JUDGMENT OF THE COURT (Fifth Chamber)
1 October 1998 *

In Case C-279/95 P,

Langnese-Iglo GmbH, a company incorporated under German law, established in Hamburg (Germany), represented by Martin Heidenhain, Bernhard M. Maassen and Horst Satzky, Rechtsanwälte, Frankfurt am Main, with an address for service in Luxembourg at the chambers of Jean Hoss, 2 Place Winston Churchill,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 8 June 1995 in Case T-7/93 *Langnese Iglo* v *Commission* [1995] ECR II-1533, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Wouter Wils, of its Legal Service, acting as Agent, assisted by Alexander Böhlke, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

supported by

* Language of the case: German.

Mars GmbH, a company incorporated under German law, established in Viersen (Germany), represented by Jochim Sedemund, Rechtsanwalt, Berlin, and by John E. Pheasant, Solicitor, with an address for service in Luxembourg at the Chambers of Michel Molitor, 55 Boulevard de la Pétrusse,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 13 November 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 18 August 1995, Langnese-Iglo GmbH brought an appeal, pursuant to Article 49 of the EC Statute of the Court of Justice, against the judgment of the Court of First Instance of 8 June 1995 in Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533 (hereinafter 'the contested judgment') in which that Court dismissed in part its application for the annulment of 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, hereinafter 'the contested decision').

2 The facts to which the present appeal relates are set out in the contested judgment as follows:

'1 By letter of 6 December 1984, the Bundesverband der deutschen Süsswarenindustrie eV — Fachsparte Eiskrem (Association of the German Confectionary Industry — Ice-cream Section, hereinafter "the Association") asked the Commission to send it a "formal declaration" as to the compatibility with Article 85(1) of the Treaty of the exclusive agreements concluded by the German ice-cream producers with their customers. By letter of 16 January 1985, the Commission informed the Association that it considered that it could not grant the request to make a decision applicable to the industry as a whole.

2 The German undertaking, Schöller Lebensmittel GmbH & Co. KG (hereinafter "Schöller") 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 Schöller'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.

..."

3 On 18 September 1991, Mars GmbH (hereinafter "Mars") lodged a complaint with the Commission against the applicant and against Schöller 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.

4 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 Schöller 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 single-item 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 Langnese to the extent necessary for the application of the abovementioned prohibition.

5 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 93/406/EEC relating to a proceeding pursuant to Article 85 of the Treaty against Langnese-Iglo GmbH (IV/34.072

— OJ 1993 L 183, p. 19, hereinafter "the decision"), the operative part of which is as follows:

"*Article 1*

The agreements concluded by Langnese-Iglo GmbH requiring retailers established in Germany to purchase single-item ice-cream 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

Langnese-Iglo GmbH 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.

Article 4

Langnese-Iglo GmbH may not conclude agreements of the kind referred to in Article 1 until after 31 December 1997.

...'"

3 On 23 December 1992 the Commission also adopted against Schöller Decision 93/405/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH & Co. KG (Cases IV/31.533 and IV/34.072 — OJ 1993 L 183, p. 1). That decision, in particular Articles 1, 3 and 4 thereof, is essentially the same as the contested decision.

4 On 19 January 1993 Langnese-Iglo brought an action before the Court of First Instance for annulment of the contested decision.

5 By application received at the Registry of the Court of First Instance on 4 February 1993, Mars applied for leave to intervene in the proceedings before the Court of First Instance in support of the Commission. By order of 12 July 1993, the President of the First Chamber of the Court of First Instance granted that application.

6 By the same order and by order of 9 November 1994 of the President of the Second Chamber, Extended Composition, the Court of First Instance granted, under Article 116(2) of its Rules of Procedure, a request for confidential treatment submitted by Langnese-Iglo.

7 In support of its application before the Court of First Instance, the applicant put forward five pleas in law, alleging, first, irregular notification of the decision, in that the Commission failed to notify certain annexes; second, breach of the principle of protection of legitimate expectations, in that the Commission did not maintain the position adopted by it in its comfort letter; third, infringement of Article 85(1) of the Treaty; fourth, infringement of Article 85(3) of the Treaty and breach of the principle of proportionality, in that the Commission withdrew the benefit of the block exemption provided for by Regulation No 1984/83 from all the contested supply agreements; and, fifthly, 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—62, p. 87).

