JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
8 June 1995 *

In Case T-9/93,

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

applicant,

v

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

defendant,

supported by

* Language of the case: German.

Mars GmbH, a company governed by German law, established in Viersen (Germany), represented by Jochim Sedemund, Rechtsanwalt, Cologne, and by John Pheasant, Solicitor, with an address for service in Luxembourg at the Chambers of Michel Molitor, 14a Rue des Bains,

intervener,

APPLICATION for the annulment of Commission Decision 93/405/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH&Co KG (IV/31.533 and IV/34.072 — OJ 1993 L 183, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: B. Vesterdorf, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 16 November 1994,

gives the following

Judgment

Facts

1 The applicant notified to the Commission by letter of 7 May 1985 a form of 'supply agreement' governing its relations with its retail distributors. On 20 September 1985, the Commission Directorate General for Competition sent a comfort letter to the applicant's lawyer, which included the following paragraphs:

'...

On 2 May 1985, you applied on behalf of Schöller Lebensmittel GmbH&Co KG, pursuant to Article 2 of Regulation No 17, for a negative clearance for an "ice-cream supply agreement".

Pursuant to Article 4 of that regulation, you also notified the agreement in advance. Subsequently, by letter of 25 June 1985, you provided a standard agreement to serve as a reference for the agreements which Schöller will conclude in the future.

By letter of 23 August 1985, you clearly indicated that the exclusive purchasing obligation imposed on the client by the standard agreement notified, which is accompanied by a prohibition of competition, may be cancelled for the first time by giving six months' notice no later than at the end of the second year of the agreement, and thereafter by giving the same period of notice at the end of each year.

It appears from the information available to the Commission, which is essentially based on that given in your application, that the fixed duration of the agreements

to be concluded in the future will not exceed two years. The average duration of all your client's "ice-cream supply agreements" will therefore fall well short of the period of five years laid down in Commission Regulation (EEC) No 1984/83 of 22 June 1983 (OJ 1983 L 173, p. 5) as a precondition for a block exemption to be available in respect of exclusive purchasing agreements.

Those facts clearly show that, even if account is taken of the number of agreements of the same nature, the "ice-cream supply agreements" concluded by Schöller do not have the effect, in particular, of eliminating competition for a substantial part of the products concerned. Access for third-party undertakings to the retail sector remains guaranteed.

Schöller's "ice-cream supply agreements" which were notified are therefore compatible with the competition rules of the EEC Treaty. It is therefore unnecessary for the Commission to take action regarding the agreements notified by your client.

The Commission nevertheless reserves the right to re-open the procedure if there is any appreciable change affecting certain matters of law or of fact on which the present assessment is based.

We also wish to inform your client that the existing ice-cream supply agreements are the subject of a similar assessment and that it is therefore unnecessary to notify them if the fixed duration of those agreements does not exceed two years after 31 December 1986 and they can thereafter be cancelled by giving notice of a maximum of six months at the end of each year.

...'

2 On 18 September 1991, Mars GmbH (hereinafter 'Mars') lodged a complaint with the Commission against the applicant and against Langnese-Iglo GmbH (hereinafter 'Langnese') for infringement of Articles 85 and 86 of the Treaty and asked that protective measures be taken in order to forestall the serious and irreparable damage which, in its opinion, would be caused by the fact that the sale of its ice-creams would be severely hampered in Germany by the implementation of agreements contrary to the competition rules which the applicant and Langnese had concluded with a large number of retailers.

3 By decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.072 — Mars/Langnese and Schöller — Interim measures, hereinafter 'the decision of 25 March 1992'), the Commission, essentially, by way of interim measure, prohibited the applicant and Langnese from enforcing their contractual rights under the agreements concluded by them or for their benefit, whereby retailers undertook to buy, offer for sale or sell only the ice-cream of those producers, to the exclusion of the ice-cream products 'Mars', 'Snickers', 'Milky Way', and 'Bounty' where the latter are offered to the final consumer as individually wrapped products. The Commission also withdrew the benefit of the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5, hereinafter 'Regulation No 1984/83') to the exclusive agreements concluded by the applicant to the extent necessary for the application of the abovementioned prohibition.

4 It was in those circumstances that, by way of final decision, following the decision of 25 March 1992, on the 'supply agreements' at issue, the Commission adopted, on 23 December 1992, Decision 93/405/EEC relating to a proceeding pursuant to Article 85 of the Treaty against Schöller Lebensmittel GmbH&Co KG (IV/31.533

and IV/34.072 — OJ 1993 L 183, p. 1, hereinafter 'the decision'), the operative part of which is as follows:

'Article 1

The agreements concluded by Schöller Lebensmittel GmbH&Co KG requiring retailers established in Germany to purchase single-item ice-cream [1] for resale only from that undertaking infringe Article 85(1) of the EEC Treaty.

Article 2

An exemption pursuant to Article 85(3) of the EEC Treaty for the agreements referred to in Article 1 is hereby refused.

Article 3

Schöller Lebensmittel GmbH&Co KG is hereby required within three months of notification of this Decision to inform dealers with whom it has current agreements of the kind referred to in Article 1 of the full wording of Articles 1 and 2, and to notify them that the agreements in question are void.

1 — *Kleineis*, as defined in the commentary on product classification describing the situation at 21 May 1990, drawn up by the ice-cream section of the Association of the German Confectionery Industry (Bundesverband der Deutschen Süsswareindustrie eV).

Article 4

Schöller Lebensmittel GmbH&Co KG may not conclude agreements of the kind referred to in Article 1 until after 31 December 1997.

Article 5

...'

5 On the same date, a decision was adopted in relation to Langnese (Commission Decision 93/406/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Langnese-Iglo GmbH (IV/34.072 — OJ 1993 L 183, p. 19)).

Procedure

6 By application lodged at the Registry of the Court of First Instance on 10 April 1992, the applicant brought an action for the annulment of the decision of 25 March 1992 and, by a separate document received at the Registry of the Court of First Instance on the same date, the applicant also requested the adoption of interim measures (Cases T-28/92 and T-28/92 R).

7 By order of 16 June 1992, the President of the Court of First Instance, by way of interim order, prescribed interim measures (Cases T-24/92 R and T-28/92 R *Langnese-Iglo and Schöller Lebensmittel* v *Commission* [1992] ECR II-1839).

8 By letter received at the Registry of the Court of First Instance on 2 February 1993, the applicant informed the Court, pursuant to Article 99 of the Rules of Procedure, that it was discontinuing the proceedings and, by order of the President of the First Chamber of the Court of First Instance of 1 April 1993, Case T-28/92 was removed from the register of the Court of First Instance.

9 Pursuant to the fourth paragraph of Article 173 of the EC Treaty, which reproduces the second paragraph of Article 173 of the EEC Treaty, the applicant, by a document lodged at the Registry of the Court of First Instance on 20 January 1993, brought the present action for the annulment of the decision.

10 By separate document, received at the Registry of the Court of First Instance on the same date, the applicant also applied for suspension of the operation of the decision, pursuant to Articles 185 of the Treaty and 104 of the Rules of Procedure of the Court of First Instance (Case T-9/93 R).

11 By application received at the Registry of the Court of First Instance on 3 February 1993, Mars sought leave to intervene in case T-9/93 R in support of the Commission. By application lodged at the Registry of the Court of First Instance on 4 February 1993, Mars also sought leave to intervene in case T-9/93, in support of the Commission.

12 By order of 19 February 1993, the President of the Court of First Instance granted leave to Mars to intervene in Case T-9/93 R and made an order in respect of the application for suspension of operation lodged by the applicant (Cases T-7/93 and T-9/93 R *Langnese-Iglo and Schöller Lebensmittel* v *Commission* [1993] ECR II-131).

13 By order of 12 July 1993, the President of the First Chamber of the Court of First Instance granted leave to Mars to intervene in Case T-9/93 and granted a request for confidential treatment made by the applicant under Article 116(2) of the Rules of Procedure of the Court of First Instance.

14 Langnese also brought an action for the annulment of the decision addressed to it (Case T-7/93). Mars was also granted leave to intervene in that case.

15 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by letter of 26 September 1994, the Court requested the parties to answer certain questions in writing. The applicant and the defendant responded to those questions by letters of 17 and 19 October 1994 respectively. By order of 9 November 1994, the President of the Second Chamber, Extended Composition, granted a request for confidential treatment submitted by the applicant pursuant to Article 116(2) of the Rules of Procedure of the Court of First Instance in relation to certain particulars contained in the parties' answers to the questions put to them.

16 The confidential treatment of certain particulars, by virtue of the orders of 12 July 1993 and 9 November 1994, was observed at the hearing. The same applies to the present judgment.

17 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 16 November 1994.

Forms of order sought

18 The applicant claims that the Court should:

— annul the Commission Decision;

— order the Commission to pay the costs.

19 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs, including those on the proceedings for interim measures.

20 The intervener, Mars, claims that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs, including those of the proceedings for interim measures.

21 In support of its application, the applicant puts forward three pleas in law alleging, first, infringement of Article 85(1) of the Treaty, in that the supply agreements

concerned do not have an appreciable effect on competition; secondly, infringement of Article 85(3) of the Treaty, in that the Commission refused to grant an exemption for the agreements at issue, and, thirdly, infringement of Article 3 of Council Regulation No 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17').

