JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
23 October 2003 *

In Case T-65/98,

Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd, established in Dublin (Ireland), represented by M. Nicholson and M. Rowe, solicitors, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by W. Wils and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Masterfoods Ltd, established in Dublin (Ireland), represented by P.G.H. Collins, solicitor, with an address for service in Luxembourg,

and by

Richmond Frozen Confectionery Ltd, formerly Treats Frozen Confectionery Ltd, established in Northallerton (United Kingdom), represented by I.S. Forrester QC, with an address for service in Luxembourg,

interveners,

APPLICATION for 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 Limited) (OJ 1989 L 246, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2002,

gives the following

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* [2000] ECR I-11369. 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).

Procedure and forms of order sought

24 By application lodged at the Registry of the Court on 21 April 1998, HB brought an action under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC) for the annulment of the contested decision.

25 By separate document received by the Registry on the same day, HB also applied, under Article 185 of the EC Treaty (now Article 242 EC), for suspension of the operation of that decision until the Court had ruled on the merits.

26 By applications lodged on 29 April and 8 May 1998 respectively, Mars and Treats Frozen Confectionery Ltd, which changed its name in the course of the proceedings to Richmond Frozen Confectionery Ltd (hereinafter 'Richmond'), sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

27 The applications to intervene were served on the parties in accordance with Article 116(1) of the Rules of Procedure of the Court of First Instance.

28 By fax dated 13 May 1998, HB stated that it had no objection to the application by Mars for leave to intervene, but objected to the application by Richmond on the ground that it did not have a sufficient interest in the outcome of the case. HB requested that only a non-confidential version of its application and of the contested decision should be furnished to the applicants for leave to intervene. For that purpose, it listed the information which it considered to be secret or confidential.

29 By separate document lodged at the Registry on 14 May 1998, the Commission stated that it had no objection to the two applications for leave to intervene. With regard to HB's request for confidential treatment, it expressed certain reservations on 18 May 1998.

30 By order of 16 June 1998, received at the Court of Justice on 21 September 1998, the Supreme Court referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Articles 85, 86 and 222 of the EC Treaty (now Article 295 EC). That case was registered as Case C-344/98.

31 By Order of 7 July 1998 in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, the President of the Court of First Instance suspended the application of the contested decision until delivery of final judgment of the Court in the present case and reserved the costs.

32 By order of the President of the Fifth Chamber of the Court of 2 March 1999, Mars and Richmond were given leave to intervene in the present case in support of the form of order sought by the Commission. In that same order, he granted, in part, the request for confidential treatment submitted by HB. A non-confidential version of the pleadings was served on the interveners.

33 By order of 28 April 1999, the President of the Fifth Chamber of the Court stayed the proceedings in the present case pursuant to Article 47(3) of the Statute of the Court of Justice pending delivery of judgment in Case C-344/98.

34 On 14 December 2000 the Court of Justice gave judgment in *Masterfoods and HB*. By letters of 1 February 2001 the Registrar of the Court of First Instance invited the parties to lodge observations on the implications, if any, to be drawn in the present proceedings from that judgment. The Commission and HB lodged their observations at the Registry on 15 and 27 February 2001 respectively. On 13 March 2001 Mars lodged at the Registry its statement in intervention in the present case and also its observations on the implications to be drawn from the judgment of the Court of Justice. Richmond did not lodge a statement in intervention.

35 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

36 The parties presented oral argument and answered questions put by the Court at the hearing on 3 October 2002.

37 HB claims that the Court should:

— annul the contested decision in its entirety;

— in the alternative, annul those parts of the contested decision that the Court finds erroneous or unsafe;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order HB to pay the costs.

39 Mars claims that the Court should:

— dismiss the application as unfounded;

— order HB to pay Mars' costs.

40 At the hearing Richmond claimed that the Court should:

— dismiss the application;

— order HB to pay the costs.

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

Arguments of the parties

42 HB maintains that the contested decision is vitiated by manifest errors of assessment of the facts, resulting in errors of law. It considers that the parties disagree not as to the facts themselves but rather as to the conclusions to be drawn from them.

43 HB submits that freezer-cabinet exclusivity cannot be regarded as outlet exclusivity (recital 184 of the contested decision) because the retailers are entitled to terminate the contract with HB or to install new freezers not belonging to HB alongside HB's freezer if new and attractive products are offered or if they are no longer satisfied with HB's range of products or level of service. It is clear from the judgment in Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533 that the duration of a contractual tie is significant when assessing the degree of foreclosure of the market. According to HB, its freezer agreements are not of indefinite duration, as the retailers are able to terminate them at any time. The fact that its freezer cabinets are rarely replaced merely proves that retailers with those freezers are satisfied with the arrangement and does not imply that the outlets in question are tied.

44 According to HB, all the evidence suggests that the overwhelming majority of retailers alleged by the Commission to be foreclosed as a consequence of HB freezer-cabinet exclusivity have in fact positively chosen such exclusivity in preference to any of the alternative configurations available to them for the storage and sale of impulse ice-cream. It follows that the Commission should not have concluded that the freezer exclusivity clause leads to a foreclosure of the

relevant market contrary to Articles 85 and 86 of the Treaty. The Commission has failed to make out any causal connection between HB freezer-cabinet exclusivity and HB's continuing popularity as reflected in the relatively limited market penetration by rival brands on the relevant market. The retailers are thus willing to stock new products where there is consumer demand for them. However, the facts show that the limited penetration of HB's competitors is not due to any foreclosure of the market resulting from the exclusivity clause but rather to the fact that their products have not proved sufficiently attractive to consumers.

45 HB claims that the Commission has incorrectly analysed the question of market foreclosure. It ought to have distinguished between sales outlets which are deprived of any freedom of choice because of the provisions of a distribution agreement and sales outlets which enjoy commercial freedom of choice and have exercised it only after assessing the merits of the offers made by the competitors on the market. Only the first group may be regarded as foreclosed. In fact the Commission assumed that sales outlets which have only HB freezer cabinets, regardless of their number, are foreclosed. HB explains that it is not seeking to justify absolute territorial protection or any other alleged restriction of competition at issue in the present case, but that it is submitting that all the evidence shows that the limited market penetration by its competitors is due to the fact that HB satisfies the needs of retailers and of consumers. The Commission has not sought to find any other explanation for the failure of HB's competitors.

46 HB considers that another factor shows that the Commission's reasoning in regard to foreclosure of the relevant market is flawed. If a 'tie' resulting from the freezer agreements between HB and the retailers were to be established, HB submits that it would then be necessary to take account of the fact that the degree of foreclosure of the market is not 40%, as submitted in the Lansdowne survey, but at most 6%. In any event, when the degree of foreclosure of the relevant

market is calculated, HB submits, pointing to various data and to the Lansdowne survey, that it is necessary to exclude from the calculation the following three categories of sales outlets:

— outlets where there are two or more HB freezer cabinets in place: these are outlets where by definition there is the necessary space and it is profitable to have a second freezer (namely 6% of sales outlets);

— outlets where there is no interest on the part of the retailer in stocking another brand of ice cream: in such a situation there is an insufficient causal connection between the practice of the provision of HB's freezer cabinets and the failure of the competing supplier to gain access to the market (27% of sales outlets);

— outlets where the retailer is interested in stocking another ice cream brand and would be prepared to install another cabinet, to replace an HB cabinet with two smaller cabinets or to replace an HB cabinet by his own cabinet for the purpose (2 to 5% of sales outlets).

47 HB thus submits that, when the degree of market foreclosure is calculated, account should be taken only of outlets in which the retailer wishes to change brand but is unable to do so. The approach adopted in the contested decision concerning the application of Article 85(1) of the Treaty is therefore over-simplistic and at variance with the law as it has developed over recent years. HB also submits that the Commission overestimates the space restrictions encountered by retailers.

48 HB also observes that its calculation of the true measure of market foreclosure is supported by other evidence of the dynamics of the relevant market. It submits, in particular, that the relevant market is contested by at least five manufacturers and that other manufacturers, including new entrants, have been able to achieve substantial levels of distribution, both numeric and weighted.

49 HB disputes the finding in the contested decision that the provision of freezers subject to an exclusivity clause is a cost barrier to entry or expansion of suppliers and raises competitors' cost of entry to the relevant market, inasmuch as new entrants too need to provide and maintain freezers. HB submits that this practice is necessary in order to prevent its competitors from using its freezers to store their products without having invested in their own freezers.

50 According to HB, to supply freezers to the impulse ice-cream trade in Ireland subject to a separate rental would involve demands on its logistical and other resources that cannot be quantified in purely monetary terms. In addition, HB would be at a competitive disadvantage since it would be required to carry on its balance sheet a fleet of freezer cabinets for use not only in its business but also in the business of its retail customers and competitors.

51 HB contests the Commission's assertion in recital 198 of the contested decision that price competition may suffer because competition in the impulse ice-cream products sector takes place to a large extent between outlets and that inter-brand competition is therefore reduced in outlets stocking only a single brand. It observes that in any event around 44% of outlets stock two brands of ice cream.

52 HB submits that the correct application of Article 85(1) of the Treaty, in the light of the case-law of the Court of Justice, calls for application of the rule of reason. It is necessary to make a distinction between restrictions of conduct and restrictions of competition. Any agreement inevitably involves some form of restriction of conduct, but does not necessarily give rise to a restriction of competition. It is therefore clear that application of Article 85(1) inevitably involves a qualitative assessment of any given restriction of conduct.

53 HB also submits that in the light of an analysis based on the rule of reason, Article 85 of the Treaty does not apply to freezer cabinet agreements, as it is clear that the exclusivity clause is necessary to achieve the full benefits of the system. Furthermore, the exclusivity clause is not unreasonably restrictive of competition. The exclusivity relates only to the freezer and the agreement is effectively terminable at will (see paragraph 43 above). It observes that in Case 161/84 *Pronuptia* [1986] ECR 353 the Court stated that it is possible to deal with particular formats for distribution (a system of distribution through franchises in that case) at the stage of deciding whether Article 85(1) is applicable. Community law has long recognised that in considering the applicability of Article 85(1) in a given case, it is necessary to take account of the nature of the products governed by the agreement (Case 56/65 *Société Technique Minière* [1966] ECR 235, at p. 250).