8 The Commission, supported by Mars, contended that the application should be dismissed.

9 In the contested judgment, the Court of First Instance annulled Article 4 of the contested decision and dismissed the remainder of the application. It also ordered Langnese-Iglo to pay all the costs of the proceedings, including those in respect of the application for interim measures (see the order of the President of the Court of First Instance of 19 February 1993 in Joined Cases T-7/93 R and T-9/93 R *Langnese-Iglo and Schöller* v *Commission* [1993] ECR II-131) and those of Mars, with the exception of one-quarter of the costs borne by the Commission. The Commission therefore bore one-quarter of its own costs.

10 Schöller also brought before the Court of First Instance an action for annulment of Decision 93/405 addressed to it. By judgment of 8 June 1995 in Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, the Court of First Instance, as in the contested judgment, annulled Article 4 of that decision and dismissed the remainder of the application. Schöller has not appealed against that judgment.

11 In its appeal Langnese-Iglo claims that the Court of Justice should set aside the contested judgment to the extent to which it dismissed its application, annul Articles 1, 2 and 3 of the contested decision and order the Commission to pay the costs

both of the proceedings before the Court of First Instance and of the appeal. In the alternative, Langnese-Iglo claims that the case should be referred back to the Court of First Instance.

12 The Commission contends that the Court should dismiss the appeal, set aside the contested judgment to the extent to which it upheld Langnese-Iglo's application and annulled Article 4 of the contested decision, and dismiss Langnese-Iglo's appeal. It also contends that Langnese-Iglo should be ordered to pay the costs.

13 Mars contends that the appeal should be dismissed and that the contested judgment should be set aside to the extent to which it annulled Article 4 of the contested decision.

14 By order of 20 March 1996 the President of the Court of Justice granted, pursuant to the second sentence of Article 93(3) and Article 118 of the Rules of Procedure of the Court of Justice, a request from Langnese-Iglo for confidentiality. That order accords confidential treatment for certain information illustrating the extent of tying-in. This judgment therefore makes no reference to that information.

15 In support of its appeal Langnese-Iglo puts forward three pleas, namely:

— breach of the principle of the protection of legitimate expectations;

— infringement of Article 85(1) of the Treaty — effect of the exclusive purchasing agreements on competition;

— breach of the principles of proportionality and equal treatment.

16 In support of its cross-appeal, the Commission, supported by Mars, contends that the annulment of Article 4 of the contested decision infringes Article 3 of Regulation No 17.

17 By letter received at the Court of Justice on 27 March 1998 Langnese-Iglo asked the Court to find of its motion that judgment need not be given on the cross-appeal brought by the Commission. Both the Commission and Mars oppose that request.

The main appeal

The first ground of appeal

18 The first ground of appeal concerns paragraphs 35 to 42 of the contested judgment which relate to breach of the principle of the protection of legitimate expectations.

19 Before the Court of First Instance Langnese-Iglo submitted that the Commission was bound by the assessment it made in its comfort letter in view of the fact that it was not in a position to show that that letter had been obtained on the basis of incorrect or incomplete information or that the legal or factual situation prevailing in the ice-cream market had undergone any appreciable change since the letter was sent (paragraphs 28 to 30 of the contested judgment).

20 Langnese-Iglo also maintained that even though the comfort letter had been addressed to Schöller, the Commission and the participants — including Langnese-

-Iglo — in the procedure initiated in response to the Association's letter of 6 December 1984 nevertheless agreed that the notification by Schöller in May 1985 concerning the ice-cream supply agreements which it had concluded and the request made at that time for the issue of a negative clearance were also valid for all the members of the Association. In its view, therefore, the comfort letter covered all the exclusive agreements existing in the ice-cream market (paragraph 31 of the contested judgment).

21 In the contested judgment the Court of First Instance considered at the outset, in paragraph 35, that it was not necessary to examine whether the applicant could legitimately expect that the Commission's assessment in the comfort letter addressed to Schöller should also apply to its legal situation or that witnesses should be heard on this point, as requested by Langnese-Iglo. The Court of First Instance considered it sufficient to state that, in any event, the comfort letter could not constitute any obstacle to examination by the Commission of the complaint lodged by Mars.