The plea of infringement of Article 85(1) of the Treaty

22 This plea comprises three parts. First, the applicant criticizes the Commission for adopting too narrow a definition of the relevant market. It then claims that the Commission disregarded the effect of the supply agreements on competition. Finally, it maintains that the Commission is not empowered by Article 3 of Regulation No 17 to prohibit all the existing exclusive agreements, including those not covered by the prohibition contained in Article 85(1) of the Treaty.

The first part of the plea: definition of the market

23 The applicant claims that the definition of both the product market and the geographical market adopted by the Commission is incorrect.

The product market

24 In point 87 of its decision, the Commission defined the product market as comprising industrial impulse ice-cream sold through all distribution channels with the exception of doorstep delivery services.

Summary of the arguments of the parties

25 The applicant claims that the relevant market covers ice-cream in general, regardless of how it is manufactured (industrially or by the craft trade), the number of portions and the presentation. There is no significant difference regarding the properties, the final use, the manufacturing characteristics and the price, such as to exclude interchangeability or equivalence of the products or to justify different markets being distinguished for certain types of ice-cream.

26 According to the applicant, the product market must be defined by reference to the consumer's needs. It points out that, according to the Commission Notice of 3 September 1986 on Agreements of Minor Importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2, paragraphs 11 and 12, hereinafter 'the Notice on Agreements of Minor Importance'), the products forming part of a market must be 'interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together'. The Commission is therefore wrong, in the applicant's view, to state that the consumer's point of view is not the 'sole' criterion for defining the product market in this case and that 'differentiation is necessary'. The decisive factors in defining the product market are the uniform need of consumers to enjoy a portion of ice-cream and the fact that each type of retail trade re-sells ice-cream to consumers, in the main without processing it.

27 As regards craft-trade ice-cream, the applicant states that the consumer's choice does not depend on whether the seller offers a craft-trade or industrially produced ice-cream for immediate consumption. The pleasure expected from tasting a portion of ice-cream is the same in all cases. Moreover industrially produced ice-cream in individual portions, according to the applicant, is often in competition with

craft-trade ice-cream in certain catering establishments where a range of services is provided, namely fast-food restaurants, snack bars, dining cars, and so on.

28 As regards the different types of industrially produced ice-cream, the applicant claims that, from the qualitative point of view, industrially produced ice-cream is identical regardless of its various presentations. According to the applicant, the size and form of packaging in which ice-creams are offered to consumers are therefore of little importance. All those types of ice-creams are distributed through the various existing distribution channels and, according to the applicant, tend to satisfy the same consumer need. In support of that view, the applicant adds, first, that some service stations, for example, sell family ice-cream packs and, secondly, that grocers, bakers and kiosks may also sell individual portions and sell for immediate consumption both craft-trade ice-cream and industrially produced ice-cream for bulk-buying customers. Furthermore, the applicant estimates that about 14% of all its customers, namely retailers who sell for immediate consumption in the streets, such as for example service stations, kiosks, and so on, buy only a combination of prepackaged single-item ice-cream products and ice-creams sold in packages containing several individual portions, called 'multipacks', which, in its view, shows that the Commission's market definition is incorrect.

29 The applicant then claims that the place where ice-cream is offered for sale and consumed has no bearing on the satisfaction of consumer needs. The consumer's need to eat a portion of ice-cream is the same, whether it arises at his home, at his workplace, in the street, during travel or elsewhere. It is therefore appropriate to include all the various kinds of ice-cream, without any distinction based on the channels of distribution through which they are sold. According to the applicant, therefore, the Commission was wrong to exclude ice-cream distributed by doorstep delivery services.

30 Finally, the applicant asserts that the Commission is wrong to refer to the case-law according to which 'even identical products can belong to different product

markets if they satisfy specific demand' (see point 79 of the Decision). According to the applicant, there is no 'specific' demand from consumers according to the different types of packaging and the latter do not respond to 'economic needs, which are themselves also different' within the meaning of the case-law (see the judgment of the Court of Justice in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).

31 The Commission bases its definition on the consumer's point of view. Thus, it is first necessary, according to the Commission, to exclude ice-cream sold as part of a catering service, since, according to the case-law of the Court, that market is separate (see the judgment in Case see C-234/89 *Delimitis* [1991] ECR I-935). According to the Commission, such ice-cream comprises partly industrially produced ice-cream intended for large consumers and craft-trade ice-cream.

32 The Commission then observes that, in view of the specific link between consumption and the availability of refrigeration, deriving from the inherent nature of the product, the place of consumption of ice-creams is of decisive importance in determining the interchangeability of products for purposes of competition law, particularly since a need often arises on impulse and is short-lived.

33 In those circumstances, it is appropriate in the Commission's opinion, also to exclude 'multipacks', take-home ice-cream and single-item ice-cream products sold by doorstep delivery services with a view to storage in private freezers, such products not being available for the satisfaction of needs away from home. In that connection, the Commission contends that it is apparent from the case-law of the Court of Justice that even identical products can belong to different product markets if they satisfy a specific demand (see the judgment in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano Commercial Solvents* v *Commission* [1974] ECR 223, *Hoffmann-La Roche*, cited above, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461).

34 However, the consumer's point of view is not, in the Commission's view, the only decisive factor. Account must, it considers, also be taken both of the various distribution channels through which ice-creams are sold to consumers and of the different conditions of competition which characterize the various stages of distribution, since the supply agreements at issue concern access to the retail trade by producers and/or wholesalers. Since Article 85(1) of the Treaty prohibits any restriction of competition at any stage of trade between the producer and the final consumer (see the judgment of the Court of Justice in Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125), the consumer's viewpoint cannot, in this case, be the only decisive factor in assessing the effects on competition of the supply agreements.

35 In those circumstances, it is appropriate, in the Commission's view, to exclude from the product market, first, craft-trade ice-creams, since there is no trade in them on a market where the supply emanates from industrial ice-cream producers and wholesalers and in which demand comes from retailers and, also, 'scooping' ice-cream, since the retail trade fulfils different distribution functions as between that type of ice-cream and impulse ice-cream and the distribution channels for those two groups of products overlap only marginally. In that respect, the Commission states that the structure of demand may be taken into consideration in defining the market (*Michelin* v *Commission*, cited above).

36 As regards ice-cream for bulk-buying customers, the Commission adds that it also displays different particular features which justify its exclusion from the relevant market.

37 The intervener, Mars, considers that it is appropriate to subdivide the market defined by the Commission into two sub-markets: the traditional trade, on the one hand, and the grocery retail trade on the other, since the present proceedings essentially concern only the sub-market of impulse ice-cream, which is distributed in the

traditional trade, access to that sector being closed to new competitors because of the existence of exclusive agreements.

38 According to Mars, it should also be noted that more than 60% of all impulse ice-cream is distributed through the traditional trade. Mars adds that the Commission has also demonstrated significant structural differences between the two submarkets, which are such as to justify, under German law, a subdivision. According to Mars, the same products may, when sold through different distribution channels, be classified as falling within different markets.

Findings of the Court

39 In order to establish whether the definition of the market adopted by the Commission in point 87 of its decision is correct, the Court observes, at the outset, that delimitation of the relevant market is essential in order to analyse the effects of the exclusive agreements on competition and, in particular, to analyse the possibilities available to new domestic and foreign competitors to establish themselves in the ice-cream market or to increase their market shares thereof (*Delimitis*, paragraphs 15 and 16).

40 In that connection, it is settled law that account must also be taken of the consumer's point of view. Thus, the Court of Justice held, in a case concerning the application of Article 86 of the Treaty, that the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products (see the judgment of the Court of Justice in Case 6/72 *Euroemballage and Continental Can* v *Commission* [1973] ECR 215). As regards the product market, the Court of Justice has held, more specifically, that that concept implies that there can be effective competition

between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market (*Hoffmann La-Roche*, cited above). Moreover, as regards the possibility of taking account of other factors, the Court observes that an examination limited to the objective characteristics of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (*Michelin*, cited above, paragraph 37).

41 The Court must therefore examine the definition of the product market adopted by the Commission in the light of those considerations. It must be borne in mind that, in point 80 of its decision, the Commission stated that scooping ice-cream and craft-trade ice-cream served for immediate consumption in the street, that is to say without the provision of any catering services, and impulse ice-cream sold at the same place are, from the consumer's point of view, equivalent products.

42 The Court considers, first, that the Commission was therefore right to exclude ice-cream offered as part of a catering service, that is to say some industrial ice-cream for bulk-buying customers and craft-trade ice-cream, since that market, according to the case-law of the Court of Justice (*Delimitis*, cited above, paragraph 16), constitutes a separate market, the consumption of ice-creams in restaurants generally involving the provision of a service and being less often affected by considerations of an economic nature than purchases, for example, in a grocery store.

