COURT OF FIRST INSTANCE

Action brought on 19 January 1993 by Langnese-Iglo GmbH against the Commission of the European Communities

(Case T-7/93)

(93/C 54/09)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 19 January 1993 by Langnese-Iglo GmbH of Hamburg, represented by Dr Martin Heidenhain, Dr Bernhard Maassen and Dr Horst Satzky, Rechtsanwälte, of Frankfurt, with an address for service in Luxembourg at the Chambers of Jean Hoss, of Elvinger, Hoss & Prussen, 15 Côte d'Eich.

The applicant claims that the Court should:

— annul the Commission's decision of 23 December 1992 concerning a proceeding under Article 85 of the EEC Treaty (Case IV/34.072 — Langnese-Iglo GmbH), and

— order the Commission to pay the costs.

Pleas in law and main arguments adduced in support:

In the contested decision the Commission stated that the agreements concluded by the applicant, granting to retailers an exclusive right of sale from retail outlets, infringed Article 85 of the EEC Treaty, and withdrew from those agreements the benefit of Regulation (EEC) No 1984/83; it required the applicant to inform resellers who were currently party to such agreements of that decision within three months and prohibited the applicant from concluding such agreements in the future.

1. The applicant's distribution system using traditional specialist outlets is governed by the relevant requirements of the sale of ice-cream. The development of the market and the maintenance of geographically comprehensive, regular and competitively priced supplies to consumers of a wide, high-quality range of ice-creams would be impossible without the grant of exclusivity to retail outlets.

2. The relevant market for the purpose of the proceeding is the market in ice-cream for direct consumption. The market comprises all types of ice-cream which are considered by users as equivalent with regard to their characteristics, price and intended use.

3. The level of tied sales — i. e. the proportion of the quantities of ice-cream which are sold by those participating in the market through the intermediary of tied retail outlets — amounts to approximately 25 to 30 % and is thus in any event lower, whether the Commission's definition of the market is adopted or the applicant's, than the 30 % level of tied sales regarded as unobjectionable in the Fifteenth Report on Competition Policy.

4. Access to traditional specialist outlets is neither impeded nor barred as a result of the existing networks of exclusive purchasing agreements. The majority of retail outlets are open to any competitor. The duration of the exclusive purchasing agreements is limited. A retail outlet can change from one competitor to another without any commercial difficulties.

5. The initially successful entry by Mars into the ice-cream market has not been maintained. This is due not to the exclusive purchasing agreements but to the market strategies pursued by Mars.

6. The Commission is bound by the administrative letter ('comfort letter') of 20 September 1985. The factual circumstances — in particular, the number of competitors, their market shares and distribution systems — have not substantially altered since the comfort letter was issued. Neither the change in the Commission's interpretation of the law nor the entry into the market of Mars and its complaint are circumstances warranting a derogation from the comfort letter.

7. The Commission has stated in the comfort letter and in the Fifteenth Report on Competition Policy that the networks of exclusive purchasing agreements built up by the applicant and its competitors are compatible with Article 85 (1) of the EEC Treaty. This view has been confirmed by the principles laid down in the judgment of the Court of Justice in Case C-234/89 *Delimitis v. Henninger* (1991) ECR I-935.

8. Even if the exclusive purchasing agreements maintained by the applicant are caught by Article 85 (1) of the EEC Treaty, they are exempted by Regulation (EEC) No 1984/83 from the prohibition contained in Article 85 (1) of the EEC Treaty.

9. The withdrawal of the benefit of the group exemption is unlawful. The provisions of Article 14 (a) and (b) of Regulation (EEC) No 1984/83 are void, since they are not covered by the underlying authority. Quite apart from this, the conditions laid down by them do not exist. The ice-cream market is essentially governed by competition. There is no substantial impediment restricting access to traditional specialist outlets.

10. The prohibition of all exclusive purchasing agreements is incompatible with the principle of proportionality. In considering a network of exclusive purchasing agreements, the Commission has to distinguish between those agreements which qualify for a group exemption and those agreements from which the benefit of group exemption may be withdrawn pursuant to Article 14 of Regulation No 1984/83.

11. The total prohibition on the future conclusion of any exclusive purchasing agreements is incompatible with Article 85 (1) of the EEC Treaty, Article 3 of Regulation No 17 and Article 14 of Regulation (EEC) No 1984/83. The Commission is not empowered to prohibit the conclusion of agreements which fall outside Article 85 (1) of the EEC Treaty or which are exempt by virtue of Regulation (EEC) No 1984/83. There is no legal basis for the prohibition of future agreements.