

Press and Information Division

PRESS RELEASE N° 93/03

23 October 2003

Judgment of the Court of First Instance in Case T-65/98

Van den Bergh Foods Ltd v Commission of the European Communities

**THE COURT OF FIRST INSTANCE CONFIRMS THE COMMISSION'S DECISION
IN REGARD TO VAN DEN BERGH FOODS**

The provision by Van den Bergh Foods of freezer cabinets "without charge" to ice cream retailers on condition that they use them exclusively for the stocking of its ice creams is contrary to Community competition law.

Van den Bergh Foods, formerly HB Ice Cream Ltd ("HB"), a wholly-owned subsidiary of Unilever plc, is the principal manufacturer of ice-cream products in Ireland. HB provides ice-cream retailers "free of charge" with freezer cabinets for ice-creams for immediate consumption ("impulse ice-creams"), provided that they are used exclusively to stock HB's ice creams ("the exclusivity clause"). HB retains ownership in the cabinets and maintains them. The contract may be terminated by either of the parties on two months' notice. In 1989 many retailers with freezer cabinets supplied by HB began to stock and display the products of Mars, an American company, which was trying to penetrate the Irish market. Consequently, HB demanded that retailers complied with the exclusivity clause.

In parallel to proceedings before the Irish courts (which are still pending), Mars lodged a complaint against HB with the European Commission in September 1991. Its complaint related to the provision by HB, to a large number of retailers, of freezer cabinets which had to be used exclusively for HB products.

In its decision of March 1998, the Commission held that HB's distribution agreements containing the exclusivity clause were incompatible with Community competition law. It found that HB had a dominant position on the relevant market (the market for single-wrapped items of impulse ice-creams in Ireland), illustrated by the degree of both numeric (79%) and weighted (94%) distribution of HB products and by the strength of the brand. Moreover, HB's position was reinforced by the strength of Unilever on the other ice-cream markets in Ireland and on the international markets. The Commission observed that the network of HB's

agreements as a whole had the effect of restricting the ability of retailers to sell products of HB's competitors. It found that the restrictive effect was a consequence of the space constraints inevitably experienced by retail outlets. According to the Commission, in some 40% of all outlets in Ireland, the only freezer cabinet or cabinets for the storage of impulse ice-cream was or had been provided by HB, and only 17% of retailers had freezer cabinets which are not subject to an exclusivity clause. Consequently, it was difficult for other suppliers to penetrate the market without first of all overcoming substantial barriers, such as persuading the retailer to replace a freezer cabinet or to install an additional cabinet. In its decision the Commission also refused to grant an individual exemption to HB and found that HB had abused its dominant position on the market.

HB brought an action for annulment of that decision before the Court of First Instance of the European Communities.

The Court has dismissed the action.

First of all, the Court finds that, **taking into account the specific conditions of the market, the popularity of HB ice creams, HB's strength on the market and the specific features of the products**, the effect of the agreements as a whole is to **restrict competition** on the market.

The provision of a freezer cabinet "without charge", the popularity of HB's ice cream, the breadth of its range of products and the benefits associated with their sale 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 to terminate their contract with HB. In reality, retailers only very rarely opt to replace freezer cabinets supplied by HB, particularly because of the position and popularity of HB on the Irish market.

The effect of the exclusivity clause is to cause retailers to act differently towards other brands and thus distorts competition in the market. The retailers are prepared to stock ice creams from various manufacturers, provided that they may do so in one and the same freezer. For example, after HB had insisted on retailers' compliance with the exclusivity clause, the numeric distribution of Mars ice creams fell from 42% to less than 20%. The Commission therefore rightly held that the effect of the exclusivity clause was to restrict in practice the commercial freedom of retailers to choose the products they wished to sell in their outlets.

The Court finds that the ability to terminate the contract in no way precludes the effective enforcement of the contract during the period in which that option is not used. In view of the fact that the contracts are terminated on average every eight years, the argument that it is always possible to terminate the contracts is unsound.

The Court also finds that the provision to retailers of freezer cabinets and the maintenance costs of those freezers represent a financial barrier to the entry of new suppliers on the market and to the expansion of existing suppliers. As retailers are not inclined to accept freezer cabinets that are not free, the supplier must acquire a stock of cabinets, which represents a large investment that could dissuade him from entering the market.

As regards the possibility of the grant of **an individual exemption** by the Commission, the Court finds that the exclusivity clause does not display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of

competition. Thus, the exclusivity clause does not contribute to improving the production or distribution of the goods in question and **does not satisfy the first condition for the grant of an individual exemption**.

The Court notes that HB has a **dominant position** on the market and that HB does not dispute the definition of the market. Although the provision of freezer cabinets on a condition of exclusivity constitutes a standard practice on the relevant market, that activity may restrict competition where it is entered into by an undertaking with a dominant position. The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream and of preventing competitors from gaining access to the market. Therefore, by inducing retailers, by those means, to obtain supplies exclusively from HB, **HB has abused its dominant position on the market**.

Moreover, **the Commission's decision does not deprive HB of its rights of property** in its stock of freezer cabinets and does not prevent it from exploiting those assets by renting them out on commercial terms. HB is merely forbidden from making them available on the basis of an exclusivity clause so long as it holds a dominant position on the relevant market.

Reminder: An appeal against the decision of the CFI, limited to points of law, can be brought before the Court of Justice of the European Communities within two months of delivery.

Unofficial document, for media use only, which does not bind the Court of First Instance.

Available languages: FR, EN, NL, ES, IT, DE

*The full text of the judgment can be found on the internet (www.curia.eu.int).
In principle it will be available from midday CET on the day of delivery.*

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