

# Case T-65/98

Van den Bergh Foods Ltd

v

Commission of the European Communities

(Action for annulment — Competition — Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) — Ice creams intended for immediate consumption — Supply of freezer cabinets to retailers — Exclusivity clause — Barriers to entry to the market — Property rights — Article 222 of the EC Treaty (now Article 295 EC))

Judgment of the Court of First Instance (Fifth Chamber), 23 October 2003 II-4662

## Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Distribution agreements containing an exclusivity clause — Criteria for assessment — Accessibility of the market — Agreements whose cumulative effect is to partition the market — Specific economic context of the agreements taken into account — Distribution agreements for ice cream for immediate consumption under which the manufacturer supplies a freezer cabinet exclusively for storage of its products (EC Treaty, Art. 85(1) (now Art. 81(1) EC))*

2. *Competition — Agreements, decisions and concerted practices — Prohibition — No rule of reason in Community competition law*  
(EC Treaty, Art. 85(1) and (3) (now Art. 81(1) and (3) EC))
  
3. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Improvement in the production or distribution of goods — Appraisal by reference to the public interest, not the interests of the parties to the agreement*  
(EC Treaty, Art. 85(3) (now Art. 81(3) EC))
  
4. *Competition — Dominant position — Characterised by the holding of extremely large market shares*  
(EC Treaty, Art. 86 (now Art. 82 EC))
  
5. *Competition — Dominant position — Meaning*  
(EC Treaty, Art. 86 (now Art. 82 EC))
  
6. *Competition — Dominant position — Abuse — Meaning — Objective concept referring to conduct likely to influence the structure of the market and with the effect of hindering the maintenance or development of competition — Obligations on dominant undertakings — Exercise of competition only on the merits*  
(EC Treaty, Art. 86 (now Art. 82 EC))
  
7. *Competition — Dominant position — Abuse — Undertaking in a dominant position binding retailers by distribution agreements containing an exclusivity clause — Distribution system constituting an abuse*  
(EC Treaty, Art. 86 (now Art. 82 EC))
  
8. *Community law — Principles — Fundamental rights — Right to property — Restrictions — Permissibility — Conditions — Restrictions imposed pursuant to the competition rules*  
(EC Treaty, Art. 3(g) (now, after amendment, Art. 3(1)(g) EC) and Arts 85, 86 and 222 (now Arts 81 EC, 82 EC and 295 EC))

9. *Acts of the institutions — Statement of reasons — Obligation — Scope — Taking the context into account*  
(EC Treaty, Art. 190 (now Art. 253 EC))
10. *Community law — Principles — Protection of legitimate expectations — Conditions — Notice under Article 19(3) of Regulation No 17 — Legitimate expectation of the future grant of an exemption — None*  
(Council Regulation No 17, Art. 19(3))
11. *Competition — Community rules — Application by the national courts — Proceedings before national courts concerning the same case or a case similar to that concerned by the administrative procedure before the Commission — Commission decision finding an infringement of the Community rules — Breach of the principles of subsidiarity, sincere cooperation and legal certainty — None*  
(EC Treaty, Arts 85 and 86 (now Arts 81 EC and 82 EC))
12. *Community law — Principles — Proportionality — Equal treatment — Scope — Decision finding a network of agreements to be incompatible with the competition rules and declaring the exclusivity clause in them to be invalid — Appraisal of anti-competitive effects of the network as a whole — Infringement — None*

1. In order to determine whether an undertaking's distribution agreements fall within the prohibition contained in Article 85(1) of the Treaty (now Article 81(1) EC), it is necessary 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 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 those agreements 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.

It follows that the contractual restrictions placed on retailers by those distribution agreements 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.

With regard to a collection of distribution agreements entered into by a manufacturer of ice-cream products sold as single-wrapped ice creams for immediate consumption, under which the manufacturer supplies to the retailer freezer cabinets, in which it retains ownership, and which are supplied free of charge or at a nominal rent and maintained at its cost, provided that they are used exclusively for its ice creams, that contractual restriction must be examined in the economic context in which those agreements operate. Therefore, when assessing those agreements in the light of the prohibition in Article 85(1) of the Treaty, it is permissible to take into consideration the effective dependence of retailers which results from the presence in the sales outlets of freezer cabinets supplied by the manufacturer, its dominant position 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, they all being features that form part of the economic context of those agreements.

2. The existence of the rule of reason in Community competition law is not accepted since an interpretation of Article 85(1) of the Treaty (now Article 81(1) EC) that accepts that agreements inevitably involving some form of restriction of conduct do not necessarily give rise to a restriction of competition, is difficult to reconcile with the structure of the rules prescribed by Article 85.

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. Consequently, 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 paras 2, 83-84, 91)

(see paras 106-107)

3. The improvement of the production or distribution of goods, which Article 85(3) of the Treaty (now Article 81(3) EC) lays down as the first of the four conditions that must all be satisfied for an exemption to be granted in respect of an agreement between undertakings which does not observe the prohibitions laid down in Article 85(1), cannot be identified with any advantage which the parties obtain from the agreement in their production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.
4. Very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for — without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.