22 In paragraph 36 the Court of First Instance noted that, according to settled case-law, a comfort letter constituted 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 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327; Case 37/79 *Marty* [1980] ECR 2481; Case 99/79 *Lancôme* [1980] ECR 2511; and Case 31/80 *L'Oréal* [1980] ECR 3775). The Court of First Instance went on to say, in paragraph 37, that the comfort letter was a communication informing the undertaking concerned, namely Schöller, that the Commission considered it inappropriate, in view of the circumstances, to take action regarding the agreements at issue. Finally, the Court of First Instance considered, in paragraph 38, that the Commission had undertaken only a provisional analysis of the market conditions and had 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.

23 In paragraph 39 of the contested judgment the Court of First Instance found, first, that two new competitors, Mars and Jacobs Suchard, had entered the market after the comfort letter was issued, and, second, that, after Mars lodged its complaint, the Commission had become aware of the existence of additional barriers to access to the market. In paragraph 40 the Court of First Instance considered that those factors constituted new circumstances which, particularly in the light of the specific problems encountered by Mars, 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, 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. In that connection, the Court of First Instance also relied on the Commission's obligation to examine complaints.

24 In its appeal Langnese-Iglo maintains that the Commission had no authority to depart from the content of the comfort letter and to prohibit the network of exclusive agreements maintained by Langnese-Iglo, unless an examination had shown that the legal and factual situation prevailing on the ice-cream market had changed appreciably. Langnese-Iglo contests the findings made by the Court of First Instance regarding supervening changes in factual circumstances on the market.

25 It also criticises the contested judgment for stating that, before issuing the comfort letter, the Commission had undertaken only a provisional examination of the conditions prevailing on the market. In Langnese-Iglo's view, even if that finding were correct, it would have been of no consequence. The undertakings concerned had to be able to rely on the fact that a comfort letter would be based on an objective verification of the factual and legal situation prevailing on the relevant markets.

26 In that connection it must be observed at the outset that, according to settled case-law of the Court of Justice, by virtue of Article 168a of the EC Treaty and the

first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, in particular, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 36 and 39, and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraphs 18 and 21).

27 However, in disputing the new circumstances mentioned by the Court of First Instance, namely the appearance of new competitors on the market and the existence of new obstacles to access to the market of which the Commission became aware after Mars lodged its complaint, Langnese-Iglo is challenging the assessment of the facts made by the Court of First Instance. Such an argument is therefore inadmissible in an appeal. The same applies to Langnese-Iglo's complaint concerning the finding by the Court of First Instance that the Commission undertook, before issuing the comfort letter, only a provisional analysis of the market conditions.

28 Langnese-Iglo's argument must be understood as also criticising the Court of First Instance for recognising that the Commission was entitled to depart from the assessment set out in its comfort letter not only because of changes in factual or legal circumstances supervening after the issue of the letter but also because of additional circumstances which, although existing long before, had not been brought to the Commission's notice until after the issue of that letter.

29 In that connection reference must be made to the grounds of the judgment of the Court of First Instance regarding the legal nature of comfort letters (paragraphs 36 and 37 of the contested judgment), then to the statement in that letter that in this case the Commission nevertheless reserved the right to reopen the procedure if

there was any appreciable change affecting certain matters of law or of fact on which its assessment had been based (paragraph 38 of the contested judgment) and, finally, to the Commission's obligation to examine complaints in an appropriate manner (paragraph 41 of the contested judgment).

30 It is clear from those points mentioned by the Court of First Instance, in response to which Langnese-Iglo has not raised any specific argument in its appeal, that the fact that the Commission has issued a comfort letter cannot mean that it is no longer entitled to take account of a factual situation which existed before the letter was sent but was brought to its notice only later, particularly in connection with a complaint lodged at a later stage.

31 It follows that the first ground of appeal is partly inadmissible and partly unfounded and must therefore be rejected.

