

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
19 February 1993 *

In Joined Cases T-7/93 R T-9/93 R,

Langnese-Iglo GmbH, a company governed by German law, established in Hamburg, Germany, represented by Martin Heidenhain, Bernhard M. Maassen and Horst Satzky, Rechtsanwälte, Frankfurt-am-Main, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

and

Schöller Lebensmittel GmbH&Co. KG, a company governed by German law, established in Nuremberg, Germany, represented by Ulrich Scholz, Rechtsanwalt, Nuremberg, and Rainer Bechtold, Rechtsanwalt, Stuttgart, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 8 Rue Zithe,

applicants,

v

Commission of the European Communities, represented by Bernd Langeheine, of its Legal Service, acting as Agent, assisted by Alexander Böhlke, Rechtsanwalt, Frankfurt-am-Main, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Mars GmbH, a company governed by German law, established in Viersen, Germany, represented by Jochim Sedemund, Rechtsanwalt, Cologne, and by John

* Language of the case: German.

Pheasant, Solicitor, of Lovell, White & Durrant, Brussels, with an address for service in Luxembourg at the Chambers of Michel Molitor, 14a Rue des Bains,

intervener,

APPLICATION for suspension of the operation of the Commission's decisions of 23 December 1992 relating to two proceedings under Article 85 of the EEC Treaty (IV/34.072 — Langnese-Iglo GmbH and IV/31.533 and IV/34.072 — Schöller Lebensmittel GmbH&Co. KG),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

1 By application lodged at the Registry of the Court of First Instance on 19 January 1993, Langnese-Iglo GmbH ('Langnese') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission's decision of 23 December 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.072 — Langnese).

2 By a separate document lodged at the Registry of the Court of First Instance on the same date, Langnese also applied for interim relief pursuant to Article 185 of the EEC Treaty and Article 104 of the Rules of Procedure of the Court of First Instance, in the form of suspension of the operation of the contested decision until the Court of First Instance had given a decision on the substance of the case.

- 3 By application lodged at the Registry of the Court of First Instance on 20 January 1993, Schöller Lebensmittel GmbH&Co. KG ('Schöller') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the decision of 23 December 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.533 and IV/34.072 — Schöller).
- 4 By a separate document lodged at the Registry of the Court of First Instance on the same date, Schöller also applied for interim relief pursuant to Article 185 of the EEC Treaty and Article 104 of the Rules of Procedure of the Court of First Instance, in the form of suspension of the operation of the Commission decision addressed to it until the Court of First Instance had given a decision on the substance of the case.
- 5 By applications received at the Registry of the Court of First Instance on 3 February 1993, Mars GmbH ('Mars') sought leave to intervene in Cases T-7/93 R and T-9/93 R in support of the Commission.
- 6 The applications to intervene were served on the parties to the main proceedings pursuant to Article 116(1) of the Rules of Procedure of the Court of First Instance.
- 7 By fax received at the Registry of the Court of First Instance on 5 February 1993, Langnese gave notice that it had no objection to Mars's application to intervene. The applicant nevertheless requested that only a selective version of its application should be disclosed to Mars. To that end, Langnese forwarded to the Court a non-confidential version of its application for interim relief. By fax received at the Registry of the Court of First Instance on the same date, Schöller contended that Mars's application to intervene was inadmissible because it related only to the proceedings for interim relief and intervention in such proceedings was, in its view, possible only where the person applying to intervene has previously been granted leave to intervene in the main proceedings. The applicant requested at the same time that certain information on page 8 of its application for interim relief be treated as confidential.

- 8 The Commission submitted its written observations on the applications for interim relief lodged by Langnese and Schöller on 3 and 4 February 1993 respectively. By fax received at the Registry of the Court of First Instance on 5 February 1993, the Commission stated that it had no objection to Mars's applications to intervene. As regards the applicants' requests for confidential treatment for certain documents, the Commission expressed doubts as to whether the passages mentioned by the applicants contained genuine business secrets and reserved the right to submit detailed observations in the event of Mars's being granted leave to intervene in the main proceedings.
- 9 By letters of 5 and 8 February 1993, the Registry of the Court of First Instance invited Mars to attend the hearing and sent to it the non-confidential versions of the applications for interim measures and the Commission's observations on those applications.
- 10 The parties presented oral argument on 10 February 1993.
- 11 Before the merits of the applications submitted to the Court are considered, it is appropriate to examine the context of the present cases and, in particular, the essential facts underlying the disputes before the Court, as described in the pleadings lodged by the parties and their oral observations at the hearing on 10 February 1993.
- 12 On 18 September 1991, Mars submitted a complaint to the Commission against Langnese and Schöller, alleging infringement of Articles 85 and 86 of the EEC Treaty and requesting that protective measures be adopted in order to prevent the serious and irreparable damage that, in its view, it would suffer as a result of the sale of its ice cream being severely hindered in Germany by the implementation of agreements contravening the competition rules which Langnese and Schöller had concluded with a large number of retailers.