54 The contested decision accepts that the free on-loan freezer system provides benefits to both the supplier and the retailer (recital 224) and that it is widely employed in Europe (recital 21). HB also submits that the exclusivity clause does not confer geographical exclusivity on the retailer and has not prevented entry by Mars or other competitors to the relevant market. That clause does not therefore fall within the scope of Article 85(1) of the Treaty, as it is an ancillary restraint. HB observes that this analysis corresponds to that adopted by the Irish High Court in *Masterfoods Ltd* v *HB Ice Cream*, paragraphs 141 to 146 and 221 to

229, and more particularly paragraph 222. Similarly, HB relies on the report of the UK Monopolies and Mergers Commission of March 1994 on the supply in the UK of ice cream for immediate consumption and various judgments of United States courts and submits that there the approach to provision of point-of-sale equipment differs from the approach adopted by the Commission in the contested decision.

55 Even if a rule of reason were not applied, HB submits that the exclusivity clause would still fall outside the scope of Article 85(1) of the Treaty on a 'quantitative basis', notwithstanding the attempt in the contested decision to create an artificially broad category of foreclosed outlets. It submits that the judgment of the Court of Justice in Case C-234/89 *Delimitis* [1991] ECR I-935 and the judgment in *Langnese-Iglo* require a detailed examination of the contestability of a market in deciding whether or not a particular agreement or set of agreements produces such a degree of foreclosure as to fall foul of the Article 85(1) prohibition. According to HB, the *Delimitis* and *Langnese-Iglo* cases require two conditions to be satisfied for a market to be deemed open, namely, first, that there is access to the minimum number of outlets necessary for the profitable operation of the distribution system and, second, that competitors have some possibility for expansion of their activities, that is to say, to increase their market share. According to HB, 'if the market is contestable so that new entrants are not "denied access" in the sense that there are "real and specific possibilities" for market entry, there is no foreclosure such as to bring Article 85(1) into play.' Moreover, the importance of the network of similar agreements in the industry should not be exaggerated as it constitutes only 'one factor amongst others'.

56 HB submits that the Court must examine the question of foreclosure of the market, and whether such foreclosure is acceptable or not, on the assumption that Mars or any other competitor is willing to make an investment in freezers comparable to that of the other market participants. That is apparent from paragraph 21 of the judgment in *Delimitis*, according to which it is necessary to

take account of other strategies for penetrating the market before concluding that a competitor has been unreasonably denied access to the market.

57 According to HB, the relevant market is not foreclosed if the quantitative criterion is applied. First, as regards the duration of the restriction, it was established in the *Langnese-Iglo* case that the agreements in question had been concluded for five years and had an average duration of two and a half years; however, the freezer cabinet agreements are terminable at will (see paragraph 43 above).

58 Second, HB claims that, in the *Langnese-Iglo* case, the Court's assessment of the foreclosure effect of the agreements at issue was based on the fact that the agreements excluded competing suppliers entirely from the relevant outlets. By contrast, the freezer exclusivity clause has no such effect. A competitor may convince the retailer of the merits of its products and so obtain access to his sales outlet.

59 Third, HB submits that in paragraph 105 of the *Langnese-Iglo* judgment the Court applied a two-tier test based on a 'tying-in' threshold of 30% in order to determine whether certain agreements had the effect of foreclosing the market. It is therefore necessary to convert the quantitative criteria developed in the *Langnese-Iglo* case in relation to outlet exclusivity, so as to apply it to freezer exclusivity. According to HB, the most appropriate method to convert those criteria is to focus on that part of the retail sector where the retailer has only an HB freezer and either no room for another freezer or considers that investment in a freezer is not economically viable. In the light of the Lansdowne survey, it is viable for a retailer to invest in his own freezer in 47% of sales outlets, accounting for over 80% of total ice-cream turnover.

60 HB therefore submits that the Commission has not established a causal connection between the freezer exclusivity clause and the difficulties experienced by suppliers or new entrants in penetrating the market. It concludes from this that, as the market is not foreclosed on the criteria laid down in the *Langnese-Iglo* case, there is no need to go to the second limb of the test, which is to look at the effect of the agreements in question in contributing to the overall degree of foreclosure of the relevant market. The judgment in *Langnese-Iglo* suggests that the Commission ought to have pointed to other features of the economic and legal context which it claims lead to significant foreclosure in the relevant market.

61 The Commission, supported by the interveners, submits that the exclusivity clause is contrary to Article 85 of the Treaty in that it restricts the freedom of retailers and prevents access to the market. It states that the clause operates as a de facto tie for two categories of retailers, namely 'those who might add an additional freezer or those who might replace an existing freezer'. The contested decision demonstrates that retailers are reluctant to install an additional freezer because this requires giving up space which could be used for other products. The contested decision also shows that retailers who have no space but could replace an existing freezer, either by a freezer supplied by another manufacturer or by their own freezer, are reluctant to do so because replacing a freezer involves additional responsibilities like maintenance (for retailers buying their own freezers) or the loss of HB products (for retailers taking a freezer from another ice-cream manufacturer).

62 According to the Commission, the real question to be addressed by the Court is whether the contested decision has provided sufficient proof of its conclusion at paragraph 143 that 'this restriction has the consequence that those competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market'. The Commission contends that the contested decision clearly sets out the difficulties faced by retailers who wish to sell other brands of ice cream.

63 The Commission observes that the contested decision is simply intended to restore the commercial freedom of retailers and so allow rival producers to compete on the merits of their products. The real question is whether retailers, who are ultimately paying for the freezers in their shops, should be free to stock the ice-cream brand of their choice in those freezers. The contested decision has demonstrated the dilemma faced by retailers wishing to stock other brands of ice cream. If, in order to sell non-HB ice cream, the retailer must either install an additional freezer or cease to sell HB products, he will be reluctant to sell other brands. As a result, that outlet is closed off to any rival brand, regardless of the merits of the product. The Commission considers that this dilemma is exactly the same as that which it had identified in the judgment in *Langnese-Iglo* v *Commission*, cited above, at paragraph 108, and in Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 84). In those judgments the Court found that the Commission was right to regard freezer exclusivity agreements as 'contributing to making access to the market more difficult.'

64 According to the Commission, HB exploits this dilemma for its own purposes by using the exclusivity clause as a barrier to the entry of new competitors. HB's expenditure on freezers enables it to keep other suppliers out of the market. It also contests HB's arguments that retailers are satisfied with their agreement with HB and have no interest in selling other brands of ice cream. The Commission accepts that the exclusivity clause presents advantages for the parties but observes that this fact does not mean that it does not contain any anti-competitive element.

65 With regard to the opportunity for retailers to terminate their agreement with HB, the Commission submits that a key element to be taken into consideration is the economic effect of the agreement. The Lansdowne survey shows that retailers who have an HB freezer rarely exercise their right to replace it with a freezer of another brand or to purchase their own freezer.

66 The Commission also submits that it is possible to separate the supply of ice cream from the supply of the freezer. It is not necessary for ice-cream manufacturers to own freezers. HB accepts that distinction, because in 1995 and 1996 it made two separate proposals to the Commission, which separated the ownership of freezers from the supply of ice cream, and were intended to allow it to obtain exemption under Article 85(3) of the Treaty.

67 Mars submits that by making success in the marketplace depend on success in gaining access to retail outlets, freezer exclusivity distorts the competitive process by conferring on the existing supplier an unfair advantage over smaller suppliers or newcomers in that market who are unlikely to have a full range of established products.

68 The Commission disputes HB's claim that 6% of the relevant market is foreclosed rather than the 40% referred to in the contested decision.

69 The contested decision shows how difficult it is for a new entrant to gain access to the relevant market owing to the existence of the exclusivity clause (recitals 185 to 200). In any event, there is a causal connection between the practice of HB freezer cabinet provision and the low market shares achieved by its competitors (recitals 185 to 194).

70 The Commission disputes HB's argument to the effect that the agreements concluded with retailers fall outside the scope of Article 85 of the Treaty because of the application of the rule of reason and the judgment in *Pronuptia*. The provisions of the agreement examined by the Court of Justice in the judgment in *Pronuptia* were different.

71 Similarly, the Commission disputes HB's interpretation of the judgment in *Delimitis* (see paragraph 55 above). It observes that in that judgment the Court of Justice examined whether it was possible for a new competitor to penetrate the bundle of contracts existing on the relevant market. Contrary to HB's assertion, the minimum number of sales outlets necessary for the profitable operation of a distribution system is not a test used by the Court as a factor in assessing whether there are concrete possibilities of market penetration.

72 In *Delimitis* the Court of Justice stated that it was first necessary to establish whether there is clearly 'a bundle of similar contracts' in the relevant market. In Ireland the majority of freezers installed in outlets are supplied by HB (recital 152 of the contested decision). It is then necessary to examine whether there are opportunities for penetration of the relevant market. The Commission disputes that there are such possibilities in the present case. Thirdly, the Court of Justice suggested in its judgment in *Delimitis* that it is necessary to take into account the conditions under which competitive forces operate on the relevant market. The contested decision identifies the difficulties caused for new entrants by the fact of the exclusive use of HB freezers, which discourages retailers from stocking other products and creates logistical and cost barriers to market entry. The Commission submits that HB's argument that a new entrant must be assumed to compete 'in the manner which is characteristic of the industry' is not to be found in any of the cases cited by HB and would be unacceptable if the industry as a whole engaged in practices contrary to Article 85 or 86 of the Treaty.