43 The Court also considers that it is also necessary to exclude, as contended by the Commission, ice-creams stored in private freezers at consumers' homes, since they are not available to satisfy a need arising away from home, in particular an impulse need, and are only to a limited extent interchangeable with products sold in the street (*Michelin*, cited above, paragraphs 48 and 49). They are take-home ice-cream,

which in general is purchased with a view to home storage, and single-item ice-creams delivered to the doorstep. The Court considers that the place of consumption was correctly considered by the Commission to be a decisive factor in determining the market in this case, since the products in question can be stored for only a very limited time without refrigeration and must therefore necessarily be consumed in the immediate neighbourhood of the last place where cold storage was possible.

44 As regards ice-cream sold in 'multipacks', it is apparent from the decision that ice-cream of that kind is as a general rule offered for sale by the grocery trade and doorstep delivery services and is not therefore available to satisfy impulse needs away from home. Admittedly, the applicant claims that about 14% of all its customers buy only a combination of individual pre-packaged portions and 'multipacks'. However, it is apparent from the applicant's answers to the questions on that subject put to it by the Court, first, that that percentage covers not only traditional retailers but also those in the grocery trade, and, secondly, that in 1993 alone a very limited number of retailers in the traditional trade sold that combination. Moreover, since the applicant did not contest, at the hearing, the statement made by the Commission in its answers to the questions put by the Court to the effect that 'multipacks' account for only about 4% of the total volume of sales to the category of customers to which the applicant referred, the Court considers that the Commission was right to consider that 'multipacks' are not as a general rule intended for immediate consumption and, consequently, to exclude ice-creams presented in that form from the product market.

45 It is apparent from point 81 et seq. of the decision that, according to the Commission, in view of the different conditions of competition which characterize the various stages of distribution and the parallel distribution channels through which the products in question are offered to consumers, it is also necessary to

exclude, first, craft-trade ice-creams as a whole, that is to say craft-trade ice-creams which are sold in the street without the provision of catering services, on the ground that, in a market involving only sales to retailers, there is no trading in those ice-creams, and secondly, industrially produced ice-cream for bulk-buying customers, on the ground that ice-cream in that form displays several peculiar features as compared with industrially produced impulse ice-cream.

46 As regards craft-trade ice-creams, the documents before the Court show that ice-cream of that kind is generally offered for sale at or close to the place of production. It is not therefore covered by the contested supply agreements, since craft-trade ice-creams are not — and the applicant does not deny this — either offered or sought by the various types of retailer. In those circumstances, the Court considers that the assessment of the effects on competition, in particular regarding access to retailers, of the supply agreements at issue, is not likely to change if those ice-creams are included in the product market. Accordingly, the Commission was right to exclude them from the product market.

47 As regards industrially produced ice-cream for bulk-buying customers, intended for sale in individual portions, that is to say 'scooping' ice-cream, it should be borne in mind that their exclusion from the product market is explained, in points 84 to 86, by three considerations. First, the decision indicates that the retail trade performs various marketing functions which are dependent on different product characteristics, with the result that there is only a slight overlap between the distribution channels for these two categories of article. Secondly, it is stated in the decision that the further processing operation, namely serving up in portions, required for scooping ice-cream, means that impulse ice-cream and scooping ice-cream are offered together to a significant extent only in the catering sector. Moreover, the grocery trade and the traditional specialized trade, which sell by far the greater part of industrially produced impulse ice-cream, are generally not geared to selling catering ice-cream. Thirdly, the decision states that there are differences between the two categories of products from the point of view of product technology.

48 The Court finds that the Commission has not put forward any evidence to show that there are different patterns of demand for the two categories of product, within the meaning of the *Michelin* judgment, which could in themselves justify a delimitation of the market which excludes scooping ice-cream sold in the street. The Court considers that although there are various channels of distribution, that fact is not in this case sufficient in itself to exclude ice-cream for bulk-buying customers sold in individual portions for consumption outside catering establishments. The Court considers that the applicant was right to claim that the mere division into individual portions carried out by a trader in the traditional trade does not constitute a 'catering service' within the meaning of *Delimitis*. Moreover, the Commission has not shown that the operation of serving up in portions affects the consumer's choice between scooping ice-cream and impulse ice-cream at points of sale where such ice-creams are offered together, namely in the street. The Commission even stated that those two types of ice-cream constitute equivalent products from the consumer's point of view (see paragraph 41 above). The Court also considers that the fact that the products may differ from the point of view of product technology is not sufficient in itself to distinguish two separate markets where that difference is not taken into account by the consumer as a decisive factor.

49 It is also apparent from the documents before the Court that scooping ice-cream is also, at least to some extent, sold in the street otherwise than in a catering context, that is to say in the traditional specialized trade. It is also apparent from those documents that not only kiosks but also bakeries and cake shops, confectioners, ice-cream vendors, cinemas, swimming pools and service stations have the equipment necessary to sell scooping ice-cream and that they are also able to offer impulse ice-cream. The Commission for its part recognized, at least by implication, in the written procedure that some catering ice-cream is offered, as scooping ice-cream, for immediate consumption without any catering service.

50 Consequently, the question arises whether the Commission should have included the proportion of catering ice-cream sold in individual portions and in competition with impulse ice-cream in the street in several types of outlet, those two categories of product being interchangeable from the consumer's point of view. However, it must be borne in mind that it is apparent from point 140 of the decision, to which the applicant has not taken objection, that ice-cream for bulk-buying customers is distributed in the traditional trade under exclusive agreements. In those circumstances, the Court considers that the decision not to include scooping ice-cream in the relevant market did not substantially affect the assessment made of the effects on competition of the supply agreements at issue, in particular as to whether access to the market was closed or considerably hindered by the existence of the agreements. The Court considers, therefore, that it is not necessary to annul the decision for failure to include scooping ice-cream in the product market.

51 It follows that the applicant's complaint concerning delimitation of the product market cannot be upheld.

The geographical market

Summary of the arguments of the parties

52 According to the applicant, if the definition of the product market proposed by the Commission, constituting the ice-cream market in the broad sense, is accepted it is also necessary not to limit the geographical market to the German national market in view of the fact that, first, the Commission took account, in its decision, of the fact that the applicant, Langnese and Mars operate not only in Germany but also in numerous other countries and, secondly, the fact that the development of the domestic European market will continue to reduce the existing national differences.

53 The Commission contends that the geographical market is the German market. It states, first, that the applicant itself admits that there continue to be differences at the national level. Also, the distribution of ice-cream, including the contested supply agreements concluded by the applicant, is organized on an entirely national basis. Moreover, there are differences from one Member State to another regarding the market structures and market presence. Finally, the Commission states that the rules on the manufacture of ice-cream are not harmonized.

Findings of the Court

54 It is apparent from the decision, and has not been denied by the applicant, that the distribution of industrially produced ice-cream is always undertaken at national level and that national characteristics are reflected in differences in market structure, product ranges and prices. It is also common ground that the agreements at issue are concluded at national level. Moreover, since the applicant has not expressly contended that it is wrong to define the geographical market as the German market where the product market is defined as being that of industrially produced impulse ice-cream, the Court considers that the Commission acted correctly and in accordance with the case-law in treating the German market as constituting the relevant geographical market (see *Delimitis*, paragraph 18, and *Michelin*, paragraphs 25 to 28). Accordingly, the complaint concerning the definition of the geographical market cannot be upheld.

55 It follows that the first part of the plea, alleging incorrect definition of the market, must be rejected.

The second part of the plea: the effect on competition of the exclusive purchasing agreements

Summary of the arguments of the parties

56 The applicant claims that, regardless of the definition of the relevant market, the Commission did not undertake a sufficiently far-reaching market analysis conforming with the criteria laid down in the case-law of the Court of Justice. In support of that argument, the applicant states that, according to *Delimitis*, the effects of existing networks of agreements in a market on access to that market depend on the ratio between the number of sales outlets tied by commitments and the number of outlets not so tied, the duration of the commitments entered into and the ratio between the quantities of products covered by the commitments and the quantity not so covered.

57 According to the applicant, the Commission cannot confine itself to finding that its supply agreements cover about (...)% (more than 10%) of the sales outlets existing in the relevant market and of the volume of sales achieved through them.

58 According to the applicant, it is settled law that the question whether an exclusive purchasing agreement has effects restrictive of competition does not depend solely on the effects flowing directly from the individual agreement but also on the latter's economic and legal context, in which it, with others, may contribute to a cumulative impact on competition. That general context includes both agreements concluded by the same producer with other customers (see the judgments of the Court of Justice in Case 8/74 *Dassonville* v *Procureur du Roi* [1974] ECR 837 and Case 27/87 *Erauw-Jacquery* v *La Hesbigonne* [1988] ECR 1919) and similar agreements concluded by other producers with their customers (see the judgments of the Court of Justice in Case 23/67 *Brasserie de Haecht* [1967] ECR 525 and *Delimitis*, cited above). Moreover, the cumulative effect on the market of similar agreements is merely one factor among others. It is in the light of those principles that, in the

applicant's view, the impact of the supply agreements on competitors' access to the market must be analysed.