- 13 By decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.072 — Mars/Langnese and Schöller — Protective measures), the Commission adopted protective measures which, essentially, prohibited Langnese and Schöller from enforcing their contractual rights under agreements concluded by them or for their benefit, whereby retailers undertook to buy, offer for sale and/or sell only the ice cream of those producers, to the exclusion of the ice cream products 'Mars', 'Milky Way', 'Snickers' and 'Bounty' where the latter are offered to the final consumer as individually wrapped products. The Commission also withdrew the benefit of the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreement (OJ 1983 L 173, p. 5, hereinafter 'Regulation No 1984/83') to the exclusive dealing agreements concluded by Langnese to the extent necessary for the application of the abovementioned prohibition. The applicants in the present proceedings brought before the Court of First Instance two actions for the annulment of that decision (T-24/92 and T-28/92) and two applications for interim relief (T-24/92 R and T-28/92 R) suspending its operation.
- 14 By order of 16 June 1992 in Cases T-24/92 R and T-28/92 R *Langnese and Schöller v Commission* [1992] ECR II-1839, the President of the Court of First Instance suspended the operation of the Commission decision of 25 March 1992 except with regard to retail outlets in service stations which were tied to the applicants by exclusive dealing agreements pending the adoption of a Commission decision bringing to an end the administrative procedure then in course or delivery of a judgment in the main proceedings. The President also ordered the Commission to monitor the implementation of the order and to forward to the Court of First Instance, from 1 July 1992 and on a monthly basis, in particular the information which would be communicated to it by Mars on retail outlets in service stations which were tied to the applicants by exclusive dealing agreements and with which Mars had concluded contracts for the sale of its ice-cream products.
- 15 By its contested decisions of 23 December 1993, the Commission:
- declared that the exclusive dealing agreements concluded by Langnese and Schöller with retailers in Germany concerning the resale of individually wrapped ice creams constituted an infringement of Article 85(1) of the EEC Treaty (Article 1 of each decision);

- withdrew the benefit of the application of Regulation No 1984/83 to the exclusive dealing agreements concluded by Langnese which fulfilled the requisite conditions to benefit from the block exemption and refused to grant an individual exemption under Article 85(3) of the Treaty to the agreements concluded by Schöller (Article 2 of each decision);
- required Langnese and Schöller within three months after notification of the decisions to notify the wording of Articles 1 and 2 to the resellers with which they had concluded agreements of the kind to which the decisions related, indicating that those agreements were void (Article 3 of each decision); and
- prohibited Langnese and Schöller from concluding agreements of the type referred to in Article 1 of each of the decisions until 31 December 1994 (Article 4 of each decision).

Law

The applications to intervene

- 16 The applications to intervene were lodged within the prescribed time-limits.
- 17 The contested decisions brought to an end the administrative procedure initiated by the Commission following the complaint lodged by Mars on 18 September 1991 against Langnese and Schöller concerning a barrier to the distribution of Mars ice-cream products in Germany set up in breach of the competition rules of the EEC Treaty. Moreover, as a result of the adoption of the contested decisions, the order of the President of the Court of First Instance of 16 June 1992 partially suspending the operation of the protective measures adopted by the Commission by decision of 25 March 1992 became inoperative, as is apparent from paragraph 3 of the operative part thereof.
- 18 Accordingly, Mars has an interest in intervening in support of the Commission in the present applications for interim measures.

The requests for confidentiality

- 19 It is appropriate, at the interim proceedings stage, to accede to the requests made by Langnese and Schöller that certain particulars be treated as confidential, since, *prima facie*, they appear to constitute business secrets.

The applications for suspension of the operation of the decisions

- 20 By virtue of the combined provisions of Articles 185 and 186 of the EEC Treaty and Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of First Instance may, if it considers that the circumstances so require, order suspension of the application of the contested measure or prescribe the necessary interim measures.
- 21 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures made pursuant to Articles 185 and 186 of the EEC Treaty are to state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures applied for must be provisional in the sense that they do not pre-judge the decision on the substance of the case.
- 22 In the contested decisions, the Commission takes the view that the agreements to which Langnese and Schöller are parties constitute an infringement of Article 85(1) of the EEC Treaty in that, first, they exclude competition between products of the same brand and appreciably limit competition between products of different brands in the relevant market and, secondly, they are liable to have an appreciable negative impact on trade between Member States. The Commission also considers that the supply agreements concluded by Langnese and Schöller cannot benefit from the provisions of Regulation No 1984/83, since they were concluded for an indeterminate period within the meaning of Article 3(d) of that regulation. In any event, the Commission has withdrawn the block exemption for the agreements concluded by Langnese and has refused to grant an individual exemption for the agreements notified by Schöller on the ground that the cumulative effect of the agreements excludes any competition for a substantial proportion of the products in question.