Consequently, distribution agreements which by providing advantages to the parties to them in terms of efficiency of planning, organisation and distribution strengthen a manufacturer which already has a strong position in the market cannot be exempted by the Commission. Such agreements lead not to more but to less competition because they constitute a major barrier to entry into the market, as well as to expansion within the market by its existing competitors.

(see para. 154)

5. A dominant position is a position of economic strength which enables the undertaking to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

(see paras 139-140)

(see para. 154)

6. 'Abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. It follows that Article 86 of the Treaty (now Article 82 EC) prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by having recourse to means other than those within the scope of competition on the merits. The prohibition is also justified by the consideration that harm should not be caused to consumers.
7. The fact that a manufacturing undertaking in a dominant position on a market ties de facto 40% of outlets in the relevant market by distribution agreements containing an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty (now Article 82 EC). The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of the same product or of reducing the opportunity for them to do so, even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market.

(see para. 160)

Therefore, whilst the finding that a dominant position exists does not in itself imply any reproach against the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market.

(see paras 157-158)

8. Although the right to property forms part of the general principles of Community law, it is not an absolute right but must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

As Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) provides that in order to achieve the aims of the Community, its activities are to include a system ensuring that competition in the internal market is not distorted and the application of Articles 85 and 86 of the Treaty (now Articles 81 EC and 82 EC) therefore constitutes one of the aspects of public interest in the Community, restrictions may be applied, under those articles, on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.

mation to enable them to ascertain whether the decision is well founded or vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure. However, it is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty (now Article 253 EC) must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

A manufacturer of ice creams intended for immediate consumption which holds a dominant position may therefore be prohibited from making the provision of freezer cabinets to retailers subject to an exclusivity clause prohibiting the retailers from using them to store other manufacturers' products.

(see para. 176)

(see paras 170-171)

9. The extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient infor-

10. The right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations by giving him precise assurances.

This is not the case where the Commission, in a notice under Article 19(3) of Regulation No 17, proposes — on a preliminary basis — to adopt a favourable attitude to certain agreements between undertakings which have previously given rise to a statement of objections, in the light of their

revision by the parties, and invites all the interested third parties to submit their observations to it within a specified time. Such a notice merely represents a preliminary position of the Commission, which is subject to change, in the light particularly of the observations of third parties. Consequently, the undertakings concerned cannot have had a legitimate expectation that the Commission would grant it an exemption under Article 85(3) of the Treaty (now Article 81(3) EC) in accordance with that notice, solely on the basis of publication of the notice.

If the Commission finds that the changes made to the agreements have not had the expected results it may initiate a new procedure and raise new objections to those agreements in a new statement of objections.

Moreover, even if the Commission grants an exemption, it has the power, and even the obligation, under Article 8(3) of Regulation No 17, to revoke or amend that exemption if it finds that the exempted agreements have certain effects that are incom-

patible with the conditions laid down in Article 85(3) of the Treaty.

(see paras 192, 194-195)

11. Although Articles 85(1) and 86 of the Treaty (now Articles 81(1) EC and 82 EC) produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which the national courts must safeguard, that does not mean that the Commission has no right to adopt a position in a case, even though an identical or similar case is pending before one or more national courts, provided in particular that trade between Member States is capable of being affected.

The Commission has exclusive competence to adopt decisions in implementation of Article 85(3) of the Treaty pursuant to Article 9(1) of Regulation No 17 and is also entitled to adopt, at any time, individual decisions applying Articles 85 and 86 of the Treaty, even though it shares competence to apply Articles 85(1) and 86 of the Treaty with the national courts, and even where an agreement or practice has already been the subject

of a decision by a national court and the decision contemplated by the Commission conflicts with the national court's decision.

12. The principle of proportionality requires that the acts of the Community institutions do not exceed the limits that are appropriate and necessary in order to achieve the aim pursued, whilst the principle of non-discrimination prohibits the different treatment of identical situations or the treatment of different situations identically.

It follows that there is no infringement of the principles of subsidiarity, sincere cooperation and legal certainty where the Commission, after receiving a request for an exemption of an agreement and complaints against that agreement, adopts a decision applying the Community competition rules even though various courts and competition authorities are seised of parallel proceedings raising questions similar to those dealt with in that decision. Moreover, in those circumstances, the adoption of a decision by the Commission is appropriate in order to ensure that the Community competition rules are applied coherently to the various forms of agreements practised throughout the Community.

A Commission decision applying Articles 85 and 86 of the Treaty (now Articles 81 EC and 82 EC) and prohibiting, with immediate effect, an undertaking in a dominant position on the market for ice creams intended for immediate consumption from continuing a practice whereby it binds retailers by agreements making freezer cabinets available that may be used only for the sale of its own products does not infringe those principles where the network of those agreements significantly contributes, in conjunction with all the similar contracts found on the relevant market, including those of other suppliers, to denying access to the market to new national and foreign competitors.

(see paras 197-199)

(see paras 201, 203-206)