73 The Commission submits that the degree of dependence referred to in the judgment in *Delimitis* is merely one factor amongst others in the economic and legal context in which a network of contracts must be assessed and that this is also apparent from the judgments in *Langnese-Iglo* v *Commission* and *Schöller* v *Commission*.

74 The analysis by the Court of First Instance in the last mentioned cases must, according to the Commission, be applied in the present case. The Court's

conclusion that exclusivity clauses relating to freezers make access to the market more difficult is applicable to the exclusivity clause at issue, because the Court there confirmed that the need for a new entrant to create a network of retailers for itself did constitute a barrier to market entry.

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 (see paragraph 42 above), 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* [1987] ECR 4487, paragraph 62, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25, Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, 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 (*Delimitis*, paragraphs 23 and 24, and *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 (see the Court's findings in paragraphs 155 and 156 below). 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* [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, 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 [...] [1] % (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.

1 — Confidential data omitted.

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 (see paragraph 46 above). 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.

101 Contrary to HB's submission (see paragraph 46 and 47 above), in the 6% of sales outlets with more than one HB freezer cabinet (and which therefore have space to install more than one cabinet) the retailers are not likely to replace an HB cabinet unless they take the view that this replacement and the sale of another brand of

ice cream will enable them to obtain at least the same turnover as that which they previously achieved with HB ice creams. It is apparent from the file that in reality retailers only very rarely opt to replace one of the freezer cabinets supplied by HB with their own cabinet or with one belonging to another manufacturer, particularly because of the position and popularity of HB on the relevant market.

102 The Court considers that the 6% of sales outlets in question together with the 27% of sales outlets which have an HB freezer cabinet, and in which the retailers are allegedly not interested in stocking a brand of ice cream other than HB (according to the analysis made by HB of the Lansdowne survey data), must not be excluded when calculating the degree of foreclosure of the relevant market. Owing to the operation of the exclusivity clause, those retailers are faced with a situation which distorts their business options. In the light particularly of HB's position on the relevant market, the fact that none of its competitors has a range of products as well known or complete as its own, and the space constraints already referred to in paragraph 87 above, the ability of the retailers concerned to sell products of other manufacturers, especially where those manufacturers have a limited range of products, is in general an insufficient inducement to replace HB freezer cabinets or to install another cabinet (see, by analogy, *Langnese-Iglo* v *Commission*, paragraph 108).

103 With regard to the third category of sales outlets, namely those in which retailers are allegedly interested in stocking other brands of ice cream and are able to do so but have not done so, their number varies between 2% and 5% — according to the figures submitted by HB and based on the analysis of the Lansdowne survey. Even though this category was not clearly defined by HB, it still represents only a tiny part of the 40% total and is not such as to invalidate the Commission's finding in the contested decision that the identified part of HB's network of agreements involved around 40% of all sales outlets on the relevant market.

104 Furthermore, with regard to the two latter categories of sales outlets, the Court also observes that the figures presented by HB based on its analysis of the Lansdowne survey are not such as to vitiate the Commission's assessment of the degree of foreclosure of the relevant market. In the absence of any indication on the part of HB of the reasons for which, first, 27% of the sales outlets in question are not interested in stocking a brand of ice cream other than HB and, second, 2% to 5% of the sales outlets in question which are interested in stocking other brands nevertheless do not take the steps necessary to do so, the Court considers that it is entirely possible that the circumstances are attributable to the factors identified by the Commission (see in particular recitals 157 to 184 of the contested decision) which reinforce the restrictions on competition in the relevant market resulting from the exclusivity clause and in fact create commercial dependence of retailers on HB.

105 As to HB's argument alleging that the freezer cabinet exclusivity imposed by the exclusivity clause cannot be regarded as an outlet exclusivity because the retailers have the option of terminating their distribution agreements with HB at any time, the Court considers that this possibility in no way precludes the effective enforcement of the agreements in question during the period in which that option is not used. Consequently, in assessing the effects of the distribution agreements on the relevant market, the Court must take their actual duration into consideration (see, by analogy, *Langnese-Iglo* v *Commission*, paragraph 111). HB rightly submits that, unlike the situation in other Member States, where the exclusivity clause is combined with a contractual obligation of several months or even several years, the situation in the present case, as the Commission acknowledges, offers retailers the possibility of terminating the exclusivity clause on very short notice, or even immediately. Such an argument might be convincing if that option were exercised in practice and if outlets were thus to become regularly available to new entrants on the relevant market. However, as the Commission has shown, that is not the case, because HB's distribution agreements are terminated on average every eight years. It follows that the argument to the effect that it is possible to terminate the HB distribution agreements is unsound, since the possibility of so doing does not in fact operate to reduce the degree of foreclosure of the relevant market.

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* [1986] ECR 353, paragraph 24, and Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, 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* [1998] ECR II-3141, 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* [1999] ECR I-4539, paragraph 133; Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265; Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and also Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraphs 72 to 74).

108 Furthermore, it cannot be inferred with certainty from the sole fact that the identified part of the HB network of agreements involved around 40% of all sales outlets in the market, that that part is automatically capable of preventing, restricting or distorting competition appreciably. That implies, as HB contended at the hearing, that 60%, therefore a majority, of sales outlets in the relevant market are not foreclosed as result of the exclusivity clause.

109 When assessing the effects of such a network of distribution agreements, it is necessary to have regard to the economic and legal context in which it operates and in which it might combine with others so as to have a cumulative effect on competition (see *Delimitis*, paragraph 14, and *Langnese-Iglo* v *Commission*, paragraph 100).

110 In the present case, the Commission took into consideration in the contested decision the effects on competition not only of HB's distribution agreements but also of the various networks of agreements relating to freezer cabinets that were subject to an exclusivity clause, operated by other suppliers on the relevant market. According to the contested decision, 55% of sales outlets possessed only one or two HB freezer cabinets, 14% had one HB cabinet and a Mars cabinet, 7% had an HB cabinet and a cabinet from a manufacturer other than Mars (recital 108). The Commission also observed that the exclusivity condition applicable to freezer cabinets in 83% of the sales outlets on the relevant market (see paragraphs 18 and 86 above) constituted a significant practical and financial obstacle to market entry and to the expansion of other suppliers (see recitals 185 to 194).

111 The Court finds that, given that suppliers other than HB also make freezer cabinets available to retailers under very similar conditions (see in particular paragraph 85 above) and with the same constraints in terms of space, the Commission rightly held in the contested decision that the difficulties encountered in the outlets equipped only with HB freezer cabinets, in persuading retailers to replace the existing HB cabinet or to install additional freezer cabinets for impulse ice-creams, apply also to any freezer cabinet subject to a condition of exclusivity, even if the other suppliers do not have the same position and same popularity as HB on the relevant market. Competing suppliers are in effect prevented from gaining access to the relevant market by a series of factors including the burden which the purchase and maintenance of a freezer cabinet represents for retailers, their aversion to risk and their reluctance to sever established relations with their suppliers. It follows that the networks of agreements in place on the relevant market affect 83% of outlets in that market.

112 However, the extent of tying-in brought about by networks of agreements, although of some importance in assessing the partitioning of the market, is only one factor amongst others pertaining to the economic and legal context in which the network of agreements must be assessed (see *Delimitis*, paragraphs 19 and 20, and *Langnese-Iglo* v *Commission*, paragraph 101). It is also necessary to analyse the market conditions and in particular the real and specific opportunities for new competitors to penetrate that market notwithstanding the existence of those networks.

113 The Court also finds that the Commission rightly held in the contested decision that the provision to retailers of freezer cabinets subject to a condition of exclusivity and the running maintenance costs of those freezers represent a financial barrier to the entry of new suppliers on the relevant market and to the expansion of existing suppliers. The Court finds that there is no objective link between the supply of freezer cabinets subject to a condition of exclusivity and the sale of ice creams. It is apparent from the contested decision that retailers are not inclined to accept freezer cabinets from suppliers who do not offer terms that are at least as advantageous as those offered by the suppliers of the cabinets already in place in the outlets concerned, or those offered by suppliers to that market in general. In the context of the relevant market, that means that the supplier must be ready to offer a freezer cabinet 'without charge' and to service it. It follows that, in accordance with the Commission's findings in the contested decision (see in particular recital 189), the expense involved in acquiring a stock of freezer cabinets for installation in outlets which will ensure that the supplier's products can achieve viable distribution levels, renders it very difficult to enter the relevant market, particularly for small companies and the suppliers of impulse ice-creams which occupy quite specific niches, because it is difficult to justify the investment in freezer cabinets from suppliers who offer a smaller range of products. Moreover, HB's argument, set out in paragraph 59 above, that it is viable for 47% of outlets to have a freezer owned by the retailer, must be rejected because, given the practice not only of HB but also of other suppliers of making freezers available 'without charge' to retailers, the latter have no reason to buy their own freezer.

114 The Court also finds that HB has not proved to the requisite legal standard that it is impractical to impose a separate rental in respect of the supply of freezers (see paragraph 50 above). It is apparent from the contested decision that in Northern Ireland HB charges retailers an annual rent for the loan of its freezer cabinets and applies a price reduction to products which it supplies to retailers with their own cabinets (see recital 127). It follows that, having regard to the fact that it is possible to charge a separate rent for the supply of freezers in another geographic market, it cannot be regarded as necessary to have an exclusivity clause in order for a given supplier to prevent his competitors from using his freezers to stock their products. For the same reason, it cannot be claimed that HB would be obliged, without remuneration, to carry on its balance sheet freezer cabinets for use not only in its business but also in the business of its retail customers and competitors (see paragraphs 49 and 50 above).

115 Furthermore, although it is not disputed that the provision to retailers of freezer cabinets presents certain economic and practical advantages for suppliers of ice creams and for retailers, the Court holds that, when the supply of freezer cabinets to retailers is the subject of an exclusivity clause, the economic advantages of that practice are, in the conditions prevailing in the relevant market, counterbalanced by its negative effects on competition. It follows that the Court cannot accept the argument, put forward by HB in its pleadings, to the effect that this practice should be criticised only if there were no objective commercial justification for it.