- 23 In view of the fact that the two applications for suspension of the operation of the contested measures are related, it is appropriate to join the cases for the purposes of the present proceedings.

The parties' arguments

- 24 The arguments put forward by the parties in their pleadings and at the hearing on 10 February 1993 may be summarized as follows.

- 25 The applicants argue that their applications for suspension of the operation of the contested decisions are urgent and are justified on factual and legal grounds. As regards urgency, the applicants state that the effects that would certainly follow from the immediate implementation of the decisions and the serious damage that such implementation would cause them would be irreversible. They contend that the effects of the immediate implementation of the decisions could not be rectified in the event of subsequent annulment of the decisions, a return to an exclusive dealing arrangement with the sales outlets being practically excluded.

- 26 They maintain, in particular, not only that all their competitors could henceforth have access to all the sales outlets with which they have exclusive dealing agreements but also that each of the applicants would take advantage of that opening up of the market in order to extend its business to the other's sales outlets by offering particularly advantageous conditions. The operators of those outlets would increase their profits and thereafter would not agree to return to exclusive dealing agreements. According to the applicants it would no longer be possible to maintain regular supply of the numerous small traditional trade outlets throughout the territory because the delivery service would be unprofitable. The applicants further contend that the loss of exclusive rights over their sales outlets would also undermine the exclusive use of the freezers which they make available to some of their distributors, which is not prohibited by the contested decisions. Indeed, the operators of the sales outlets would often be prompted to place both the applicants' products and those of their competitors in the freezers lent by the applicants to their resellers.

- 27 In their view it is apparent from the foregoing that there is a danger of irreversible destruction of the applicants' distribution systems and, consequently, the risk of serious and irreparable damage, justifying an order suspending the operation of the contested decisions (orders of the President of the Court of Justice in Case 43/82 R *VBVB and VBBB v Commission* [1982] ECR 1241 and Case 56/89 R *Publishers Association v Commission* [1989] ECR 1693 and of the President of the Court of First Instance in *Langnese and Schöller v Commission*, cited above).
- 28 The applicants also consider that suspension of the operation of the contested decisions will not put competitors at any disadvantage or at most would cause only negligible damage to Mars, the latter's difficulties regarding access to the market being due not to the exclusive dealing agreements concluded by the applicants but, on the contrary, to Mars's own marketing strategy.
- 29 As regards the existence of a *prima facie* case, the applicants state that the question whether the actions are in fact well founded must remain in abeyance and that it is important only to determine that they are not entirely without foundation (see the orders of the President of the Court of Justice in *Publishers Association v Commission*, cited above, and of the President of the Court of First Instance in Case T-29/92 R *SPO and Others v Commission* [1992] ECR II-2161). They maintain that the Commission expressly recognized that the exclusive dealing agreements were compatible with the Community competition rules in a comfort letter which it sent to Schöller on 20 September 1985 and that the withdrawal in respect of those agreements of the block exemption provided for by Regulation No 1984/83 is unlawful. They also consider that neither Article 85(1) of the EEC Treaty nor Article 3 of Regulation No 17 nor Regulation No 1984/83 authorizes the Commission to prohibit them from concluding any exclusive dealing agreement in the future.
- 30 The applicants also consider that the balance of convenience in this case justifies suspension of the operation of the contested decisions, since they are intended essentially to protect Mars's interest in extending its market share still further in a sector (ice-cream bars) which represents only a negligible percentage of the ice-cream market. That interest runs counter to the applicants' interest in maintaining

for the time being distribution systems which have existed for decades throughout the market.