59 Referring to the ice-cream market in Germany, the applicant states, first, that the extent of tieing-in, namely the quantities of impulse ice-cream sold under the supply agreements objected to by the Commission, is particularly small. The applicant considers that, even if the definition of the market adopted by the Commission is accepted, its competitors' exclusive purchasing agreements cover hardly more than 18% of the quantities sold on the market. The extent of tieing-in deriving from the agreements concluded by the applicant amounts only to about (...)%. The extent of tieing-in of 30% considered by the Commission to be acceptable in its 1985 *Fifteenth Report on Competition Policy* is not therefore exceeded. The applicant also considers that the Commission is wrong to include the quantities sold through wholesalers in its calculations of the extent of tieing-in since the latter conclude exclusive purchasing agreements in their own name and on their own responsibility.

60 Secondly, the applicant considers that the Commission did not take sufficient account of the relatively short duration of the supply agreements. It is apparent from the agreements at issue that they may be terminated at the end of each calendar year following the end of the second year after their entry into force. According to the applicant, two-thirds of the current agreements at a given moment are thus for a fixed duration of less than one year. Moreover, one-third of all the exclusive agreements are terminated each year and access to the sales outlets concerned is thus open to any competitor.

61 In view of those circumstances, access to the traditional specialized trade is not, in the applicant's view, either impeded or excluded by the existing network of exclusive agreements.

62 In points 68 to 71 of its decision, the Commission finds, first, that the exclusive purchasing obligation imposed by the applicant on resellers constitutes a restriction of competition both between products of the same brand and between products of different brands. Offers of products from other suppliers cannot therefore, in the Commission's view, be entertained by the reseller because of the contractual prohibition to which he is subject. According to the Commission, the exclusive purchasing obligations make it more difficult or impossible to set up independent distribution structures such as are necessary if new entrants are to gain access to the relevant market or if an existing market position is to be consolidated. The contractual obligation to buy only contractual products *ipso facto* carries with it the obligation not to distribute competitors' products. The combination of both arrangements strengthens the restriction of competition.

63 The Commission goes on to state, in paragraph 105 of its decision, that the applicant's turnover and market share by virtue of the contested supply agreements far exceed the ceilings laid down in the Notice on Agreements of Minor Importance. That is sufficient reason to conclude that the supply agreements appreciably restrict the scope for German competitors and competitors from other Member States to establish themselves on the relevant market or to consolidate their market share and that, therefore, they are caught by the prohibition contained in Article 85(1) of the Treaty. According to the Commission, it is unnecessary to examine the effects of networks of agreements of the same nature concluded by other undertakings on the relevant market.

64 In its pleadings and at the hearing, the Commission added that it is only where the network of agreements of the same nature of the undertaking whose agreements are under review does not in itself meet the condition of having an appreciable effect that the cumulative effects of parallel networks must be taken into account, in accordance with the case-law (*Brasserie de Haecht* and *Delimitis*, cited above).

65 The intervener, Mars, accepts that the extent of tieing-in is between 25% and 30%, regardless of whether the Commission's or the applicant's definition of the market is relied on. However, that figure does not reflect the true market conditions in the traditional trade since the calculations are based on an average.

66 According to Mars, it is necessary specifically to analyse the situation in the traditional trade, since more than 60% of all impulse ice-cream is distributed through that market and it is only in respect of that part of the market that the applicant has concluded supply agreements.

67 In the traditional trade, the extent of tieing-in amounted in 1990 to more than 70%, according to research undertaken by the intervener. Moreover, account should be taken of the applicant's market shares and of the extent to which they are concentrated. According to Mars, in 1992 the applicant achieved a market share of 33.4% for sales of impulse ice-cream in the traditional trade. Langnese's share amounted to 60%. Those two large producers thus held a joint market share of more than 90%. There is no doubt, in Mars's opinion, that the applicant and Langnese occupy a dominant position in that market. It cannot therefore seriously be doubted that the exclusive agreements concluded by the applicant are caught by Article 85(1) of the Treaty.

68 As regards the main arguments put forward by the applicant to show that access to the traditional specialized trade is not hindered or precluded, Mars observes, first, that the most attractive sales outlets from the economic point of view are in fact tied by exclusive agreements. Secondly, Mars states that the actual duration of the agreements is much longer than the estimates given by the applicant, probably extending beyond ten years. Indeed, as a general rule, retailers do not decide to terminate their agreements.

69 Furthermore, a new competitor entering the market would be confronted with the problem that retailers tied by an exclusive agreement have to take an 'all or nothing' decision. Few traders are willing to give up the range of products of the dominant competitor and opt for the less well-known products of the new competitor.

70 The simple fact that, in the retail grocery trade for 'multipacks', in which there are no exclusive agreements, Mars has, according to its own figures, a market share of around 17%, which is thus ten times higher than its market share in ice-cream bars in the traditional trade (about 1.7%), is sufficient evidence of the fact that access to the traditional trade is precluded.

Findings of the Court

71 It should be noted at the outset that the Commission was right, in paragraphs 68 to 70 of the decision, to state that the clause contained in the supply agreements whereby the retailer undertakes to sell through its sales outlet only products purchased directly from the applicant contains both an exclusive purchasing obligation and a prohibition of competition, which are capable of giving rise to a restriction of competition within the meaning of Article 85(1) of the Treaty both between products of the same brand and between products of different brands.

72 In those circumstances, the Court must consider whether the Commission has established to the requisite factual and legal standard that the contested supply agreements have, as it contends, an appreciable effect on competition on the market.

73 The Court finds, first, that the applicant holds a strong position on the relevant market. The decision indicates that in 1991 the applicant achieved a total turnover of (...) (more than one thousand million) German marks, including (...) (more than 900 million) German marks in respect of ice-cream. In the same period, the group of the same name achieved a consolidated turnover of (...) (more than one and a half thousand million) German marks. In addition, the Südzucker group, which directly and indirectly holds 49% of the applicant's capital, declared a turnover of 4.54 thousand million German marks. According to points 31 and 35 of the decision, the share held by the applicant on the relevant market amounted in 1991 to about (...)% in the grocery trade and (...)% (more than 25%) in the traditional trade. It should be noted that at the hearing the applicant confirmed the latter figure on the basis of the Commission's definition of the market being accepted. As regards the quantitative importance of the contested agreements on the relevant market, the Court finds, on the basis of the documents before it, that, on the market as a whole, as defined by the Commission, the applicant has tied, by those agreements, about (...)% (more than 10%) of the sales outlets and that the volume sold by the applicant through those sales outlets also represents about (...)% (more than 10%) of the total volume of sales on that market.

74 According to the Commission, the latter figures confirm that the agreements appreciably limit the scope for German competitors and competitors from other Member States to establish themselves on the relevant market or consolidate their market shares, without there being any need to examine the cumulative effect of the parallel networks set up by the other suppliers of ice-cream, since the market share covered by the contested agreements, in itself representing around (...)% (more than 10%) of the relevant market, and the turnover achieved by the participating undertakings, are well in excess of the ceilings laid down in the Notice on Agreements of Minor Importance.

75 However, that notice is intended only to define those agreements which, in the Commission's view, do not have an appreciable effect on competition or trade

between Member States: it cannot be inferred from it with any certainty that a network of exclusive purchasing agreements is automatically liable to prevent, restrict or distort competition appreciably merely because the ceilings laid down in it are exceeded. Moreover, it is apparent from the actual wording of paragraph 3 of that notice that it is entirely possible, in the present case, 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.

76 As to whether the exclusive purchasing agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, according to the case-law, 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, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements as a whole cannot undermine 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 necessary to assess the extent to which the contested agreements contribute to the cumulative effect produced, on the basis that only agreements which contribute significantly to any closing-off of the market are prohibited (*Delimitis*, paragraphs 23 and 24).

77 Furthermore, as the Court of Justice held in its judgment in *Brasserie de Haecht*, consideration of the effects of an exclusive agreement implies that regard must be had to the economic and legal context of the agreement, in which it might combine with others to have a cumulative effect on competition.

78 As regards the impact of networks of exclusive agreements on access to the market, it is also apparent from the case-law of the Court of Justice, first, that it depends in particular on the number of sales outlets tied to the producers in relation to the number of retailers not so tied, on the quantities to which those commitments relate and on the proportion between those quantities and those which are sold through retailers that are not tied. Furthermore, the extent of tieing-in brought about by a network of exclusive purchasing agreements, although of some importance in assessing the extent to which the market is closed off, is only one factor amongst others pertaining to the economic and legal context in which the agreement or, as in this case, a network of agreements must be assessed (*Delimitis*, paragraphs 19 and 20).

79 As regards the extent of tieing-in, that is to say the percentage of sales outlets tied by exclusive agreements and of the volume of sales effected through such sales outlets, the Court considers that this must be determined in this case by reference to the extent to which it is possible to gain access to retailers throughout the relevant market, as previously defined by the Commission, that is to say both in the traditional trade and in the grocery trade, the delimitation of the market serving to define the context in which the effects of the contested agreements on competition must be assessed.

80 The Court finds, first, that, as indicated above (paragraph 73), if account is taken of the volume of sales of impulse ice-creams achieved in the relevant market, a figure is arrived at for the extent of tieing-in of about (...)% (more than 10%) attributable to the exclusive purchasing agreements concluded by the applicant. As regards the cumulative effect of other similar agreements on the market, the Court finds, secondly, that the exclusive purchasing agreements concluded by Langnese, the other main ice-cream producer in Germany, for their part cover about (...)% of the relevant market.