The second ground of appeal

32 By its second ground of appeal Langnese-Iglo contests the conclusion reached by the Court of First Instance in paragraphs 94 to 114 that the Commission was right to consider that Langnese-Iglo's exclusive purchasing agreements involved an appreciable restriction of competition on the relevant market and were thus incompatible with Article 85(1) of the Treaty.

33 According to Langnese-Iglo, that conclusion is based on certain factors which did not appear in the documents before the Court of First Instance and on a misconceived legal assessment of the factual situation.

34 In support of that view, Langnese-Iglo states, first, that the documents before the Court of First Instance were not conducive to the conclusion, in paragraph 105, that the networks of exclusive purchasing agreements set up by it and Schöller gave rise to tying-in exceeding 30% in the aggregate. According to Langnese-Iglo, it is clear from the documents in the case that the extent of tying-in was less than 30%, the percentage considered acceptable by the Commission in its comfort letter and in its *Fifteenth Report on Competition Policy*, 1985.

35 Secondly, Langnese-Iglo maintains that the Court of First Instance's finding that the system of lending a large number of freezer cabinets (paragraphs 107 and 108) to retailers on condition that they used them solely to keep its products was merely a repetition of a statement made by the Commission but contested by Langnese-Iglo before the Court of First Instance. The same applies to the rebates granted by Langnese-Iglo to ensure the sale of a particular percentage of single-item ice-creams (paragraph 109 of the contested judgment). According to Langnese-Iglo, the Commission did not adduce evidence in support of its statements even though the Court of First Instance stressed, in paragraph 95, that it was for the Commission to establish the existence of the alleged barriers to access to the market.

36 Thirdly, Langnese-Iglo maintains that, even if the extent of tying-in on the relevant market for ice-cream fell between the figure put forward by it and the one accepted by the Court of First Instance, so that it was slightly above or below 30%, the factual circumstances, in so far as they were properly established by the Court of First Instance, were not such that it could be concluded that access to the market was appreciably impeded or indeed prevented.

37 It must first be observed that in so arguing Langnese-Iglo is disputing various matters of fact established by the Court of First Instance. As pointed out in paragraph 26 of this judgment, the Court of Justice has no jurisdiction to appraise the facts in an appeal.

38 With regard more particularly to matters of evidence, it must be made clear that it is for the Court of First Instance alone to assess the value which should be attached to the evidence adduced before it, save where the sense of that evidence has been distorted (see in that connection the order in *San Marco* v *Commission*, cited above, paragraph 40, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, and *Deere* v *Commission*, cited above, paragraph 22). However, Langnese-Iglo has put forward no solid argument to show that the Court of First Instance distorted the sense of the evidence.

39 As regards the third part of this ground of appeal, it seems that Langnese-Iglo is criticising in its entirety the conclusion drawn by the Court of First Instance from the facts which it established, contending in particular that a degree of tying-in slightly above or below 30% does not seriously impede access to the market, particularly where the market in question is expanding rapidly.

40 On this point, it must be observed that Langnese-Iglo does not specify the errors of law allegedly committed by the Court of First Instance in its assessment of matters of law and is calling in question facts established by the Court. In those circumstances, this part of the plea is also inadmissible.

41 It is clear from the foregoing considerations that the second plea is inadmissible in its entirety.

The third plea in law

42 The third plea in law comprises two parts, alleging, first, breach of the principle of proportionality and, second, breach of the principle of equal treatment.

The first part of the third plea

43 Langnese-Iglo claims that the Court of First Instance infringed the principle of proportionality in that it held that the Commission had not committed any error in withdrawing the benefit of the block exemption provided for by Regulation No 1984/83 and prohibiting all exclusive purchase contracts concluded by Langnese-Iglo, without first having informed Langnese-Iglo of the extent to which a network of exclusive purchasing contracts was compatible with Article 85(1) of the Treaty and, therefore, without giving it an opportunity to adjust the network to the requirements of that provision.

44 In support of that argument, Langnese-Iglo claims that the reasoning of the Court of First Instance is contradictory. Thus, it considered, first, in paragraph 131, that a bundle of similar agreements, like Langnese-Iglo's exclusive purchasing agreements, had to be considered as a whole and, therefore, that the Commission was right not to examine the agreements separately and, second, in paragraph 193, that, in applying Article 85 of the Treaty, the Commission is not required to indicate which agreements do not make a significant contribution to any cumulative effect caused by similar agreements on the market. In Langnese-Iglo's view, the views expressed by the Court of First Instance conflict with those expressed in paragraphs 207 and 208, to the effect 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 partitioning of the market, and that the Commission is not empowered, by means of an individual decision, to restrict or limit the legal effects of a legislative measure such as Regulation No 1984/83.

