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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