81 It must therefore be held that the networks of exclusive purchasing agreements set up by the two main producers affect about (...)% of the market, which exceeds

the extent of tieing-in of 30% considered acceptable by the Commission in the comfort letter sent to the applicant, and later commented on in paragraph 19 of the 1985 *Fifteenth Report on Competition Policy*.

82 However, as stated above (paragraph 78), the extent of tieing-in is only one factor among others pertaining to the economic and legal context in which the network of agreements must be assessed. It is also necessary to analyse the conditions prevailing on the market and, in particular, the actual specific possibilities for new competitors to penetrate the market despite the existence of a network of exclusive purchasing agreements.

83 With respect to those factors, the Commission has drawn attention to the existence of additional substantial barriers to access to the market, both in the grocery trade and in the traditional trade. It is apparent from points 100 and 134 to 137 of the decision that access to the market for new competitors is made more difficult by the existence of a system under which a large number of freezer cabinets are lent by the applicant to retailers both in the grocery trade and in the traditional trade (in 1991, about (...) in all, comprising (...) in the traditional trade and (...) in the grocery trade, according to the decision — point 57), the retailers being obliged to use them exclusively for the applicant's products.

84 The Court considers that the Commission was right to treat that factor as contributing to making access to the market more difficult. The necessary consequence of that situation is that any new competitor entering the market must either persuade the retailer to exchange the freezer cabinet installed by the applicant for another, which involves giving up the turnover in the products from the previous supplier, or to persuade the retailer to install an additional freezer cabinet, which may prove impossible, particularly because of lack of space in small sales outlets. Moreover, if the new competitor is able to offer only a limited range of products, as in the case

of the intervener, it may prove difficult for it to persuade the retailer to terminate its agreement with the previous supplier.

85 It is also apparent from the documents before the Court that, in the traditional trade, there are numerous individual retailers whose average turnover is rather low. The establishment of a profitable distribution system therefore presupposes that a new competitor must have a large number of retailers concentrated within a specified geographical area which can be supplied through regional or central warehouses. The fact that there are no independent intermediaries means that this fragmentation of demand constitutes an additional barrier to access to the market. Finally, the Commission rightly took into account the fact that the applicant's product brands are very well known.

86 In those circumstances, the Court considers that examination of all the similar agreements concluded on the market and of other aspects of the economic and legal context in which they operate, as examined in paragraphs 83 to 85 above, shows that the exclusive purchasing agreements concluded by the applicant are liable appreciably to affect competition within the meaning of Article 85(1) of the Treaty.

87 In view of the strong position occupied by the applicant in the relevant market and, in particular, its market share, the Court considers that the agreements contribute significantly to the closing-off of the market.

88 In view of all the foregoing, the Court considers that the Commission was right to conclude that the contested agreements give rise to an appreciable restriction of competition in the relevant market.

89 The second part of the plea must therefore be rejected.

The third part of the plea: the Commission's alleged obligation to consider individual agreements separately so that some of them escape the prohibition contained in Article 85(1) of the Treaty

Summary of the arguments of the parties

90 The applicant claims that the Commission is entitled to prohibit only agreements which are caught by Article 85(1) of the Treaty, and then only if the restriction of competition exceeds a threshold above which its impact becomes appreciable.

91 According to the applicant, that approach is particularly necessary in this case since, first, the Commission also prohibited the parallel exclusive agreements concluded by Langnese, which it took into consideration when examining the cumulative effect of similar agreements and, secondly, following the order made by the President of the Court of First Instance on 16 June 1992 on an application for interim measures in the case which preceded the present application (see paragraph 7 above), it might have been appropriate to consider whether, after exclusion of the agreements concluded with service stations, the exclusive dealing clauses contained in the other agreements still have an appreciable effect on competition.

92 The Commission claims that it was not obliged to set a ceiling under which the ice-cream supply agreements concluded by the applicant were compatible with Article 85 of the Treaty.

93 In support of that view, the Commission states, in point 107 of the decision, that the appreciable effect on competition derives from all the supply agreements concluded by the applicant. The Commission is of the opinion that, where there is a network of agreements of the same kind concluded by a single producer, there either is an appreciable effect or there is not, and it is impossible to consider certain factors separately. Article 85(1) of the Treaty does not admit a division of individual agreements or networks of agreements so that an 'inappreciable' section can be removed from the prohibition contained in that article.

94 The Commission adds that the applicant has been unable to indicate any criteria according to which the agreements as a whole could be divided. In its view, such a division would prove arbitrary. It adds that Article 85(2) of the Treaty precludes such a division, for reasons of legal certainty, particularly where a network of agreements is involved.

Findings of the Court

95 It is settled law that a network of exclusive purchasing agreements set up by a single supplier can escape the prohibition laid down in Article 85(1) if it does not significantly contribute, with the totality of similar agreements found on the market, including those of other suppliers, to denying access to the market to new national and foreign competitors (*Delimitis*, paragraphs 23 and 24). In the Court's view, it follows that, where there is a network of similar agreements concluded by the same producer, the assessment of the effects of that network on competition applies to all the individual agreements making up the network. Furthermore, the Commission is required, in assessing the applicability of Article 85(1) of the Treaty, to examine the actual details of the case and cannot rely on hypothetical situations. In that respect, the Court considers that, as the Commission has observed, it might be arbitrary in the present case to divide the contested agreements into different hypothetical categories.

96 As regards the question whether the Commission should have considered the restrictive effect on competition of a network of agreements set up by the applicant following the prohibition of a similar network set up by Langnese, it need merely be borne in mind that it follows from *Delimitis* that, where the Commission finds, as in this case, that all the similar agreements concluded on the market and other factors pertaining to the economic and legal context are liable appreciably to affect competition within the meaning of Article 85(1) of the Treaty and then correctly concludes that a producer's supply agreements contribute significantly to that closing-off of the market, the contested agreements of that producer are all caught by the prohibition laid down by Article 85(1) of the Treaty. This finding cannot be altered by the fact that the Commission simultaneously prohibits a network of similar agreements established by another producer.

97 Finally, as regards the order of the President of the Court of First Instance of 16 June 1992 to which the applicant refers in support of its arguments, it must be borne in mind that that order, which suspended operation of the Commission decision of 25 March 1992 except as regards the applicant's and Langnese's sales outlets at service stations, was made in response to an application for interim measures. That measure, which was decided upon after the various interests of the parties to the proceedings were considered, was intended to mitigate the risk of serious and irreparable damage to both Mars and the applicant. The order was thus made for a specific purpose and the Court considers therefore that it cannot be relied on in support of the contention that the Commission was under an obligation to consider the individual agreements separately with a view to deciding whether they were caught by Article 85(1) of the Treaty.

98 The Court considers, therefore, that a bundle of similar agreements must be considered as a whole and, therefore, that the Commission was right not to examine the agreements separately. It follows that this part of the plea is unfounded.

99 Consequently, the plea as to infringement of Article 85(1) of the Treaty must be rejected.

The plea of infringement of Article 85(3) of the Treaty

100 The applicant claims that, in the event of the contested agreements being caught by Article 85(1) of the Treaty, they could be granted either a block exemption under Regulation No 1984/83 or an individual exemption. The plea is divided into three parts. The applicant considers, first, that the Commission is not entitled to depart from the assessment contained in the comfort letter which it sent following notification of the contested agreements in 1985. Secondly, the applicant claims that the contested agreements were not concluded, as wrongly contended by the Commission, for an indefinite duration within the meaning of Article 3(d) of Regulation No 1984/83 and that, consequently, they qualify for a block exemption under Regulation No 1984/83. Thirdly, the applicant maintains that the refusal to grant an individual exemption constitutes an infringement of Article 85(3) of the Treaty.

The first part of the plea, alleging that the Commission is required not to depart from the assessment contained in its comfort letter

Summary of the arguments of the parties

101 In support of its view that the Commission was not entitled to depart, as regards the application of Article 85(3) of the Treaty, from the assessment contained in its comfort letter, the applicant claims, first, that the issue of a comfort letter must not place the undertakings which accept it in a less favourable position than they would have been in if they had been able to obtain a formal decision from the Commission. In that connection, the applicant, referring to Article 8(3) of Regulation No 17, maintains that the Commission may not revoke or subsequently amend a formal exemption decision unless the factual situation changes regarding a matter essential to the decision or the decision is based on incorrect information or was

induced by deceit. According to the applicant, it follows, in particular from that provision that a change in the legal position is not a sufficient basis for revoking an exemption decision. In its view, the same restriction applies to the assessment contained in a comfort letter.

102 As regards the Commission's statements in points 149 and 150 of the decision, the applicant submits, first, that the matters of fact set out in the notification were complete and in conformity with the rules applicable at the material time. Moreover, there has been no appreciable change in the factual situation since the comfort letter was issued in 1985.

