

## Case T-9/93

Schöller Lebensmittel GmbH&Co. KG

v

Commission of the European Communities

(Competition — Exclusive purchasing agreements for ice-cream —  
Relevant market — Possible barriers to entry to the market by third parties —  
Comfort letter — Negative clearance — Duration of contracts —  
Block exemption— Prohibition of conclusion of exclusive agreements in the future)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 8 June 1995 ..... II - 1615

### Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Appreciable effect — Scope of the Notice concerning Agreements of Minor Importance (EEC Treaty, Art. 85(1))*
2. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Exclusive purchasing agreements — Criteria for assessment — Accessibility of the market — Significant contribution by the agreements at issue to possible closing-off of the market owing to a large number of similar agreements (EEC Treaty, Art. 85(1))*

3. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Network of exclusive agreements — Assessment of effects and of compatibility with the competition rules of the Treaty valid for all individual agreements*  
(EEC Treaty, Art. 85(1))
  
4. *Competition — Agreements, decisions and concerted practices — Notification — Commission decision to close the case — Legal nature — Subsequent initiation of an infringement procedure — Conditions*  
(Council Regulation No 17)
  
5. *Competition — Agreements, decisions and concerted practices — Prohibition — Block exemption — Exclusive purchasing agreements — Regulation No 1984/83 — Agreements subject to tacit renewal which may endure beyond five years — Excluded from the benefit of the exemption*  
(Commission Regulation No 1984/83, Art. 3(d))
  
6. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Improvement in the production or distribution of goods — Appraisal by reference to the public interest, not the interests of the parties to the agreement*  
(EEC Treaty, Art. 85(3))
  
7. *Competition — Administrative procedure — Cessation of infringements — Commission's powers — Power to prohibit an undertaking from concluding exclusive agreements in the future — None — No legal basis — Contrary to the principle of equal treatment*  
(EEC Treaty, Art. 85(3); Council Regulation No 17, Art. 3; Commission Regulation No 1984/83, Art. 14)

1. A network of exclusive purchasing agreements is not automatically liable to prevent, restrict or distort competition appreciably merely because the ceilings laid down in the Commission Notice on Agreements of Minor Importance are exceeded. It is entirely possible, in certain cases, that agreements concluded between undertakings which exceed the ceilings indicated affect trade between Member States or competition only to an insignificant extent and consequently are not caught by Article 85(1) of the Treaty.
  
2. In order to determine whether a network of exclusive purchasing agreements falls within the prohibition contained in Article 85(1) of the Treaty, it is appropriate to consider whether, taken together, 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 for new domestic and foreign competitors. If that is found not to be the case, the individual agreements making up the bundle of agreements as a whole cannot adversely affect competition within the meaning of the abovementioned article. If, on the other hand, it is found that it is difficult to gain access to the market, it is necessary to assess the extent to which the agreements in question contribute to the cumulative effect produced, on the basis that only agreements which contribute significantly to any closing-off of the market are prohibited.

Where it is necessary to assess the impact on access to the market of networks of exclusive agreements, account must be taken of the number of sales outlets tied to the producers in relation to the number of retailers not so tied, the quantities to which those commitments relate and the proportion between those quantities and those which are sold through retailers that are not tied; it must also be borne in mind that the extent of tying-in brought about by such networks, important though it may be, is only one factor amongst others pertaining to the economic and legal context in which the assessment must be made.

3. The assessment of the effects on competition of a network of similar exclusive purchasing agreements set up in a market by a supplier and the inferences to be drawn pursuant to Article 85 of the

Treaty apply to all the individual agreements making up the network.

4. A comfort letter whereby an undertaking which has notified a standard form for its supply agreements with its retail distributors is informed of the Commission's opinion that it is unnecessary for it, on the basis of the information in its possession, to take action regarding those agreements and that the case may therefore be closed, constitutes neither a decision granting negative clearance nor a decision applying Article 85(3) of the Treaty within the meaning of Articles 2 and 6 of Regulation No 17, provided that it has not been adopted in accordance with the provisions of that regulation. It does not therefore prevent the Commission, after receiving a complaint which it is required to examine, from reopening the procedure, in the exercise of a power which it had reserved the right to exercise, in order to examine the compatibility of those agreements with the competition rules if it considers that there has been any appreciable change affecting certain matters of law or of fact on which its first assessment was based.
5. Exclusive purchasing agreements subject to tacit renewal which may endure beyond five years must be regarded as having been concluded for an indefinite duration and cannot therefore qualify for a block exemption under Regulation No 1984/83 in favour of certain categories of exclusive purchasing agreements.

6. The improvement of the production or distribution of goods, provided for by Article 85(3) of the Treaty as the first of the four conditions that must all be satisfied for an exemption to be granted in respect of an agreement between undertakings which does not observe the prohibitions laid down in Article 85(1), cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities. The improvement must, as far as the public interest is concerned, display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.

7. The Commission has no power to prohibit an undertaking which it orders to dismantle the network of exclusive purchasing agreements that it has established from concluding new agreements of that kind in the future. There is no legal basis for that power either in Article 85(1) of the Treaty, which does not in principle

prohibit such agreements, or in Article 3 of Regulation No 17, which merely authorizes the Commission to prohibit existing agreements, or in Article 14 of Regulation No 1984/83, which only grants it the power to withdraw the benefit of a block exemption from exclusive purchasing agreements whose implementation has been found to have certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty.

Moreover, it would be contrary to the principle of equal treatment, one of the fundamental principles of Community law, to exclude for certain undertakings the benefit of a block exemption regulation as regards the future whilst other undertakings could continue to conclude exclusive purchasing agreements of the kind prohibited by the decision. Such a prohibition would be liable to undermine the economic freedom of certain undertakings and create distortions of competition on the market, contrary to the objectives of the Treaty.