116 In addition, it is apparent from the file that the fact that independent wholesale of impulse ice-cream is undeveloped in Ireland means that access to distribution via such independent intermediaries is rendered more difficult. Furthermore, the strength of existing brands in the relevant market and customer loyalty towards them amount to a formidable obstacle to new entrants (see recital 195 of the contested decision).

117 As to HB's argument that the relevant market is disputed by at least five manufacturers, it is apparent from the file that the other suppliers of impulse ice-creams hold only very small market shares. During the period June/July 1997,

Mars, HB's biggest competitor on the market, had a market share of merely 4% to 5% in volume and in value. Furthermore, the market share held by Mars, Valley and Leadmore fell during the years preceding the adoption of the contested decision (see recitals 32 to 37). The Court therefore holds that the weak market shares held by HB's competitors are, at least in part, attributable to HB's practice of making freezer cabinets available without charge.

118 In the light of all the foregoing, the Court finds that it is clear from an examination of the entirety of the similar distribution agreements concluded on the relevant market, and other evidence of the economic and legal context of which those agreements form part, that the distribution agreements concluded by HB are liable to have an appreciable effect on competition for the purposes of Article 85(1) of the Treaty and contribute significantly to a foreclosure of the market.

119 The first and second pleas, alleging manifest errors of assessment of the facts and infringement of Article 85(1) of the Treaty are accordingly rejected.

The third plea: errors in law in applying Article 85(3) of the Treaty

Arguments of the parties

120 HB claims that the exclusivity clause falls within the scope of Article 85(3) of the Treaty and may be the subject of an exemption. It disputes the Commission's

assertion in the contested decision that the restrictive effects of such agreements outweigh the advantages flowing from the distribution efficiency produced by them. Likewise it disputes that those advantages accrue solely to it and its retailers and are not, in the light of a broader public interest, of such a character as to compensate for the disadvantages which those agreements have for competition. Finally, HB disputes the findings in recital 234 of the contested decision that the advantage of total territorial coverage resulting from the exclusivity clause cannot outweigh the disadvantages of the foreclosure of the market caused by HB's network of freezer cabinet agreements.

121 HB claims more specifically that the contested decision is vitiated by three fundamental errors of law in relation to Article 85(3).

122 First, it submits that the contested decision contains a fundamental logical flaw with regard to the relationship between Article 85(1) and Article 85(3) of the Treaty. It states that according to the contested decision, Article 85(3) of the Treaty requires a balancing exercise between restriction of competition and availability of benefits of a type to justify exemption (see recitals 222 to 225). According to the contested decision, by competing too effectively in providing benefits to retailers and consumers, HB restricts competition contrary to Article 85(1) of the Treaty (see recital 226). Given that the benefits in question allegedly produce a restriction of competition under Article 85(1), those benefits cannot be taken into account for the grant of an exemption under Article 85(3) of the Treaty. The Commission's argument is therefore circular.

123 Second, according to HB, the various conditions for the application of Article 85(3) of the Treaty are cumulative, in the sense that each of the criteria must be satisfied before an exemption can issue. However, the question whether

the criteria are satisfied must be the subject of a separate examination in respect of each of them. The Commission cannot contend that the benefits produced by the HB freezer cabinet agreements are de facto negated by the restrictive effects of those agreements; the question of a substantial elimination of competition must be addressed separately from the question of the benefits arising from the agreements. The Court made the need for separate analysis clear in paragraph 122 of its judgment in *Matra Hachette* v *Commission*. HB observes that the Commission considers that improvement of distribution at retail level in terms of reduced costs of transport and regular supply, distribution efficiencies at supply level in planning and logistics terms, and stimulation of demand by maximisation of product availability and visibility can be ignored because of alleged negative implications for competition in the relevant market. Contrary to what is alleged by the Commission (see paragraph 130 below), once objective advantages arising from an agreement have been identified, the question of foreclosure is relevant only to the test of a substantial elimination of competition under Article 85(3) of the Treaty. Paragraph 180 of the judgment in *Langnese-Iglo* v *Commission*, cited by the Commission, is not inconsistent with HB's arguments in that regard (see again paragraph 130 below).

124 Third, HB submits that the Commission erred in its examination under Article 85(3) of the Treaty in relying on the fact that the relevant market is foreclosed. The true measure of foreclosure in that market is no more than 6%.

125 HB also submits that the detailed application by the Commission of some of the criteria in Article 85(3) of the Treaty also constitutes an error of law. It observes that the contested decision (see recital 227) acknowledges that the wider availability of freezer cabinets in retail outlets covering the entire geographic market and brought about largely by HB's freezer cabinet network can be considered an objective advantage, particularly in the distribution of products, and that the exclusivity clause contributes to the attainment of that advantage. The Commission seeks, however, to negate the advantage by asserting that it can be assumed that HB, in the interest of profit maximisation, will continue to supply cabinets even on a non-exclusive basis. The Commission is not, however, entitled to presume that HB will continue to supply cabinets in the absence of an

exclusivity clause. Moreover, HB submits that the Commission, contrary to its statements in recitals 232 and 233 of the contested decision, cannot assume that there are competing suppliers who can manufacture a range of products comparable to HB's, and as cost effectively as HB, so as to be able profitably to distribute those products to sales outlets with a turnover that is too low to interest it and to retailers who, if they should cease to be supplied with ice cream by HB, would be able to provide their own cabinets. Similarly, it submits that there is no evidence that an independent dealer could provide a distribution service more cheaply and cost effectively than HB or that the emergence of a new entrepreneurial type of independent wholesaler is precluded by reason only of HB's form of freezer cabinet agreement.

126 HB submits that, in the context of distribution, 'indispensable' does not mean that there is no other way of distributing the products, but only that the restrictions are necessary to achieve the particular marketing strategy adopted by the manufacturer which brings benefits under Article 85(3) of the Treaty. It submits that if outlet exclusivity can be regarded as indispensable to realisation of those benefits, as the block exemptions for exclusive distribution and exclusive purchasing agreements clearly recognise, the same must be true of the exclusivity clauses in respect of freezer cabinets.

127 HB adds that if the exclusivity clause were to be held unlawful, that would clearly adversely affect its situation and its distribution arrangements. First, it would suffer a competitive disadvantage in that a third party competitor would be able to use HB's assets without making its own investment in cabinet provision in the outlets concerned but at the same time exclude HB from any cabinets that it provides. Second, it would not be possible to make the same full product offering of HB products in the cabinet, thereby resulting in lost sales. Inasmuch as costs of cabinet provision and maintenance are recouped through sales of HB ice cream, those costs would be *pro tanto* unrecovered. Third, there would be an increase in the costs of distribution of ice cream to the outlets concerned by the contested decision and to other outlets.

128 HB submits that its distribution system has benefits for consumers, in accordance with Article 85(3) of the Treaty. Otherwise the Commission would not previously have been satisfied that an exemption was justified at the time when it issued the notice under Article 19(3) of Regulation No 17 (see paragraph 12 above) stating that an exemption was justified. Indeed, much of the logic of the block exemption under 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 agreements (OJ 1983 L 173, p. 5) would also be removed.

129 HB adds that its distribution agreements do not afford the possibility of eliminating competition in respect of a substantial part of the products in question, since, even on the Commission's view, 60% of the market is not foreclosed. It also observes that the reference in recital 245 of the contested decision to the fact that it is a long time since a substantial change in the competitive structure of the relevant market has occurred is wrong on the facts, inasmuch as it ignores new market entry by large and sophisticated suppliers like Mars, Nestlé and Häagen-Dazs.

130 The Commission submits that the contested decision is not vitiated by a fundamental logical flaw. An exemption can be given only after the restrictive effects of an agreement are balanced against the benefits which it produces. Those benefits 'cannot be identified with all the advantages which the parties obtain from the agreement'. It also submits that the contested decision examines separately each of the criteria under Article 85(3) of the Treaty. It points out that in the contested decision it found that HB's agreements did not satisfy those criteria because they did not contribute to an improvement in the distribution of goods, did not allow consumers a fair share of the benefit of that system, were not indispensable to attain the benefits claimed and left HB the possibility of eliminating competition in respect of a substantial part of the products in question. The Commission, referring more specifically to paragraph 180 of the judgment in *Langnese-Iglo* v *Commission*, and to paragraph 142 of the judgment in *Schöller* v *Commission*, submits that its analysis of the first of the four criteria set out in Article 85(3) of the Treaty is not vitiated by an error of law.

131 According to the Commission, HB's application focuses on only one of the four criteria which have to be satisfied in order to obtain an exemption, namely an improvement in the distribution of goods or the promotion of technical or economic progress, and does not deal with the other criteria in detail. Furthermore, HB has not shown how the benefits resulting from its distribution system, if there are any, are the result of the exclusivity clause and not of other factors.

132 The Commission submits that all the requirements in Article 85(3) must be satisfied simultaneously. It also submits that HB has not disputed, nor even called into question, the findings in recitals 239 and 240 of the contested decision that the exclusivity clause reduces the choices available to consumers and does not guarantee that any savings in efficiency are passed on to them. The Commission contests HB's assertion that the exclusivity clause could benefit from an exemption by analogy with the block exemptions for exclusive distribution and exclusive purchasing. It states that the balance between the restrictions and the benefits — of which the notion of indispensability is an important part — is different in the case of impulse ice-cream. While, for many products, vertical restraints on the freedom of retailers can be accepted because they stimulate interbrand competition, such interbrand competition is less likely for impulse products, because customers do not in general enter a shop with the intention of buying those products and do not seek to compare the products of one sales outlet with those of another. Moreover, the benefits of the block exemptions in question could be lost if there was insufficient competition in the goods in question. That occurred in the *Langnese-Iglo* case. In addition, the fact that HB might suffer detriment if it abandoned a particular business practice does not mean that the practice is indispensable.

