlets where retailers wish to change their ice-cream supplier but are unable to do so.

100. Those arguments must be rejected.

[Paragraphs 101 to 119 examine more closely the arrangements for the provision of freezer cabinets, with particular reference to the comparison between the present case and the Langnese-Iglo case. The following two paragraphs are, however, of special interest.]

106. As regards HB's argument relating to application of the rule of reason in the present case, the Court would point out that the existence of such a rule in Community competition law is not accepted. An interpretation of Article 85(1) of the Treaty, such as suggested by HB, is moreover difficult to reconcile with the structure of the rules prescribed by Article 85.

107. Article 85 of the Treaty expressly provides, in its third paragraph, for the exemption of agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only within the specific framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84, *Pronuptia*, paragraph 24; Case T-17/93, *Matra Hachette* v *Commission*, paragraph 48, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others* v *Commission*, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had already to be carried out under Article 85(1) of the Treaty (see, to that effect, Case C-235/92 P, *Montecatini* v *Commission*, paragraph 133; Case T-14/89, *Montedipe* v *Commission*, paragraph 265; Case T-148/89, *Tréfilunion* v *Commission*, paragraph 109; and Case T-112/99, *M6 and Others* v *Commission*, paragraphs 72 to 74).

[Paragraphs 135 to 210 concern other pleas by HB, all of which were rejected.]

Court's Ruling

The Court hereby:
1. Dismisses the application as unfounded;
2. Orders Van den Bergh Foods Ltd to bear its own costs and to pay those of the Commission, including the costs of the interim proceedings;
3. Orders Masterfoods Ltd and Richmond Frozen Confectionery Ltd to bear their own costs. ■

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