103 The applicant also states that it set out in its notification all the circumstances which the Commission today still regards as essential, namely the market shares and the quantities sold through tied sales outlets. The applicant states that it had calculated an extent of tieing-in of 17% for the entire market in industrially produced ice-cream. If, at that time, the Commission had limited the ice-cream market to industrially produced impulse ice-cream, as it now does, it would have found, on the basis of the information provided by the applicant, that the extent of tieing-in obtained was then in excess of the 17% indicated by the applicant. The applicant adds that the Commission should have thought along those lines at the time since, in its 1985 *Fifteenth Report on Competition Policy*, it referred to an extent of tieing-in of 30%.

104 Nor can the Commission, in the applicant's view, justify reopening of the procedure by the fact that Mars entered the market. When the Commission examines exclusive purchasing agreements and finds them acceptable, it is permissible to conclude that in doing so it takes account of whether access to the market for actual or potential competitors is excluded or whether their possibilities of expansion

within the market are in fact hindered. Mars's complaint should therefore have been analysed in advance at the time of the investigation carried out for 1985, if the latter was conducted correctly.

105 Since the Commission has not established that the factual situation changed after the issue of the comfort letter as regards any matter essential to the decision, it is, in the applicant's view, bound by the assessment made in that letter.

106 The Commission considers, first, that, in view of the circumstances of this case, it is not bound by its comfort letter. It contends that comfort letters cannot be more binding than the formal decisions of which they take the place from the functional point of view in the practical application of the competition rules. It points out that, under Article 8(3)(a) of Regulation No 17, it is entitled to revoke or amend formal exemption decisions 'where there has been a change in any of the facts which were basic to the making of the decision'. It emphasizes that the comfort letter was issued without official commencement of a procedure, without publication under Article 19(3) of Regulation No 17 and without prior consultation of the Advisory Committee on Restrictive Practices and Dominant Positions. It adds that that letter, being the result of a provisional examination, contains, in accordance with consistent practice, an express reservation to the effect that the procedure may be reopened in the event that 'there is any appreciable change affecting certain matters of law or of fact on which the present assessment is based'.

107 In those circumstances, the Commission is of the opinion that it was right to take the view, in point 149 of its decision, that it was appropriate to reopen the procedure on the ground that the account of the facts given in the notification was incomplete, in so far as neither the existence of the agreement on the mutual recognition of exclusive agreements in the 'ice-cream section' nor the scale and

extent of the restrictions on the use of the freezer cabinets provided in the grocery trade, which would have enabled it to identify other barriers to access to the market, had been brought to its notice.

108 The Commission also states, in point 150 of its decision, that the entry of Mars and Jacobs Suchard into the market constitutes a new material fact justifying reopening of the procedure, since it was precisely the experience of Mars which disclosed how closed the market was and, consequently, provided cause for a review.

109 Furthermore, the Commission is required, by virtue of the procedural guarantees provided for in Article 3 of Regulation No 17 and Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), to examine carefully the factual and legal particulars brought to its notice by the complainant (judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223). Accordingly, the applicant was wrong to claim that, by virtue of the comfort letter, Mars's complaint should be rejected.

Findings of the Court

110 It is settled law that a comfort letter of the kind sent to the applicant following the notification of its supply agreements in 1985 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, the comfort letter not having been adopted in accordance with the provisions of that regulation (see the judgments of the Court of Justice in Joined Cases 1 to 3/79 *Giry et Guerlain and Others* [1980] ECR 2327; Case 99/79 *Lancôme and Cosparfrance* [1980] ECR 2511; Case 37/79 *Marty* [1980] ECR 2481; and Case 31/80 *L'Oréal* [1980] ECR 3775). In

those cases, the Court of Justice placed emphasis on the fact that the comfort letters in question had been sent without recourse to the publicity measures provided for in Article 19(3) of Regulation No 17 and that there had been no publication under Article 21(1) of that regulation.

111 The comfort letter was a communication informing the applicant that the Commission considered it inappropriate to take action regarding the agreements at issue, those agreements being, in view of the circumstances, compatible with the competition rules of the Treaty, and that the case could therefore be shelved. The Court considers that the fact that the Commission mentioned the issue of that comfort letter, and commented on it, in its 1985 *Fifteenth Report on Competition Policy* does not change its legal nature.

112 Finally, it is apparent from the arguments presented by the Commission at the hearing that, at the material time, it undertook only a provisional analysis of the market conditions, based essentially on the information provided by the applicant, including the particulars leading to the delimitation of the market considered to constitute the relevant market at that time and calculation of the extent of tieing-in. In that context, the Commission also reserved the right, in its comfort letter, to reopen the procedure if there was any appreciable change affecting certain matters of law or of fact on which its assessment was based. Moreover, the inclusion of such a reservation is in accordance with the Commission's administrative practice in that regard.

113 As to whether any appreciable changes occurred following issue of the comfort letter, the Court finds, first, that it is apparent from the documents before it that two new competitors, Mars and Jacobs Suchard, subsequently entered the market. In addition, as far as the intervener, Mars, is concerned, it is common ground that it is a special kind of competitor, offering only a limited range of products, which

adopted a commercial strategy different from that of its main competitors. The Court also finds that, after Mars lodged its complaint, the Commission became aware of the existence of additional barriers to access to the market, particularly in the grocery trade, relating, as far as the applicant was concerned, to the obligation which the latter imposed on retailers to use exclusively for its products the freezer cabinets which it made available to them.

114 The Court considers that those factors constituted new circumstances which, particularly in the light of the specific problems encountered by the intervener, justified a more detailed and precise analysis of the conditions of access to the market than that undertaken when the comfort letter was issued. Consequently, the Court considers that that letter did not prevent the Commission from reopening the procedure in order to examine, in the specific circumstances, the compatibility of the contested supply agreements with the competition rules.

115 That course of action is, moreover, in conformity with the Commission's obligation, by virtue of the procedural guarantees provided for in Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63, carefully to examine the factual and legal particulars brought to its notice by a complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States (*Automec* v *Commission*, cited above, paragraph 79).

116 Without it being necessary to consider whether the applicant's notification was incomplete, it follows from the foregoing that the first part of the plea must be rejected.

The second part of the plea: the contested agreements qualify for a block exemption

Summary of the arguments of the parties

117 The applicant claims that its agreements are not entered into 'for an indefinite duration' within the meaning of Article 3(d) of Regulation No 1984/83, as considered by the Commission.

118 According to the applicant, where an agreement is concluded, initially, for a specified period and, on the expiry thereof, is extended for a specified period, namely one year, its duration is certain, not uncertain. The applicant maintains that Article 3(d) of Regulation No 1984/83 does not mean that agreements concluded for specified periods cannot be renewed, as each occasion arises, for further periods. According to the applicant, it is of no importance that the extension of the agreement may be automatic or take place solely by virtue of an explicit declaration by the reseller, provided that the parties' right to terminate the agreement upon the expiry of a specified period is not in question.

119 In that context, the applicant adds that the Commission cannot deprive it of the right to claim a block exemption under Regulation No 1984/83, since the Commission did not include the withdrawal of that exemption, under Article 14 of that regulation, in the operative part of the decision.

120 The Commission contends that, as it indicated in point 112 of the decision, the supply agreements cannot qualify for a block exemption under Regulation No 1984/83 on the ground that agreements falling within the category of agreements 'concluded for a set duration of more than two years, to be renewed automatically thereafter' are entered into 'for an indefinite duration' within the meaning of Article 3(d) of the said regulation. Their termination is made

conditional on an uncertain future event, namely the initiative of either party. According to the Commission, that interpretation of Article 3(d) also meets the requirements of point 39 of the Commission Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements (OJ 1984 C 101, p. 2).

121 The Commission emphasizes that, in any event, the applicant cannot rely on Regulation No 1984/83 if the Commission has refused to grant it an individual exemption under Article 6 of Regulation No 17. That flows from the very nature of block exemption regulations: a block exemption is not conditional upon verification, case by case, that the conditions for an exemption laid down by the Treaty are actually fulfilled. Consequently, a decision refusing an individual exemption, adopted after specific examination of the agreements in question in relation to the conditions laid down by Article 85(3) of the Treaty, precludes any entitlement on the part of the applicant to a block exemption.

Findings of the Court

122 Without it being necessary to consider whether the applicant may claim a block exemption under Regulation No 1984/83 as long as the Commission has not withdrawn the benefit thereof under Article 14 of that regulation in the operative part of the decision, it need merely be pointed out that, in any event, the agreements at issue in these proceedings are entered into for an indefinite duration within the meaning of Article 3(d) of that regulation, so that they cannot qualify for the exemption provided for therein.

123 It must be borne in mind that, according to Article 3(d) of Regulation No 1984/83, the block exemption provided for by that regulation does not apply where the

agreement in question is concluded for an indefinite duration. The Court considers that, in practice, there is no difference between, on the one hand, an agreement expressly concluded for an indefinite duration, under which the parties may terminate their contractual relationship, a form excluded by Article 3(d) of Regulation No 1984/83 from the benefit of the block exemption available under that regulation, and, on the other, an agreement which is, as in this case, tacitly renewed after a period of two years until such time as it is terminated by one of the parties. In both cases, the parties are not bound, but are free, if they wish, to reconsider their contractual relationship and evaluate the other opportunities available on the market. That review, which it is the purpose of Article 3(d) of Regulation No 1984/83 to bring about, may provide new competitors with an opportunity to gain access to retailers who are no longer subject to any commitment. Moreover, it must be concluded, as the Commission does at point 113 of the decision, that the decisive factor in assessing such agreements for the purposes of competition law is that their duration, depending as it does on the initiative of either party to it, is uncertain.