133 With regard to the criterion in Article 85(3) of the Treaty relating to the possibility of eliminating competition, the Commission states that HB has not commented on recitals 242 to 246 of the contested decision concerning the lack of competition on the relevant market and the barriers to entry facing any new entrant. The Commission states that HB merely disputes its argument that it is a

long time since any substantial change in the competitive structure on the relevant market has occurred (recital 245 of the contested decision). The Commission reaffirms that the relevant market in fact continues to be dominated, at a level of 80%, by HB.

134 The Commission submits that HB's argument, set out in paragraph 128 above, is incorrect and constitutes a new plea in law which was not raised in the application and is therefore inadmissible under Article 48(2) of the Rules of Procedure.

Findings of the Court

135 It is settled case-law that the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see, to that effect, Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] II-49, paragraph 109; *Matra Hachette* v *Commission*, paragraph 104, and Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 288). It is not for the Court of First Instance to substitute its own assessment for that of the Commission.

136 It is also settled law that, where an exemption is being applied for under Article 85(3) of the Treaty, it is for the undertakings concerned in the first place to present to the Commission the evidence intended to establish that the agreement fulfils the conditions laid down by that provision (see, to that effect, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 52, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 45, and *Langnese-Iglo* v *Commission*, paragraph 179).

137 The grant by the Commission of an individual exemption decision presupposes that the agreement or the decision of an association of undertakings satisfies all the four conditions laid down by Article 85(3) of the Treaty. If one of those four conditions is not satisfied, the exemption must be refused (see, to that effect, *VBVB and VBBB* v *Commission*, paragraph 61; order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 34; and *Matra Hachette* v *Commission*, paragraph 104, and *SPO and Others* v *Commission*, paragraphs 267 and 286).

138 The Court finds that, contrary to HB's submission in paragraph 123 above, it is clear from the contested decision that the Commission carried out a detailed analysis of the HB distribution agreement in the light of each of the four conditions laid down by Article 85(3) of the Treaty (see recitals 221 to 254 of the contested decision).

139 As regards the first of those conditions, the agreements capable of being exempted are those which contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'. The Court would point out in that regard that it is settled law of the Court of Justice and of the Court of First Instance that the improvement cannot be identified with all the advantages 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 (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 348, and *Langnese-Iglo*, paragraph 180).

140 The first condition is examined in recitals 222 to 238 of the contested decision. The Commission acknowledged in particular that the agreements whereby freezer cabinets are made available might secure some or all of the benefits described in the fifth recital to Regulation No 1984/83 for HB itself and for the retailers who are the other parties to the agreements, and that the distribution method currently used by HB might offer it and its retailers certain advantages in terms of efficiency

of planning, organisation and distribution. Therefore, the Commission held that those arrangements did not present appreciable objective advantages of such a character as to compensate for the disadvantages caused to competition. In support of that assertion, it pointed out that the freezer cabinet agreements in question considerably strengthened HB's position in the relevant market, especially vis-à-vis potential competitors. It rightly observed in that regard that the strengthening of an undertaking which is as important on the market as HB leads not to more but to less competition because the network of that undertaking's agreements constitutes a major barrier to the entry of others into the market, as well as to expansion within the market by its existing competitors (see in particular recitals 225 and 236 of the contested decision, and, by analogy, *Langnese-Iglo* v *Commission*, paragraph 182). It must also be pointed out that the level of foreclosure of the relevant market is in the order of 40% (see paragraph 98 above) and not 6% as HB submits (see paragraph 124 above).

141 Consequently, the Court finds that, contrary to HB's contention (see paragraph 123 above), the Commission rightly took into consideration the barriers to entry to the relevant market resulting from the exclusivity clause, and the consequent weakening of competition, when it assessed HB's distribution agreement in the light of the first condition laid down by Article 85(3) of the Treaty (see, by analogy, *Consten and Grundig* v *Commission* at p. 348, and *Langnese-Iglo* v *Commission*, paragraph 180). It follows that the Court cannot accept HB's argument set out in paragraph 122 above to the effect that recitals 222 to 225 of the contested decision contain a fundamental logical flaw with regard to the relationship between Article 85(1) and Article 85(3) of the Treaty, as the Commission was obliged, pursuant to settled case-law on the subject, to ascertain whether there were objective advantages of such a character as to compensate for the disadvantages which an agreement creates for competition.

142 The Court also notes that HB's distribution agreements have two particular aspects, namely, first, they make freezer cabinets available 'without charge' to retailers and, second, the retailers undertake to use those cabinets to stock HB ice

creams only. The benefits ensured by the agreements in question are the result of the first aspect and can therefore be achieved even without the exclusivity clause.

143 The Court also accepts the Commission's argument in recital 227 of the contested decision that although the wide availability in outlets of freezer cabinets intended for the sale of impulse ice-creams, covering the entire geographic market and consisting mainly of HB's cabinets, could be considered an objective advantage in the distribution of those products in the public interest, it is nevertheless unlikely that HB would definitely cease to supply freezer cabinets to retailers, whatever the conditions, except in small number of cases, if its power to impose an obligation of exclusivity in respect of those freezers were to be restricted. HB has not shown that the Commission committed a manifest error in taking the view that business reality for a company such as HB, which wishes to maintain its position on the relevant market, is to be present in the maximum number of outlets possible (see recital 228 and paragraph 125 above). Contrary to HB's submission, the Commission did not merely assume continuity of provision by HB of freezer cabinets on the relevant market, but carried out a prospective analysis of the operation of the market after the adoption of the contested decision. Furthermore, contrary to HB's argument (see paragraph 125 above), the Commission could validly rely on the argument that manufacturers competing with HB might adopt a policy of supplying freezer cabinets to sales outlets whose turnover in impulse ice-creams is too low to be of interest to HB, and do so upon more advantageous conditions than those which the retailers might expect to obtain themselves if HB ceased to supply freezer cabinets to certain sales outlets. Similarly, the Commission could validly point to the possibility that cabinets would be installed by independent resellers who would obtain supplies from various sources and satisfy demand from all the sales outlets from which HB had withdrawn its equipment or to which it decided not to supply equipment. HB cannot claim that the Commission's prospective analysis is vitiated by a manifest error of assessment unless it does so on the basis of concrete evidence, which HB has failed to adduce in the present case.

144 As HB's distribution agreements do not satisfy the first of the conditions laid down by Article 85(3) of the Treaty, the third plea must therefore be rejected and it is not necessary to consider whether the Commission committed a manifest error in regard to its assessment of the other conditions laid down by that provision. If any one of the four conditions is not satisfied, the exemption must be refused.

The fourth plea: errors of law in the application of Article 86 of the Treaty

Arguments of the parties

145 In its application HB does not contest the findings in the contested decision as to the existence of a dominant position, but only the finding that there was an abuse of that position (see recital 263), and in particular the fact that it induces retailers to grant it exclusivity by supplying freezer cabinets to them and maintaining them at no direct charge to the retailer.

146 However, at the hearing and in its observations on the statement in intervention of Mars, HB claimed that it did not hold a dominant position. It argued that if, as the Court of Justice has held, a dominant position is defined by the capacity to retain market shares over a period of time 'without those having 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' (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 41), it manifestly does not have such a position. It observes that several other suppliers, in particular multinational undertakings such as Nestlé and Mars, have capacity which is largely sufficient to supply its retail customers if they wished to break away from HB.

147 HB submits that it is odd to classify as an abuse a practice which is widely employed, which the Commission does not argue has the object of restricting competition, and which is accepted as conferring benefits on the parties to the agreement.

148 HB contests the Commission's argument that the exclusivity clause interferes with retailers' freedom to choose suppliers on the basis of the merits of the products which they offer. Furthermore, that finding directly conflicts with recital 259 of the contested decision, which expressly recognises that a large majority of retailers choose to sell HB products and many of them exclusively so. HB adds that many of the retailers concerned would not stock ice cream at all if the freezer were not supplied to them. The supply of ice creams to small retailers and the provision of freezer cabinets improve HB's overall efficiency and increase competition. HB submits that the approach of Advocate General Jacobs in his Opinion in Case C-7/97 *Bronner* [1998] ECR I-7791, particularly in paragraphs 57 and 65, is also applicable to the exclusivity clause. Provision of cabinets on exclusive terms is an aspect of competition in the relevant market. HB observes that its cabinets are not an 'essential facility', since there are no material constraints preventing HB's competitors from installing cabinets in retail outlets wishing to stock alternative brands of impulse ice-cream.

149 HB also submits that the Commission's position on market foreclosure is unsustainable under Article 86 of the Treaty, because in all the cases in which vertical exclusivity has been held to be an abuse the Court of Justice or the Court of First Instance has expressly or implicitly applied a threshold or a *de minimis* test of market foreclosure (*Hoffmann-La Roche* v *Commission*; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, and *Michelin* v *Commission*; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389). HB submits that, as the percentage of outlets with the potential for foreclosure by reason of HB cabinet provision is no more than 6%, the materiality threshold for

an abuse alleged to consist of market foreclosure through the use of an exclusivity clause has not been achieved.

150 In its reply, HB observes that the Commission's analyses under Article 85(1) and Article 86 are inextricably linked to such a degree that the Commission is guilty of the 'recycling' of its Article 85 case to form an Article 86 case, in the manner criticised by the Court in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 360, hereinafter 'the *Flat Glass* judgment'.

151 The Commission, supported by the interveners, points out that the concept of an abuse is an objective one (*Hoffmann-La Roche* v *Commission*). Thus, the 'strengthening of the position of a dominant undertaking may be an abuse and prohibited under Article 86 of the Treaty regardless of the means and procedure by which it is achieved' (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 27). As to HB's argument alleging that the exclusivity clause cannot constitute an abuse as it is a common practice, the Commission submits that even a common practice in the industry may be an abuse of a dominant position. It adds that HB cannot rely on the fact that the situation arises because of the free choice of retailers. HB has induced them to enter into agreements containing an exclusivity clause, and this constitutes the abuse.