45 As the Advocate General observed in point 27 of his Opinion, Langnese-Iglo bases that alleged contradiction on considerations deduced from contexts different from that of the contested judgment, failing to take account of the fact that the Court of First Instance drew a clear distinction between, first, the application of Article 85(1) to existing agreements and, second, the effects of Article 3 of Regulation No 17 on such exclusive purchasing agreements as Langnese-Iglo might conclude in the future.

46 Contrary to Langnese-Iglo's contention, the reasoning of the Court of First Instance contains no contradiction in that regard.

47 Moreover, Langnese-Iglo does not indicate with sufficient precision the paragraphs of the judgment to which it takes exception. Its argument covers matters which are to be found both in paragraphs 129 to 132 of the contested judgment, which concern the part of the plea relating to the Commission's alleged obligation to treat individual contracts separately, so that some of them escape the prohibition contained in Article 85(1) of the Treaty, and in paragraphs 192 to 195 of the contested judgment, which concern the part of the plea in which it is alleged that the total prohibition of supply agreements is contrary to the principle of proportionality.

48 In view of that lack of precision, to which, moreover, the Commission has drawn attention, the Court of Justice is not in a position to examine the merits of this part of the plea. It must be borne in mind that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, the order in *San Marco* v *Commission,* cited above, paragraph 37, and the judgment in *Deere* v *Commission,* cited above, paragraph 19).

49 The first part of the third plea is therefore inadmissible.

The second part of the third plea

50 Langnese-Iglo contends that the prohibition of all its exclusive purchasing agreements is likewise contrary to the principle of equal treatment. It observes that the Court of First Instance found, in paragraph 209 of the contested judgment, that Article 4 of the contested decision infringed that principle because it excluded the

benefit of Regulation No 1984/83 for certain undertakings in the future, whereas Langnese-Iglo's competitors could exploit the advantage afforded by that regulation.

51 According to Langnese-Iglo, the principle of equal treatment should apply in the same way as regards the past. It contends that it is unacceptable for the Commission to prohibit all exclusive purchasing contracts regardless of whether they are caught by Article 85(1) of the Treaty and whether they benefit from an exemption under Regulation No 1984/83, whilst competitors may maintain and impose similar exclusive purchasing agreements.

52 As regards the reference to paragraph 209 of the contested judgment, it is important to note that, in criticising the total prohibition of existing agreements, Langnese-Iglo is relying on a consideration put forward by the Court of First Instance in relation only to future agreements. Accordingly, that reference is irrelevant.

53 Moreover, it must be observed that Langnese-Iglo did not put forward before the Court of First Instance any plea alleging any breach by the Commission of the principle of equal treatment in relation to the total prohibition of existing exclusive purchasing agreements.

54 In that connection, it must be borne in mind in the first place that, pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

55 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow

it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

56 This part of the third plea is therefore inadmissible.

57 The third plea is thus inadmissible in its entirety and must therefore be rejected.

58 It follows from the foregoing considerations that the pleas in law put forward by Langnese-Iglo in support of its appeal are partly inadmissible and partly unfounded. Langnese-Iglo's appeal must therefore be dismissed in its entirety.

The cross-appeal

The contested judgment and the arguments of the parties

59 In the contested judgment the Court of First Instance annulled Article 4 of the contested decision, according to which 'Langnese-Iglo may not conclude agreements of the kind referred to in Article 1 until after 31 December 1997'.

60 The Court of First Instance stated in paragraph 205 that Article 3 of Regulation No 17, according to which '[W]hen the Commission ... finds that there is an infringement of Article 85 or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end', confers on the Commission only the power to prohibit existing exclusive agreements which are incompatible with the competition rules.