124 It follows that agreements which are subject to tacit renewal and may endure for more than five years must be regarded as having been concluded for an indefinite duration and cannot therefore qualify for the block exemption provided for by Regulation No 1984/83. The second part of the plea must therefore be rejected.

The third part of the plea: whether the supply agreements satisfy the conditions laid down in Article 85(3) of the Treaty

Summary of the arguments of the parties

125 The applicant claims that, since the supply agreements satisfy the conditions laid down in Article 85(3) of the Treaty, they must be granted an individual exemption.

126 The applicant submits, first, that the supply agreements improve the distribution of ice-creams. In its view, the agreements facilitate regular supplies throughout the territory, even for small sales outlets. The applicant claims that, without the contested agreements, it would be obliged, for reasons of cost, to cease supplying about 42% of its customers, whose annual turnover is too small. The applicant considers that, contrary to the Commission's contention, supplies to small sales outlets would not be taken over by local manufacturers or wholesalers. In the case of wholesalers, the applicant adds that they have hardly any interest in ensuring regular supplies for small sales outlets since wholesalers sell ice-cream only as accompaniments intended to complete the range of products for customers who buy other frozen products in substantial quantities.

127 Furthermore, in the applicant's view, the Commission did not take sufficient account in its decision of the need to have a freezing cabinet for the sale of ice-creams. Where retailers are not willing or able to purchase them for themselves, freezer cabinets may, if appropriate, be placed at their disposal by the producer, provided that the latter can be assured that supplies to the sales outlet will enable a specified minimum turnover to be achieved. That implies that the sales outlet in question should be bound by an exclusive purchasing agreement. The applicant considers that lending freezer cabinets to retailers has the effect of opening up the market.

128 The applicant also claims that there is competitive pressure in the market, as defined by the Commission, which guarantees that benefits are passed on to consumers, since the supply agreements display a degree of tieing-in of only about 30% and the commitments are themselves limited in time. Moreover, consumers may, as a result of the applicant's distribution system, take advantage simultaneously of a large number of ice-cream outlets throughout the territory and a complete range of products at those outlets. Indeed, without the contested agreements, each producer would be obliged to offer the retail trade only the products for which there was greatest demand.

129 Finally, the applicant maintains that the exclusive purchasing agreements do not in any way eliminate competition within the meaning of Article 85(3)(b) of the Treaty. In that connection, the applicant maintains that the Commission is wrong to assert, referring to *Euroemballage and Continental Can*, that it is sufficient that there is no effective competition on the market for the negative condition laid down in Article 85(3(b) of the Treaty to be fulfilled. The general context of that judgment shows that that condition ceases to be fulfilled only where any serious chance of competition is practically rendered impossible, and that is not the position in this case.

130 In any event, the applicant considers that 'effective competition' exists on the relevant market. It maintains that the Commission wrongly failed, in its analysis, to take sufficient account of non-tied sales outlets in the grocery trade that are not subject to any commitment, through which some 39% of the total market volume is distributed. Moreover, a degree of tieing-in of less than 30% is not indicative of the 'elimination' of competition. Finally, the mere fact that two producers hold substantial shares of a market or of a market segment is no basis for the assumption that competition is absent or limited.

131 For its part, the Commission considers that the conditions laid down in Article 85(3) of the Treaty for an individual exemption were not fulfilled.

132 The Commission states, first, that the supply agreements do not contribute to improving the distribution of products within the meaning of Article 85(3), such agreements not giving rise to any specific objective advantages in the public interest, as defined by the judgment of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 of such a character as to compensate for the disadvantages which they cause in the field of competition.

133 In view of the strong position occupied by the applicant in the market, the Commission considers that such advantages as may derive from the exclusive purchasing agreements, namely stronger inter-brand competition, do not arise in the present case. On the contrary, competition in the market is restricted by the existence of a network of exclusive purchasing agreements constituting a substantial barrier to access to the market and consequently, the applicant's position vis-à-vis its competitors is considerably strengthened. Furthermore, the Commission considers that the provision of regular supplies to consumers throughout the territory would not be endangered by the disappearance of the exclusive purchasing agreements.

134 The Commission also maintains that it cannot be presumed, as a result of the fact that the exclusive purchasing agreements lead to a uniform and transparent system of distribution, that consumers enjoy a fair share of the benefits resulting from the agreements. The undertakings are not obliged to pass on the profit resulting from those agreements in the absence of pressure deriving from effective competition. Moreover, the agreements restrict the range of choice available to consumers, since they find only the range of ice-creams of a given producer at tied sales outlets.

135 Finally, the Commission considers that the negative condition laid down in Article 85(3)(b) of the Treaty is fulfilled, since there is no effective competition on the relevant market. In the case of the grocery trade, the Commission contends that the strong positions held by the applicant and Langnese, which together account for more than two-thirds of the volume of sales through that distribution channel, and the concentration of demand constitute a major barrier to access to the market. In the case of the traditional trade, the Commission considers that access to the market is considerably hindered by the cumulative effect of the totality of the exclusive purchasing agreements in force. In that connection, the Commission considers that about (...)% (more than 55%) of the volume of sales in the traditional trade is disposed of under the exclusive purchasing agreements. Moreover, it states that the freezer cabinets installed by the applicant and by Langnese throughout the market also lead to restrictions of competition.

136 The intervener, Mars, contests the view that the conclusion of exclusive purchasing agreements and the implementation of a distribution system belonging to the producer are essential for the efficient and rational distribution of industrially produced ice-cream. Such distribution systems represent a wholly exceptional situation: so-called 'impulse' products are as a general rule delivered by the producer to wholesalers' central warehouses and the wholesalers process orders in batches and make deliveries to the various sales outlets. According to the information obtained by Mars, it is only in Germany, Denmark and Italy that the applicant has concluded exclusive purchasing agreements covering sales outlets.

137 According to Mars, the applicant is wrong to assert that wholesalers have neither the will nor the means to supply the traditional trade. If wholesalers are not in a position to supply the necessary number of sales outlets to achieve rational distribution, that is, in its view, a result of the contested exclusive purchasing agreements by which a large number of sales outlets are tied.

138 In Mars's view, the system implemented by the applicant almost wholly prevents access by new competitors to the 'impulse' ice-cream market, which gives rise to very substantial profits. Finally, according to Mars, it is settled law that an undertaking is not entitled to preserve its position in the market by concluding exclusive purchasing agreements merely because it has created a market (*Hoffmann-La Roche* v *Commission*, cited above).

Findings of the Court

139 In considering whether the Commission was right to refuse to grant an individual exemption, it must first be borne in mind that an individual exemption decision may be granted only if, in particular, the four conditions laid down by Article 85(3)

of the Treaty are all met by the agreement in question, with the result that an exemption must be refused if any of the four conditions is not met (see, for example, the judgment of the Court of First Instance in Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104).

140 The Commission enjoys considerable latitude in this matter. The Commission's exclusive power under Article 9 of Regulation No 17 to grant an exemption under Article 85(3) of the Treaty necessarily involves complex evaluations on economic matters. A judicial review of such evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces from them. The judicial review must therefore in the first place be carried out in respect of the reasons given for the decisions, which must set out the facts and considerations on which the said evaluations are based (*Consten and Grundig* v *Commission*). It is in the light of those principles, as expounded in the case-law, that it is necessary to verify whether the decision is based on incorrect findings of facts or is vitiated by errors of law or manifest errors of assessment (*Matra Hachette* v *Commission*, paragraph 104).

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

142 As regards the first of the four conditions laid down by Article 85(3) of the Treaty, the Court points out that, according to that provision, 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'. It is settled law 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 (*Consten and Grundig* v *Commission*).

143 In the present case that first condition was examined in points 115 to 121 of the decision. Although it is apparent from the fifth recital in the preamble to Regulation No 1984/83 that exclusive purchasing agreements lead in general to an improvement in distribution, in that they enable the supplier to plan the sale of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement, and even if it is assumed that it would be necessary for the applicant, for reasons of cost, to terminate supplies to certain small sales outlets if it were obliged to give up supplies to them on an exclusive basis, the Commission considers nevertheless that the contested agreements do not give rise to objective and specific advantages for the public interest such as to compensate for the disadvantages which they cause in the field of competition.

144 In support of that argument, the Commission states, first, that, in view of the strong position on the relevant market held by the applicant, the contested agreements do not, contrary to the expectation expressed in the sixth recital in the preamble to Regulation No 1984/83, have the effect of intensifying competition between different brands of products. The Commission rightly took the view that the network of agreements at issue constitutes a major barrier to access to the market, with the result that competition is restricted.

145 Also, it is clear from point 120 of the decision that the Commission considered that supplies to any small sales outlets abandoned by the applicant, for reasons of costs, would be taken over either by other suppliers, for example small local producers, or by independent dealers selling several ranges of products. Moreover, the Commission points out that the applicant itself recognized that it continues to supply even very small sales outlets, whose annual turnover hovers around 300 German marks, in those cases where their geographical situation is favourable.

146 Against that background, it must be borne in mind that the intervener, Mars, stated that it is wholly exceptional for 'impulse' products to be distributed using a transport system owned by the producers. The parties agree that it is only in Germany, Denmark and Italy that undertakings in the Unilever group, including Langnese, have concluded exclusive agreements covering sales outlets.

147 Although the applicant claims that it would be obliged, for reasons of cost, to cease supplying a number of small sales outlets if it had to give up its exclusive purchasing agreements, the Court considers that it has not provided any evidence to show that such a situation would be liable to jeopardize regular supplies of impulse ice-cream to the territory as a whole and, in particular, that the small sales outlets concerned would not subsequently be supplied by other suppliers or wholesalers, simply as a consequence of the unrestricted competition which would then prevail. Nor has the applicant produced any convincing evidence of the special conditions in Germany which made it necessary to create an ice-cream distribution system belonging to the producers. The Court therefore considers that the applicant has not shown that the Commission committed a manifest error of assessment in considering that the contested agreements did not fulfil the first condition laid down by Article 85(3) of the Treaty. The Court takes the view that sufficient information

is available to it from the documents in its possession and that it is therefore unnecessary to hear witnesses as to the willingness and ability of wholesalers to supply retailers in the traditional trade or as to the restrictions of competition deriving from exclusive purchasing agreements, in particular the possibility for a new competitor to establish itself and become known in the traditional trade, as proposed by the intervener.

148 Since the agreements at issue do not fulfil the first of the conditions laid down by Article 85(3) of the Treaty, the third part of the plea must be rejected, without its being necessary to consider whether the Commission committed any manifest error in its assessment of the other conditions laid down by that provision, non-fulfilment of any of the four conditions being sufficient to make refusal of an exemption mandatory.

149 It follows that the plea as to infringement of Article 85(3) of the Treaty must be rejected in its entirety.

The plea of infringement of Article 3 of Regulation No 17

Summary of the arguments of the parties

150 In support of this plea, the applicant claims, first, that Article 3 of Regulation No 17 does not confer on the Commission the right to require it to notify the

wording of Articles 1 and 2 of the decision to the resellers with which it concluded exclusive purchasing agreements. The applicant considers that it is entitled to choose how it will comply with the Commission's decision to prohibit those agreements.

151 As regards Article 4 of the decision, the applicant claims that, under Article 3(1) of Regulation No 17, the Commission may only require it to 'bring [the] infringement to an end'. There is no legal basis for prohibiting the conclusion of new agreements which, in the Commission's opinion, would be contrary to Article 85(1) of the Treaty and would not fulfil the conditions laid down by Article 85(3). Similarly, the Commission is not in its opinion entitled to prohibit the conclusion of new agreements qualifying for an exemption under Regulation No 1984/83 without first withdrawing the benefit of that exemption under Article 14 of that regulation.

152 In any event, the applicant considers that Article 4 of the decision cannot prohibit the conclusion of new exclusive purchasing agreements which would be amended, as regards their duration, in such a manner that there would be no doubt, even if the Commission's view were accepted, that they came within the scope of Regulation No 1984/83.

153 The Commission explained, in point 154 of its decision, that the prohibition contained in Article 4 of the decision preventing the applicant from concluding, until after 31 December 1997, fresh supply agreements of the existing kind, declared incompatible with Article 85(1) of the Treaty, is justified by the fact that 'the order not to invoke the supply agreements would serve no purpose if SLG (the applicant) were permitted immediately to replace the current agreements by new ones'.

154 The Commission denies that Article 3 of Regulation No 17 does not constitute a valid legal basis. The power conferred on the Commission by that article must, in

its view, be exercised in the most efficacious manner best suited to the circumstances of each given situation (order of the Court of Justice in Case 792/79-R *Camera Care Ltd* v *Commission* [1980] ECR 119).

155 According to the Commission, that power implies the right to address certain orders to undertakings, requiring them to take or refrain from certain action, with a view to bringing the infringement to an end. The particular obligations thus imposed must, according to the Commission, be defined by reference to what is needed to restore legality. Moreover, the Commission contends that Article 3 of Regulation No 17 empowers it to take all measures found necessary to bring the infringement to an end, which may be either positive or negative measures (see the judgment of the Court of Justice in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and Others* v *Commission ('Woodpulp')* [1993] ECR I-1307).

156 The prohibition contained in Article 4 of the decision is in this case justified, in the Commission's view, by the need to prevent any attempt to circumvent the prohibition laid down in Article 1 of the decision. The applicant could, by relying on Regulation No 1984/83, at any time obtain the benefit of a block exemption for new exclusive purchasing agreements if Article 4 of the decision had not been adopted. The Commission adds that the prohibition is of an ancillary nature and is merely intended to prevent unnecessary repetition of the administrative procedure which led to refusal of the individual exemption. Article 4 of the decision goes no further than is necessary to restore a situation conforming with the Treaty.

157 Finally, the Commission contends that Article 3 of the decision is a necessary consequence of the prohibition of the supply agreements. The additional notification which the applicant is required to make to the other parties to its agreements renders the withdrawal from them effective by providing the necessary clarity.

Findings of the Court

158 It is necessary, first, to examine the applicant's contention that Article 3 of Regulation No 17 does not provide a legal basis for the Commission to adopt Article 3 of the decision, according to which the applicant 'is hereby required within three months of notification of this Decision to inform dealers with whom it has current agreements of the kind referred to in Article 1 of the full wording of Articles 1 and 2, and to notify them that the agreements in question are void'. In that connection, it must be borne in mind that, according to Article 3 of Regulation No 17, 'Where the Commission ... finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'. The Court considers that that article also confers on the Commission the power to require a notification of the kind imposed by Article 3 of the decision in order to ensure proper implementation of the decision. Moreover, since that provision is in conformity with the Commission's administrative practice in this field, the applicant's complaint concerning the validity of Article 3 of the decision must be rejected.

159 As regards, next, the question whether there is no legal basis for Article 4 of the decision, according to which the applicant may not conclude agreements of the kind regarded by Article 1 of the decision as contrary to Article 85(1) of the Treaty, the Court considers that Article 3 of Regulation No 17, cited in paragraph 158, confers on the Commission only the power to prohibit existing exclusive purchasing agreements which are incompatible with the competition rules.

160 As regards the reintroduction of a network of exclusive purchasing agreements, it is apparent from the case-law on Article 85(1) that, even where an examination of all similar agreements entered into on the relevant market and the other factors

relevant to the economic and legal context shows that access to the market in question is difficult, the exclusive purchasing agreements of a supplier whose contribution to a cumulative effect is insignificant are not caught by the prohibition contained in Article 85(1) (see the judgment in *Delimitis*, paragraphs 23 and 24).

161 It follows that Article 85(1) does not, as a general rule, preclude the conclusion of exclusive purchasing agreements, provided that they do not contribute significantly to any closing-off of the market. In that context, the Commission's argument that the prohibition of concluding future agreements is justified by the need to prevent any attempt to circumvent, by recourse to Regulation No 1984/83, the prohibition of existing agreements laid down in Article 1 of the contested decision must be rejected.

162 Regulation No 1984/83, being a measure of general application, makes available to undertakings a block exemption for certain exclusive purchasing agreements which satisfy in principle the conditions laid down by Article 85(3). According to the hierarchy of legal rules, the Commission is not empowered, by means of an individual decision, to restrict or limit the legal effects of such a legislative measure, unless the latter expressly provides a legal basis for that purpose. Although Article 14 of Regulation No 1984/83 confers on the Commission power to withdraw the benefit of the regulation if it finds that, in a particular case, an exempted agreement nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, Article 14 does not provide any legal basis for the benefit of a block exemption to be withheld from future agreements.

163 The Court also considers that 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, such as the intervener in this case, could continue to conclude exclusive purchasing agreements such as those prohibited by the decision. Such a prohibition would therefore 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.

164 For all those reasons, the Court considers that the present plea in law is well founded. It is therefore appropriate to annul Article 4 of the decision.

165 It follows that the application should be dismissed as unfounded, except as regards the claim for annulment of Article 4 of the decision.

Costs

166 Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party should bear its own costs. Since the applicant has been essentially unsuccessful, it must be ordered to bear its own costs and to pay all the costs of the proceedings, including those of the application for interim measures and those of the intervener, with the exception of one quarter of the costs incurred by the defendant. The defendant will therefore bear one quarter of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1) Annuls Article 4 of Commission Decision 93/405/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH&Co KG (IV/31.533 and IV/34.072);

2) For the rest, dismisses the application;

3) Orders the applicant to bear all the costs of the proceedings, including those in respect of the application for interim measures and those of the intervener, with the exception of one quarter of the costs incurred by the defendant;

4) Orders the defendant to bear one quarter of its own costs.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 8 June 1995.

H. Jung D. P. M. Barrington

Registrar acting as President

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