152 The exclusivity clause constitutes a barrier to market entry and to the expansion of the relevant market and strengthens the power of the incumbent supplier on the market. Any competition by existing or potential suppliers is thereby minimised. Retailers are prevented from exercising their freedom of choice with regard to the products that they wish to stock and to the optimisation of space at the sales outlets. Moreover, consumer choice is reduced. The Commission submits that HB's practice of tying the cost of the freezer cabinet to an exclusivity clause when there is no objective link between them is at variance with conditions of normal competition for consumable items. Furthermore, the sales outlets in

question represent 40% of all sales outlets on the market and not 6% as HB submits. Lastly, the Commission contends that HB has not defined the status or source of its 'materiality threshold' or explained why an abuse on such a scale cannot fall under Article 86.

153 The Commission also submits that the analysis which it carried out under Article 85 of the Treaty is separate from its analysis under Article 86 of the Treaty, so that HB cannot find support in the *Flat Glass* judgment. It states that in that judgment the Court held that the Commission had 'recycled' the facts constituting an infringement of Article 85 and had deduced from them, without carrying out any market survey, that the parties jointly held a substantial share of the market, that by virtue of that fact alone they held a collective dominant position, and that their unlawful behaviour constituted an abuse of that position.

Findings of the Court

154 It is settled case-law that 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 (*Hoffman-La Roche* v *Commission*, paragraph 41, and Case T-139/98 *AAMS* v *Commission* [2001] ECR II-3413, paragraph 51). Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it 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 (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 65, and *AAMS* v *Commission*, paragraph 51).

155 The Court notes, first, that the contested decision defines the relevant market as the market for single wrapped items of impulse ice-cream in Ireland (recitals 138 and 140 of the contested decision) and that HB does not dispute that definition. HB, whilst not challenging the Commission's assertion in recitals 28 and 259 of the contested decision that its share, in volume and in value, of the relevant market exceeds 75% and that it has retained that share over several years, submits that it does not hold a dominant position on that market. When the contested decision was adopted, HB's share of the relevant market was 89% (see paragraph 90 above). It must also be pointed out that the other suppliers of impulse ice-cream present on that market, such as Mars and Nestlé, have very small market shares (see recitals 32 and 34 of the contested decision), despite the fact that they are major players on the neighbouring markets for confectionery and chocolate and sell those products in the same outlets as those in question in the present case. Furthermore, Mars and Nestlé have well-known brands for their products and the experience and financial capacity to enter new markets. HB therefore not only has an extremely large share of the relevant market but there is a considerable gap between its market share and those of its immediate competitors.

156 Moreover, it is clear from the documents before the Court that HB has the most extensive and most popular range of products on the relevant market, that it is the sole supplier of impulse ice-creams in approximately 40% of outlets in the relevant market, that it is part of the multinational Unilever group which has been producing and marketing ice creams for many years in all the Member States and many other countries, in which undertakings in the group are very often the

major supplier in their respective market, and that the HB brand is very well-known. The Court therefore finds that the Commission correctly held that HB is an unavoidable partner for many retailers on the relevant market and that it has a dominant position on that market.

157 It is necessary, next, to ascertain whether the Commission was correct to conclude in the contested decision that HB had abused its dominant position on the relevant market. It is settled case-law that the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition 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 (*Hoffman-La Roche* v *Commission*, paragraph 91, and *AKZO* v *Commission*, paragraph 69). It follows that Article 86 of the Treaty prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumers (see, to that effect, *Europemballage and Continental Can* v *Commission*, paragraph 26, and Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 526 and 527).

158 Consequently, although a finding that an undertaking has a dominant position is not in itself a recrimination, it means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, paragraph 57).

159 The Court finds, as a preliminary point, that HB rightly submits that the provision of freezer cabinets on a condition of exclusivity constitutes a standard

practice on the relevant market (see paragraph 85 above). In the normal situation of a competitive market, those agreements are concluded in the interests of the two parties and cannot be prohibited as a matter of principle. However, those considerations, which are applicable in the normal situation of a competitive market, cannot be accepted without reservation in the case of a market on which, precisely because of the dominant position held by one of the traders, competition is already restricted. Business conduct which contributes to an improvement in production or distribution of goods and which has a beneficial effect on competition in a balanced market may restrict such competition where it is engaged in by an undertaking which has a dominant position on the relevant market. With regard to the nature of the exclusivity clause, the Court finds that the Commission rightly held in the contested decision that HB was abusing its dominant position on the relevant market by inducing retailers who, for the purpose of stocking impulse ice-cream, did not have their own freezer cabinet, or a cabinet made available by an ice-cream supplier other than HB, to accept agreements for the provision of cabinets subject to a condition of exclusivity. That infringement of Article 86 takes the form, in this case, of an offer to supply freezer cabinets to the retailers and to maintain the cabinets free of any direct charge to the retailers.

160 The fact that an undertaking in a dominant position on a market ties de facto — even at their own request — 40% of outlets in the relevant market by 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. The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream (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. It follows that HB's contention, set out in paragraph 149 above, that the percentage of outlets potentially likely to be inaccessible owing to the provision of freezer cabinets does not exceed 6%, is incorrect and must be rejected.

161 Furthermore, 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.

162 In addition, the Court must reject HB's argument relating to the 'recycling' of the file (see paragraph 150 above). Unlike the conduct criticised in the *Flat Glass* judgment, the Commission did not merely 'recycle' facts constituting an infringement of Article 85(1) of the Treaty in order to find that the conduct in question also infringed Article 86 of the Treaty. In the present case, the Commission analysed the relevant market at length in the contested decision and concluded that HB had a dominant position on that market. The Commission then correctly concluded that by inducing retailers to obtain supplies exclusively from HB under the conditions referred to in paragraphs 159 and 160 above, HB had recourse to methods different from those which condition normal competition in consumer products.

163 The fourth plea must therefore be rejected.

The fifth plea: errors of law relating to respect for rights to property and infringement of Article 222 of the Treaty

Arguments of the parties

164 HB submits that the application of the competition rules in the contested decision constitutes an unjustified and disproportionate infringement of its rights to

property, as recognised in Article 222 of the Treaty. It accepts that the right to property is not absolute but says that any restriction on that right must not constitute a disproportionate and intolerable interference with the rights of the owner (see Case 44/79 *Hauer* [1979] ECR 3727). The result of the prohibition of the exclusivity clause is to permit freezer cabinets paid for and maintained by HB to be used for the stocking of ice creams supplied by third parties and that seriously affects its property rights in the cabinets and more generally its economic interests. HB submits that, contrary to the Commission's statement in recital 219 of the contested decision, its property rights could not be appropriately protected by the levying of a separate rental fee for the freezer cabinet. It observes that the management and levying of a rental fee would involve substantial operating costs and that rental would not compensate for the economic dysfunctions which would be caused to its distribution system by the stocking of third-party ice creams in its cabinets. Moreover, it would be placed at a manifest disadvantage in comparison with its competitors, who could continue to make freezer cabinets available without charge.

165 HB also contests the Commission's claim (see recital 213 of the contested decision) that, as HB has placed the cabinets in retail outlets, any contractual restriction that HB imposes on the use of the cabinet can be subject to the competition rules. It submits that, in the intellectual property field, it is recognised that matters going to the essence of a property owner's rights include not only the rights to licence (Case 434/85 *Allen & Hanburys* [1988] ECR 1245, paragraph 11), to refuse third parties the grant of licences (Case 238/87 *Volvo* [1988] ECR 6211, paragraph 8), to prevent infringements of rights (Joined Cases C-92/92 and C-326/92 *Collins* [1993] ECR I-5145), but also particular provisions of a licence agreement (see paragraphs 75, 79, 85, 86, 90 and 100 of Commission Decision 83/400/EEC of 11 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.395 — Windsurfing International), OJ 1983 L 229, p. 1). The exclusivity clause is qualitatively comparable to the types of clauses authorised in licences of intellectual property rights.

166 HB observes that the economic value of its network of freezer cabinets lies in its having a necessary facility available at the outlets for storage and sale of its ice

creams, in particular in outlets which, without the provision of a freezer cabinet, could not sell ice creams, as they would be unable to invest in their own cabinets. Therefore, HB's rights to control the freezer cabinets, and the fact that it insists on the exclusivity attached to them, goes to the substance or essence of its rights (Case 247/86 *Alsatel* [1988] ECR 5987).

167 The Commission, supported by the interveners, contends that there has been no impairment of HB's property rights. It states that HB has already given up some of its rights over the freezer cabinets to the retailers in return for payment. HB thus remains owner but has conferred certain rights on those retailers. Consequently, HB's claim that its property rights have been 'confiscated' is purely rhetorical. It is the retailers who pay for the cabinet provision, the cost of which is included in the cost of the ice cream.

168 Furthermore, the Commission submits that if the retailers are authorised to use HB freezer cabinets to sell other brands of ice cream, they would not be 'free riding' in that respect, because HB could recover the cost of its investment in several ways, and in particular by requiring payment of a separate fee for the rental of the freezer. It disputes HB's claim that it would be difficult to collect such a fee, as HB already invoices retailers for supplies of ice cream. It states that HB has not proved that a separate system of rental would introduce economic dysfunctions into its distribution network. Moreover, the Commission submits that HB is not placed at a disadvantage in comparison with its competitors if they continue to make freezer cabinets available to retailers without charge, because if the cost of ice cream and the cost of the freezer cabinet are separated, the result should be financially neutral for retailers who continue to buy HB ice cream and stock it in freezers supplied by HB.

169 The Commission states that the analogy drawn by HB between its property rights and the field of intellectual property is erroneous, as the owners of intellectual property rights obtain certain protection to enable them to recoup the investment they have made in the products in question. According to the Commission, the

public interest in competition must be balanced against the public interest in the development of new medicines or other useful results which benefit society as a whole, as well as manufacturers. The public interest in ice cream is different. In any event, even if HB's situation were covered by the intellectual property rules, the cases cited by it in paragraph 165 above demonstrate that the owner of an intellectual property right is not entirely immune from the competition rules in the way he sells his products.