61 In that regard the Court of First Instance observed, first, that, as held in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 23 and 24, a supplier's exclusive purchasing agreements which do not contribute significantly to a cumulative effect are not prohibited by Article 85(1) of the Treaty. According to the Court of First Instance, it follows that that provision does not, as a general rule, preclude the conclusion of exclusive purchasing agreements, provided that they do not contribute significantly to any partitioning of the market. The Court of First Instance rejected the Commission's argument that the prohibition of concluding any future agreements was 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 (paragraphs 206 and 207 of the contested judgment).

62 Second, the Court of First Instance considered, in paragraph 208, that Regulation No 1984/83, being a measure of general application, did not provide any legal basis for the benefit of a block exemption to be withheld from future agreements.

63 Third, the Court of First Instance considered, in paragraph 209, that it would be contrary to the principle of equal treatment to exclude for certain undertakings the benefit of a block exemption regulation as regards the future whilst other undertakings could continue to conclude exclusive purchasing agreements such as those prohibited by the contested decision.

64 The Commission, supported by Mars, contends that the Court of First Instance's interpretation of Article 3 of Regulation No 17 is incorrect in law. In its view, that provision authorises the Commission to ensure that conduct found to have constituted an infringement of the competition provisions does not continue. It is therefore not a means of penalising existing infringements but rather of preventing their extending into the future. The Commission considers that, without Article 4 of the contested decision, Langnese-Iglo could, through Regulation No 1984/83, benefit from a block exemption for new exclusive purchasing agreements. Thus, the prohibition laid down by Article 4 constitutes a safeguard designed to ensure compliance with Articles 1 and 2 of the contested decision.

65 Before the Court of Justice, the Commission restated its views on the interpretation of Article 4 of the contested decision, indicating that it no longer adhered to its submission before the Court of First Instance to the effect that that provision also precluded the conclusion of any exclusive purchasing agreements with new resellers. It states that its cross-appeal criticises the contested judgment only in so far as it annuls Article 4 of the decision as construed narrowly, that is to say, as prohibiting Langnese-Iglo from re-establishing the same network of exclusive purchasing agreements as it had established in the past.

66 Langnese-Iglo, on the other hand, maintains that Article 4 of the contested decision must be construed as prohibiting it from concluding any exclusive purchasing agreements whatsoever with retailers for the purpose of selling single-item ice-creams. That article does not distinguish an agreement concluded with a contracting party who, at the date of the contested decision, was bound to Langnese-Iglo by an exclusive purchasing agreement from an agreement concluded with a client whom it contacted only after that date. Moreover, Article 4 prohibits the conclusion of any exclusive agreement until 31 December 1997 regardless of the number of exclusive purchasing agreements concluded by it until that date and regardless of whether and to what extent the agreement in question, individually or in conjunction with other agreements of Langnese-Iglo and of its competitors, is caught by Article 85(1) or enjoys an exemption under Regulation No 1984/83. According to Langnese-Iglo, Article 4 is likewise not necessary to prevent any circumvention of the prohibition laid down by Article 1 of the contested decision.

67 Langnese-Iglo adds that Article 4 of the contested decision differs from the corresponding provision of other decisions by which in the past the Commission, under Article 3 of Regulation No 17, has required the undertakings concerned to bring an infringement of Article 85 of the Treaty to an end. In such decisions, the Commission required the undertakings concerned to refrain in the future from concluding any agreement 'which may have the same or a similar object or effect' as the prohibited agreements.

68 Finally, Langnese-Iglo submits that to uphold the Commission's contention would be to infringe the principle of equal treatment since neither the Commission nor Mars has appealed against the judgment in *Schöller* v *Commission*, cited above.

The claim that there is no need to adjudicate on the cross-appeal

69 Since on 31 December 1997, the date specified in Article 4 of the contested decision, has now passed, Langnese-Iglo submits that the cross-appeal has become devoid of purpose. It follows that the Court of Justice should of its own motion find that there is no need to adjudicate on the cross-appeal. In that regard, Langnese-Iglo relies on the judgment in Case 56/85 *Brother Industries* v *Commission* [1988] ECR 5655.