- 31 The Commission, for its part, considers that the applications submitted by the applicants do not show the existence of circumstances giving rise to urgency or factual and legal grounds establishing a *prima facie* case for the suspension of the operation of the contested decisions.
- 32 The Commission considers that the considerations put forward by the applicants concerning the likelihood of their main actions being successful are not convincing. It states in particular that the applicants cannot rely on the comfort letter sent to Schöller since the latter contained an express proviso that the proceedings might be re-opened and notice of such re-opening was given to Schöller on 29 November 1991. The Commission also considers that in the contested decisions it explained in detail why the conditions for the withdrawal of the block exemption provided for by Regulation No 1984/83 were met and why an individual exemption cannot be granted for the exclusive dealing agreements concluded by Schöller.
- 33 In the Commission's opinion, Articles 1 and 4 of each of the contested decisions are not in any event such that their operation can be suspended. In each decision, Article 1 is merely declaratory, indicating that agreements of the of the kind described in Article 85(1) of the EEC Treaty are prohibited, without any prior decision being required for that purpose. As regards Article 4 of each decision, there are legal obstacles to the suspension of their operation since in any event they prohibit the conclusion of any new exclusive dealing agreements. At the hearing, however, the Commission stated that it had no objection to the suspension of the operation of Article 4 of the contested decisions, provided that the applicants were not authorized to renew the existing agreements. On the other hand, the Commission expressed doubts as to whether it was possible to suspend the operation of Article 2 of the decisions. The application of Article 85 calls for the appraisal of complicated economic data and the Court, in proceedings for interim measures, cannot substitute its appraisal for that of the Commission and render temporarily valid an agreement which has been declared void. In any event, no suspension that may be granted may have the effect of creating an alternative exemption since the

parties to the agreements concerned must remain free to release themselves from the contractual rules at any time.

34 The Commission observes, finally, that, in view of the results of the partial opening up of the applicants' sales outlets at service stations, it cannot be inferred that the immediate implementation of the contested decisions would lead to adverse and irreversible repercussions. On the contrary, past experience shows that the applicants occupy such a firm position in the market that the measures taken by the Commission will not in the short term have appreciable repercussions for new competitors.

35 When presenting its oral observations, the intervener, Mars, contended that there was no economic need which might justify the applicants having recourse in Germany to exclusive sales outlets, maintaining that Langnese holds substantial market shares in other Member States without having recourse to exclusive dealing agreements. Mars also expressed the view that even if the contested decisions grant it, either alone or with other small producers such as Warncke, the possibility of concluding exclusive dealing agreements, the retailers will always be dependent on the applicants since Langnese and Schöller products enjoy a considerable reputation in the German market. In any event, Mars gave an undertaking that it would not conclude exclusive dealing agreements with its sales outlets.

Findings of the President of the Court

36 In his order of 16 June 1992, cited above, concerning applications for suspension of the operation of the decision prescribing interim measures adopted by the Commission in proceedings which it had initiated against Langnese and Schöller, the President of the Court of First Instance, taking account of the particular circumstances of the case, adopted a transitional solution granting Mars access to retail outlets in service stations tied to the applicants by exclusive dealing agreements. According to the information given by the Commission to the Court, pursuant to that order, that opening up of the market has brought Mars little success, at least in the period covered by that order.

37 Furthermore, by contrast with the Commission's decision of 25 March 1992 laying down protective measures, the contested decisions are not designed solely to grant Mars full access to the ice-cream market in Germany but also declare that the distribution systems operated by the applicants in German territory for many years are contrary to Article 85(1) of the EEC Treaty. The contested decisions also withdraw from the exclusive dealing agreements concluded by the applicants with their respective retailers the benefit of the block exemption provided for in Regulation No 1984/83 and withhold any individual exemption from the agreements notified by Schöller, whilst at the same time also prohibiting the conclusion of any new exclusive dealing agreements until 31 December 1997.

38 Finally, as the President of the Court of First Instance pointed out in his order of 16 June 1992, the parties differ fundamentally as to the definition of the relevant market and the actual conditions of access to that market. A detailed analysis of those factors cannot however be undertaken in the present interlocutory proceedings, particularly since the delimitation of the relevant market is of fundamental importance to the matter of withdrawal of the block exemption provided for in Regulation No 1984/83 and, since an appraisal of complex economic data is called for, the President cannot, in these interlocutory proceedings, substitute his appraisal for that of the Commission.

39 In those circumstances, the President is unable to find that the pleas in law put forward by the applicants are, at first sight, wholly unfounded and therefore dismiss the applications for suspension of the operation of the contested decisions (see in particular the order of the President of the Court of First Instance in *Langnese and Schöller v Commission*, cited above).

40 As regards the risk of serious and irreparable damage, it must be emphasized that the immediate implementation of the contested decisions, which would entail cancellation of all the exclusive dealing agreements and would therefore undermine the distribution system which has been operating in the German market for many years, would be liable to give rise to developments in that market which there are serious reasons for believing it would be difficult or even impossible to reverse subsequently in the event of the applications in the main proceedings being granted (see

most recently the order of the President of the Court of First Instance in *SPO and others*, cited above, paragraph 31). That is particularly true in the present case, in which the issue is the granting of access to the outlets linked by exclusive dealing agreements with the applicants, not just to a single competitor, Mars, as was the case when the protective measures were adopted, but rather to all competitors, including each of the applicants themselves as regards the other's exclusive sales outlets. However, in view of the positions occupied by Langnese and Schöller in the market, the possibility cannot be excluded that, in the event of the immediate implementation of the contested decisions, the changes which would come about in the market in the period prior to the judgment of the Court of First Instance on the substance might irreversibly curtail the applicants' possibility of re-establishing their distribution systems if the Court of First Instance were to annul the contested decisions.

- 41 However, a suspension of the operation of the contested decisions is, at the same time, likely to contribute to consolidation of the present structure of the market, thereby enabling the applicants to make access to it increasingly difficult both for Mars, which would be prevented from fully exploiting such advantage as might accrue to it from the transfer to the ice-cream sector of the fame enjoyed by its chocolate-based products, and for other undertakings established in the market.
- 42 Even the applicants admit that Mars's access to their sales outlets in service stations has brought only limited success. They also seem to concede that, in view of Mars's commercial strategy, their market position would not in practice be threatened in the near future.
- 43 In view of that factual and legal situation, it is incumbent on the President, in these proceedings for interim relief, to weigh the interests of the parties, including the Commission's interest in bringing immediately to an end the infringement of the Treaty competition rules which it considers that it has found, so as to ensure that an irreversible situation does not arise and that serious and irreparable damage is not caused to one or other of the parties to the proceedings (see most recently the order in *SPO and Others*, cited above, paragraph 38).

- 44 An analysis of the documents before the Court shows that, having regard *inter alia* to the manner in which the market operates, in particular the fact that it is somewhat inflexible, the imminent risk of serious and irreparable damage referred to by the applicants derives above all from their granting each other access to their respective exclusive sales outlets rather than from access by Mars, either alone or together with other competitors such as Warncke, Eismann or Artigel, to those same sales outlets, many of which, moreover, are still linked by exclusive dealing contracts in respect of the freezers made available to them by Langnese and Schöller. Furthermore, the applicants have not proved that serious and irreparable damage might be caused by the immediate application of the prohibition, laid down in Article 4 of each of the contested decisions, of concluding agreements of the kind referred to in Article 1 of each decision until 31 December 1997 and that, consequently, the suspension of the operation of those provisions is not justified, at least at the present stage.
- 45 In view of all the foregoing considerations, it is appropriate to prescribe only such interim measures as are strictly necessary in order to limit the risk of serious and irreparable damage which the applicants might suffer as a result of the immediate implementation of the contested decisions. It will be possible to ensure sufficient protection of the interests of each of the applicants at this stage if they are allowed to exploit their exclusive rights regarding their respective sales outlets as against each other.
- 46 It must also be borne in mind that, pursuant to Article 108 of the Rules of Procedure, an order on an application for interim measures may at any time, on application by a party, be varied or cancelled on account of a change in circumstances. It will be for the applicants to apply to the Court in the event of a significant threat to their distribution networks arising following the opening up of their exclusive sales outlets to competitors.
- 47 In view of the foregoing considerations, it is appropriate to make an order, by way of interim relief, allowing Langnese and Schöller to continue to enforce against each other their exclusive rights in respect of their sales outlets until the Court of First Instance has given judgment in the main proceedings. For that purpose, the communications provided for in Article 3 of each of the contested decisions must indi-

cate to the retailers, in addition to the wording of Articles 1 and 2, that by virtue of the present order the exclusive dealing agreements may be relied on as against Langnese or Schöller.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Mars is granted leave to intervene in Cases T-7/93 R and T-9/93 R in support of the defendant;
2. At this interlocutory stage of the proceedings, the requests made by Langnese and Schöller that certain information contained in their applications for suspension of the operation of the contested decisions be treated as confidential are upheld;
3. Cases T-7/93 R and T-9/93 R are joined for the purposes of the applications for interim measures;
4. Langnese and Schöller may continue to enforce against each other their exclusive rights in respect of their sales outlets until the Court of First Instance has given judgment in the main proceedings;
5. The communications provided for in Article 3 of each of the contested decisions must indicate to the retailers, in addition to the wording of Articles 1 and 2, that by virtue of the present order the exclusive dealing agreements may be relied on as against Langnese or Schöller;
6. For the rest, the applications for suspension of the operation of the decisions are dismissed;
7. The costs are reserved.

Luxembourg, 19 February 1993.

H. Jung

J. L. Cruz Vilaça

Registrar

President