Findings of the Court

170 It is settled case-law that, 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 (*Hauer*, paragraph 23; Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15, Case C-280/93 *Germany* v *Commission* [1994] ECR I-4973, paragraph 78). 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'. It follows that the application of Articles 85 and 86 of the Treaty constitutes one of the aspects of public interest in the Community (see, to that effect, the Opinion of Advocate General Cosmas in *Masterfoods and HB*, at p. I-11371). Consequently, pursuant to those articles, restrictions may be applied on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.

171 The property right at issue in the present case concerns HB's network of freezer cabinets and its right to exploit them commercially. The contested decision in no way affects HB's ownership of its assets, but merely regulates, in the public interest, one particular manner of exploiting them, in the same way as, for example, the legislature in many Member States intervenes in order to protect a tenant. The contested decision does not deprive HB of its rights of property in its stock of freezer cabinets or prevent it from exploiting those assets by renting them out on commercial terms. It provides merely that if HB decides to exploit them by making them available 'without charge' to retailers, it may not do so on the basis of an exclusivity clause so long as it holds a dominant position on the relevant market. It follows that the Commission correctly held in the contested decision that the exclusivity clause infringes Articles 85(1) and 86 of the Treaty in outlets which have only freezer cabinets supplied by HB for the stocking of impulse ice-creams and do not have a freezer cabinet of their own or one provided by another manufacturer. It rightly rejected the request for an exemption, pursuant to Article 85(3) of the Treaty, which HB had submitted in respect of the exclusivity clause. It then simply gave HB formal notice to cease those infringements immediately and to refrain from taking any measure having the same object or effect. The contested decision does not, therefore, contain any undue limitation on the exercise of HB's right to property in its freezer cabinets.

172 Moreover, in the light of its findings in paragraph 114 above, the Court must reject HB's argument, set out in paragraph 164 above, based on the disadvantages linked to the imposition of a separate fee for the freezer cabinets. As regards HB's argument, set out in paragraph 164 above, that it is disadvantaged in comparison with its competitors, who would be able to continue to make freezer cabinets available to retailers without charge, the Court points out that the HB distribution agreements, unlike those of its competitors, contribute significantly to the foreclosure of the relevant market. In addition, as HB has a dominant position on that market, it has, irrespective of the reasons for such a position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, paragraph 57, and paragraph 158 above).

173 Consequently, the fifth plea must also be rejected.

The sixth plea: infringement of Article 190 of the Treaty

Arguments of the parties

174 HB submits that the contested decision infringes Article 190 of the Treaty in at least four respects. First, the definition of 'foreclosure' of the market used by the Commission evolved between the 1993 statement of objections and that issued in 1997. HB adds that the Commission altered its view in regard to HB during that same period. Second, the fact that the Commission did not apply the reasoning followed in *Langnese-Iglo* v *Commission* relating to the application of Article 85(1) of the Treaty to the exclusivity clause means that the contested decision is inadequately reasoned. Third, HB submits that the inferences which the Commission draws from the facts of the present case are not well founded as a matter of logic and thus the decision is vitiated by an inadequate statement of reasons. Fourth, the fact that the Commission failed to explain why HB freezer-cabinet exclusivity is not indispensable to attainment of the benefits arising from the HB agreements making those cabinets available, for the purposes of Article 85(3) of the Treaty, when it had recognised both in the 1993 statement of objections and in its 1995 notice (see paragraph 12 above) that such exclusivity could merit an exemption, is a defect of reasoning which vitiates the contested decision.

175 The Commission, supported by the interveners, observes, first, that under Article 190 of the Treaty it is required to state the reasons which led to the decision actually adopted, not the reasons which at an earlier stage might or might not have led it to adopt a different decision. Second, it submits that it has not significantly altered its analysis since 1993. In any event, it is entitled to alter

its position in the light of new facts. It took into account the judgments in *Langnese-Iglo* v *Commission* and *Schöller* v *Commission*, which were delivered after the 1993 statement of objections.

Findings of the Court

176 According to settled case-law, 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 information 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 (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 226, and Case T-241/97 *Stork Amsterdam* v *Commission* [2000] ECR II-309, paragraph 73). It is not necessary for the reasoning to go into 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 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 (see, in particular, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

177 The Court finds, first, that in its second and third arguments set out in paragraph 174 above HB fails to draw the necessary distinction between the requirement for a statement of reasons and the substantive legality of the contested decision. Under cover of its allegation that the statement of reasons is inadequate, it complains that the Commission erred in law and made a manifest error in its assessment of the facts. HB is not criticising a failure to state reasons but rather the correctness of the decision. It follows that those arguments must be rejected in the context of this plea.

178 With regard to HB's first and fourth arguments, the Court finds that the Commission explained, in particular in recitals 7 and 247 of the contested decision, that it revised its initial favourable view, contained in its statement of 15 August 1995, because the amendments proposed by HB to its distribution system had not brought about the expected results in terms of free access to sales outlets. In so doing, the Commission gave sufficient reasons in law for its decision to depart from its initial position. Moreover, it is clear from recital 241 of the contested decision that the Commission considered that HB had not shown that the alleged advantages brought about by the distribution agreements, leading to a general improvement of production and distribution for the benefit, inter alia, of consumers, could not be secured equally effectively by removing the exclusivity in favour of HB's products and thus the tie between the provision of freezer cabinets and the supply of ice creams. As recital 247 makes clear, it is for this reason in particular, that the agreements in question could not benefit from an exemption under Article 85(3) of the Treaty.

179 It follows that the plea alleging infringement of the obligation to state reasons under Article 190 of the Treaty is unfounded.

The seventh plea: failure to respect fundamental principles of Community law

Arguments of the parties

180 HB submits that the Commission, in departing from the terms of its 1995 notice (see paragraph 12 above), infringed the principle of the protection of legitimate expectations, there being no 'overriding public interest'. The circumstances surrounding the 'settlement' concluded in 1995 between HB and the Commission concerning changes to its distribution system and its implementation by HB were

of such a nature as to create the legitimate expectation that the Commission, first, would adopt a favourable view in regard to its revised agreements concerning freezer-cabinet exclusivity and, second, would not alter its previous position or reformulate its case with regard to the facts and law. HB adds that if business cannot trust the Commission to behave as agreed, the system of comfort letters and informal settlements of disputes will fall into disrepute.

181 HB submits that the Commission also infringed the principle of subsidiarity and its obligation of sincere cooperation with the national courts. It points out that identical proceedings were pending before the Irish courts and submits that there was no Community interest to justify the Commission's intervention, since the case concerned the supply by an Irish company to Irish consumers, through Irish retailers, of products specific to the Irish market.

182 HB also submits that the Commission infringed the principle of legal certainty in adopting the contested decision at a time when appeal proceedings, for which a hearing date had been fixed before the decision was taken, were pending before the Irish courts. Moreover, HB observes that the decision of the High Court was the complete opposite of the Commission's. Even though the Commission has a duty to take into account the interests of complainants, the Commission's notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the Treaty (OJ 1993 C 39, p. 6) clearly indicates that 'there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts. In these circumstances the complaint will normally be filed.'

183 Furthermore, the contested decision infringes the principle of proportionality in that it deprives HB of the economic value of its freezer cabinets in such a way that it disproportionately affects its property rights. Similarly, it is disproportionate in

that it invalidates all HB's agreements concerning the provision of freezer cabinets in the allegedly foreclosed part of the market, which is contrary to the judgment in *Langnese-Iglo* v *Commission* and *Delimitis*, which recognise that it is not necessary for all impediments to market access to be removed, provided that real possibilities for market penetration and expansion exist. Moreover, the contested decision infringes the principle of proportionality and is discriminatory in that it prohibits, not only for the past but also for the future, HB freezer-cabinet exclusivity in relations with the relevant category of retailers. In *Langnese-Iglo* v *Commission* the Court annulled the part of the Commission's decision prohibiting Langnese-Iglo from concluding exclusive purchasing agreements until after 31 December 1997, holding that it would be contrary to the principle of equal treatment to exclude for certain undertakings the benefits of a block exemption regulation as regards the future whilst other undertakings could continue to conclude exclusive purchasing agreements such as those prohibited by the decision.

184 HB also argues that the contested decision is discriminatory in that it constitutes an arbitrary attack on HB's ability to compete on the basis adopted by all other companies carrying on business on the relevant market.

185 Lastly, HB submits that the arguments relied on in support of the pleas alleging infringement of Article 190 of the Treaty equally support the plea of infringement of an essential procedural requirement. Furthermore, it asserts that the Commission, by refusing any dialogue in order to find a solution to the breakdown in the '1995 deal', fell short of accepted standards of proper administration and thereby infringed essential procedural requirements.

186 The Commission, supported by the interveners, contends that it cannot have violated a legitimate expectation of HB by virtue of HB's failure to obtain an exemption under Article 85(3) of the Treaty. HB did not receive 'precise

assurances' to that effect and, in any event, legitimate expectations cannot be invoked where there has been a breach of Community law.

187 The Commission submits that the notion of subsidiarity does not concern the question whether Community law is to be applied by national courts or by the Commission; that question has long since been settled. According to the Commission, HB's argument is based on the mistaken premiss that the Commission cannot sanction an infringement of Articles 85 and 86 of the Treaty which has been brought to its attention if that infringement (which, by definition, requires an effect on trade between Member States) produces effects only on the market of a Member State.

188 The Commission also contends that it did not infringe the principle of legal certainty by adopting the contested decision at a time when proceedings were pending before the Irish courts. It submits that it was entitled to adopt that decision for a number of reasons. First, HB had notified an agreement, seeking a negative clearance or an exemption. Only the Commission has the power to take a decision to grant an exemption under Article 85(3) of the Treaty. Second, when the Commission adopted the contested decision, a number of actions were pending before national courts and competition authorities. It submits that it had a duty to take account of the interests of complainants and, therefore, was required to take a rapid decision once it had reached the conclusion that there had been a breach of Articles 85(1) and 86 of the Treaty. According to HB, the Commission ought to have awaited the outcome of the appeal lodged before the Irish courts before adopting the contested decision. That would not have resolved the problem of legal certainty, but merely deferred the adoption of the contested decision.

189 The Commission submits that the contested decision does not infringe the principle of proportionality. That decision does not abolish HB's rights of ownership over the freezers. The decision gives a specific example of how HB could recoup its investment in the freezers by lawful means. HB has not put forward any valid reason why it cannot administer a separate billing system for

ice creams and freezers. HB claims that the contested decision invalidates all the agreements in question, but interprets the judgments in *Langnese-Iglo* v *Commission* and *Delimitis* as meaning that not all impediments to market access need be removed. However, the Commission submits that in its judgment in *Delimitis* the Court of Justice held that the agreements have to be taken as a whole and not subdivided. Furthermore, with regard to HB's argument that the contested decision prohibits the exclusivity clause not only for the past but also for the future, the Commission submits that the decision merely prevents HB from concluding new agreements with the same effect or the same object as the existing ones.

190 The Commission disputes HB's claim that it was treated unfairly and discriminated against. In the decision (recital 204) the Commission took into account the effects produced by the other networks of agreements, but established that none of those other networks had contributed significantly to the foreclosure of the relevant market. The principle of equal treatment does not require those agreements to be forbidden where they have no significant restrictive effect.

191 Lastly, the Commission denies that it has infringed any essential procedural requirement.

Findings of the Court

192 With regard to infringement of legitimate expectations, it is settled case-law that 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 (see, to that effect, Case T-266/97 *Vlaamse Televisie Maat-*

schappij v *Commission* [1999] ECR II-2329, paragraph 71, and Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission* [2000] ECR II-3659, paragraph 85).

193 The Court finds, first, that the Commission did not give HB specific assurances as to the consequences of the commitments notified by the letter of 8 March 1995 (see paragraph 12 above). Furthermore, it did not adopt a decision applying Article 85(3) of the Treaty, a decision which it could in any event have revoked or amended pursuant to Article 8(3) of Regulation No 17 if there were a change in the facts that were basic to the making of the decision.

194 The notice of 15 August 1995 was issued expressly under Article 19(3) of Regulation No 17. In that notice, the Commission proposed — on a preliminary basis — to adopt a favourable attitude to HB's distribution agreements, as revised by HB, and invited all the interested third parties to submit their observations to it within a specified time. It follows that the notice in question merely indicated a preliminary position of the Commission, which was subject to change, in the light particularly of the observations of third parties. Consequently, HB could not have had a legitimate expectation that the Commission would grant it an exemption under Article 85(3) of the Treaty in accordance with that notice, solely on the basis of publication of the notice.

195 As regards HB's argument that it acted irreversibly to its detriment in adopting changes to its distribution system on the basis of the Commission's 'proposal' to adopt a favourable position in regard to its distribution agreements, the Court considers that, if HB could have had a legitimate expectation in regard to the notice in question, that expectation would have been confined to the procedure initiated by the Commission by its 1993 statement of objections and the objections raised in it relating to the HB distribution agreements at that date. However, in the present case, the Commission did not act on the basis of its 1993 statement of objections but, having found that the changes made by HB to its distribution system had not had the expected results in terms of freedom of access to sales outlets, it initiated a new procedure and raised new objections to that

system in its 1997 statement of objections. Given that, even if the Commission had granted an exemption to HB, it would have had the power, and even the obligation, under Article 8(3) of Regulation No 17, to revoke or amend that exemption if it had found that the exempted agreements nevertheless had certain effects that were incompatible with the conditions laid down in Article 85(3) of the Treaty, and particularly if experience had shown that the changes made by HB to its distribution system had not brought about the expected results, the Court finds that the Commission, in adopting the 1997 statement of objections, did not infringe the principle of protection of legitimate expectations in the present case.

196 It follows that this objection must be rejected.

197 As regards HB's claims that the principles of subsidiarity, sincere cooperation and legal certainty have been infringed, the Court points out that, although Articles 85(1) and 86 of the Treaty 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. Such an effect has not been called into question in the present case.

198 In pointing to the fact that the present case concerns the supply by an Irish company to Irish consumers, through Irish retailers, of products that are specific to the Irish market and to the fact that when the contested decision was adopted parallel proceedings had been decided by the High Court or were pending before the Supreme Court, HB has not proved to the requisite legal standard that the Commission infringed those principles or its Notice on cooperation between itself and national courts in the application of Articles 85 and 86 of the EC Treaty. It is clear from the contested decision and the Commission's written pleadings that the application of a condition of exclusivity for freezer cabinets supplied to retailers is a contractual practice adopted by the majority of ice-cream manufacturers in the

Community. Furthermore, companies in the Unilever group play a significant role in the impulse ice-cream market in several Member States. It follows that the issues dealt with in the contested decision had a wider Community importance, in particular in light of the fact that various national courts and competition authorities were dealing with parallel cases raising similar issues to those in the present case (see, in particular, recitals 275 to 280 of the contested decision). In those circumstances, the adoption of the contested decision by the Commission was appropriate in order to ensure that the Community competition rules would be applied coherently to the various forms of exclusivity practised by ice-cream manufacturers throughout the Community.

199 Furthermore, as the Court of Justice held in its judgment in *Masterfoods and HB*, 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. The Commission 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 (see, to that effect, *Masterfoods and HB*, paragraphs 47 and 48, and *Delimitis*, paragraphs 44 and 45). Given that during the negotiations the Commission had received HB's application for an exemption as well as third-party complaints, HB's arguments relating to subsidiarity are unfounded.

200 The present objections must therefore be rejected.

201 As regards HB's assertions that the contested decision infringes the principle of proportionality and is discriminatory, the Court finds that those allegations are unfounded. 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 (see Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25). Moreover, discrimination is the different treatment of identical situations or the treatment of different situations identically.

202 First, in light of the Court's assessment set out in paragraphs 170 to 173 above, the Court finds that the contested decision does not contain any undue or disproportionate limitation of HB's property rights in its freezer cabinets. Nor does it constitute an arbitrary or discriminatory impairment of HB's ability to compete with other suppliers on the basis adopted by all the other companies active on the relevant market, in the light especially of the overwhelming position which HB holds on that market and the significant contribution by HB, unlike the other suppliers, to the foreclosure of that market (see paragraph 172 above).

203 Second, the fact that the contested decision invalidates the exclusivity clause in the agreements for the supply of freezer cabinets concluded between HB and retailers in Ireland that are applicable to cabinets installed in outlets equipped only with cabinets supplied by HB for the storage of single-wrapped impulse ice-creams and which have neither their own freezer cabinet nor a cabinet from another ice-cream manufacturer, does not mean that the decision is disproportionate.

204 A network of distribution agreements set up by a single supplier may escape the prohibition laid down in the competition rules provided that it does not significantly contribute, 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, by analogy, *Delimitis*, paragraphs 23 and 24, and *Langnese-Iglo*, paragraph 129). That means that where a network of similar agreements concluded by a single manufacturer exists, the assessment of the effects of that network on competition applies to the entire set of individual contracts constituting the network. The Court finds, therefore, that the Commission correctly assessed the bundle of HB's distribution agreements as a whole and, in consequence, did not split the agreements, as HB alleges.

It is clear from the judgment in Case C-214/99 *Neste Markkinointi* [2000] ECR I-11121, see, in particular, paragraphs 36 and 37) that it is only exceptionally, and in specific circumstances which are not present in this case, that the network of the same supplier may be subdivided.

205 Third, it is apparent from Article 4 of the contested decision that the Commission required HB immediately to cease the infringements of Articles 85(1) and 86 of the Treaty constituted by its network of distribution agreements and to refrain from taking any measure having the same object or effect. The Court finds that this provision is not disproportionate or discriminatory, as it merely prohibits HB from reintroducing the exclusivity clause in the same circumstances as those referred to in Articles 1 and 3 of the contested decision, and thereby guarantees the effectiveness of the contested decision, by preventing a return in the future to the anti-competitive practice found to exist (see, by analogy, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraph 39).

206 It follows that this objection must be rejected.

207 Inasmuch as HB's objection relating to infringement of essential procedural requirements and an inadequate statement of reasons consists of a mere reference by it to its arguments set out in the context of the fifth plea, alleging infringement of Article 190 of the Treaty, the Court finds that that objection cannot be upheld in view of the assessment made by the Court in paragraphs 176 to 179 above. As to HB's argument relating to the need to extend the negotiations in order to find a solution to the breakdown in the '1995 settlement', the Court also considers that the Commission has not infringed any essential procedural requirements. As the Commission found that the changes made by HB to its distribution system had not brought about the expected results in terms of freedom of access to sales outlets, it was not obliged to pursue the negotiations indefinitely, particularly when the case had extended over a lengthy period. The Commission was

therefore entitled to initiate a new procedure and to raise new objections to that system in its 1997 statement of objections, leaving HB an opportunity to respond to it.

208 This objection must therefore be rejected.

209 Consequently, the seventh plea is unfounded.

210 It follows that the entire application must be dismissed.

Costs

211 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As HB has been unsuccessful in its submissions and the Commission has asked for costs, HB must be ordered to bear its own costs and to pay the Commission's costs, including those relating to the interim proceedings.

212 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than those mentioned in the preceding subparagraph of Article 87(4) to bear its own costs. In the present case, Mars and Richmond, which intervened in support of the Commission, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

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.**

R. García-Valdecasas P. Lindh J.D. Cooke

Delivered in open court in Luxembourg on 23 October 2003.

H. Jung

Registrar

P. Lindh

President