70 The Commission submits, on the other hand, that the whole question of the legality of Article 4 of the contested decision, as construed narrowly, is still a live issue, both in principle and in practice. Its practical importance derives from the fact that, following the contested judgment, Langnese-Iglo infringed Article 4 of the contested decision, as construed narrowly. On this point, Mars adds that the ruling on the cross-appeal will affect, in particular, the question whether the contracts concluded by Langnese-Iglo with different sales outlets in the period before 31 December 1997 are valid and whether competitors may, where appropriate, pursue a claim for damages for infringement of Article 85(1) of the Treaty.

71 It is true that, in the event of the cross-appeal leading to the setting aside of the contested judgment to the extent to which it annulled Article 4 of the contested decision, the prohibition based on that provision would have no practical consequence for the present since that prohibition was laid down only until 31 December 1997. As the Commission and Mars have pointed out, however, that finding does not make it any less desirable to settle definitively the dispute as to the legality and scope of Article 4 of the contested decision with a view to determining its legal effects in the period up to the abovementioned date.

72 Moreover, the finding in *Brother Industries*, cited above, on which Langnese-Iglo relies, cannot be transposed to this case. The two situations are not comparable: in that case the action challenging a regulation had become devoid of purpose because the regulation had been superseded in the course of the proceedings by another, which the applicant also contested.

73 It must therefore be concluded that the cross-appeal has not become devoid of purpose and Langnese-Iglo's claim that there is no need to adjudicate on it must therefore be rejected.

Substance

74 It must first be noted that, for the reasons set out in paragraphs 205 to 209 of the contested judgment, the Court of First Instance correctly decided that the Commission was not entitled to prohibit Langnese-Iglo from concluding any exclusive purchasing agreements in the future. The Court of First Instance's assessment is, moreover, consistent with the case-law of the Court of Justice to the effect that Article 3 of Regulation No 17 is to be applied according to the nature of the infringement found (see Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45, and Joined Cases C-241/91 P and C-242/91 P *RTP and ITP* v *Commission* [1995] ECR I-743, paragraph 90).

75 Next, it must be noted that, before the Court of Justice, the Commission expressly indicated that it did not object to that assessment by the Court of First Instance. It now states that the sole purpose of Article 4 of the contested decision was to prevent Langnese-Iglo from re-establishing the same network of exclusive purchasing agreements with its retail distributors, without, however, preventing it from concluding new exclusive purchasing agreements with other retail distributors. In that respect, its states, the judgment of the Court of First Instance was based on a misinterpretation of the scope of Article 4 of the contested decision.

76 That departure by the Commission from its previous view does not however conduce to the conclusion that the Court of First Instance erred in law.

77 As the Advocate General pointed out in point 40 of his Opinion, the wording of Article 4 of the contested decision and point 154 of that decision show an intention to endow that article with the scope attributed to it by the Court of First Instance and by Langnese-Iglo. The Court of First Instance's assessment is even less open to criticism in view of the stance taken by the Commission on that point before the Court of First Instance.

78 It must also be observed that the principle of legal certainty requires that every act of the administration which produces legal effects should be clear and precise so that the person concerned may know without ambiguity what are his rights and obligations and may take steps accordingly (see, to that effect, with regard to legislative measures of general scope, Joined Cases 92/87 and 93/87 *Commission* v *France and United Kingdom* [1989] ECR 405, paragraph 22).

79 In those circumstances, it is unnecessary to examine the cross-appeal since it is based on the hypothesis that the legality of Article 4 of the contested decision should be assessed on the basis of the scope attributed to it by the Commission before the Court of Justice.

80 Consequently, the cross-appeal must be dismissed as inadmissible.

Costs

81 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Langnese-Iglo's appeal has been unsuccessful and the Commission's cross-appeal has been unsuccessful, those parties must be ordered to bear their own costs. Mars, which intervened in support of the Commission on the appeal and the cross-appeal, must, in accordance with Article 69(4) of the Rules of Procedure, be ordered to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1) Dismisses the appeal by Langnese-Iglo GmbH;

2) Dismisses the cross-appeal by the Commission of the European Communities;

3) Orders Langnese-Iglo GmbH, the Commission of the European Communities and Mars GmbH to bear their own costs.

Gulmann Wathelet Moitinho de Almeida

Jann Sevón

Delivered in open court in Luxembourg on 1 October 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber