OPINION OF ADVOCATE GENERAL COSMAS

delivered on 16 May 2000 *

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I — Introduction

1. In this case the Court is asked to give a preliminary ruling on three questions referred to it by the Supreme Court of Ireland pursuant to Article 177 of the EC Treaty (now Article 234 EC). The first question refers to the relationship between the national courts and the Community administrative and judicial institutions in cases raising an issue of ad hoc interpretation and application of Articles 85(1) and 86 of the EC Treaty (now Articles 81(1) EC and 82 EC). The two subsequent questions concern the compatibility with the Community rules of contractual exclusivity clauses imposed by a manufacturer and distributor of ice-cream on retailers in connection with the use of freezer cabinets which the distributor provides for the other contracting party.

II — Facts and procedure

2. The case concerns agreements entered into by HB Ice Cream Ltd, now Van Den Bergh Foods Ltd (hereinafter 'HB'), in connection with the distribution of impulse ice cream in Ireland. HB's commercial policy involves providing freezer cabinets to retailers distributing its ice cream subject to the condition that those freezers will be used exclusively for its own products (hereinafter 'the exclusivity clause'). HB, which, since 1974, has belonged to the Unilever Group, is the largest manufacturer and distributor of ice cream in Ireland; it has a dominant position in the market, its market share never having dropped below 70%.

3. Masterfoods Ltd (hereinafter 'Masterfoods') is a subsidiary of the US multinational Mars Inc. which entered the ice cream market in Ireland in 1989. From the

summer of that year many retailers began to stock Mars ice cream in the freezer cabinets supplied by HB. HB asked them to comply with the exclusivity clause contained in the freezer cabinet agreement.

4. In March 1990 Masterfoods brought an action before the High Court of Ireland for a declaration that the exclusivity clause was contrary to Articles 85 and 86 of the EC Treaty. HB asked the court to restrain Masterfoods from inducing retailers to stock Mars ice cream in HB freezer cabinets. In April 1990 the High Court granted HB an interlocutory injunction.

5. On 28 May 1992 the High Court gave judgment, dismissing Masterfoods' action and granting HB a permanent injunction restraining Masterfoods from inducing retailers to stock Mars ice cream in freezers belonging to HB. However, HB's claim for damages was dismissed.

6. On 4 September 1992 Masterfoods appealed against the High Court's judgments to the Supreme Court. In its appeal it asked the Supreme Court, first, to set aside the High Court's judgment and injunction; secondly, to declare that the exclusivity clauses at issue were unlawful and void, since they were contrary to Articles 85 and 86 of the EC Treaty; thirdly, in the alternative, to order the case to be reheard by the High Court; and fourthly, to order the other party to pay the costs.

7. It should be noted that, in parallel with those proceedings before the national courts, on 18 September 1991 Masterfoods lodged a complaint with the Commission, alleging that the exclusivity terms in the ice cream supply agreement between HB and the retailers were contrary to the Community competition rules. On 29 July 1993, the Commission reached the provisional conclusion that HB's distribution system constituted an infringement of Articles 85 and 86 of the Treaty and issued a statement of objections. It gave HB the opportunity of suggesting alterations to its ice cream distribution system. On 8 March 1995, following discussions with the Commission, HB notified the Commission of its proposals for alterations. The Commission initially expressed the prima facie view that the changes would merit exemption. On 15 August 1995 it issued a notice stating its intention to take a favourable view of the (revised) distribution arrangements notified. Subsequently, however, finding that the changes had not achieved the expected results on the market, and in the light of the market situation at the time, the Commission revised its expressed intention and sent a new statement of objections to HB (22 January 1997). Lastly, on 11 March

1998, it adopted Decision 98/531/EC [1] (hereinafter 'Decision 98/531').

8. Article 1 of Decision 98/531 states that: '[t]he exclusivity provision in the freezer-cabinet agreements concluded between Van den Bergh Foods Limited and retailers in Ireland, for the placement of cabinets in retail outlets which have only one or more freezer cabinets supplied by Van den Bergh Foods Limited for the stocking of single-wrapped items of impulse ice cream, and not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than by Van den Bergh Foods Limited constitutes an infringement of Article 85(1) of the EC Treaty.'

9. Article 3 of Decision 98/531 states: 'Van den Bergh Foods Limited's inducement to retailers in Ireland not having a freezer cabinet either procured by themselves or provided by an ice-cream manufacturer other than by Van den Bergh Foods Limited, to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice cream, and to maintain the cabinets, free of any direct charge, constitutes an infringement of Article 86 of the EC Treaty.'

1 — Commission Decision of 11 March 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Cases IV/34.073, IV/34.395 and IV/35.436 — *Van den Bergh Foods Limited*) (OJ 1998 L 246, p. 1).

10. On 21 April 1998 HB brought an action before the Court of First Instance of the European Communities for the annulment of the Commission decision (Case T-65/98).

11. On 16 June 1998 the Supreme Court decided, by order, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In the light of the judgment and orders of the High Court of Ireland dated 28 May 1992, the decision of the Commission of the European Communities dated 11 March 1998 and the applications by Van den Bergh Foods Limited pursuant to Articles 173, 185 and 186 of the Treaty establishing the European Economic Community (EC Treaty) to annul and suspend the latter decision:

(i) Does the obligation of sincere cooperation with the Commission as expounded by the Court of Justice require the Supreme Court to stay the instant proceedings pending the disposal of the appeal to the Court of First Instance against the aforesaid decision of the Commission and any subsequent appeal to the Court of Justice?

(ii) Does a decision of the Commission which is addressed to an individual party (and which is the subject of an application for annulment and suspension by that party) declaring such party's freezer cabinet agreement to be contrary to Article 85(1) and/or Article 86 of the EC Treaty thereby prevent such party from seeking to uphold a contrary judgment of the national court in that party's favour on the same or similar issues falling under Articles 85 and 86 of the Treaty where that decision of the national court is appealed to the national court of final appeal?

Questions 2 and 3 only arise in the event of a negative answer to Question 1(i).

2. Having regard to the legal and economic context of the cabinet agreements at issue in the market for single-wrapped items of impulse ice cream, does the practice whereby a manufacturer and/or supplier of ice cream provides a freezer to a retailer at no direct charge — or otherwise induces the retailer to accept the freezer — subject to the condition that the retailer stock no ice cream in such freezer other than that supplied by the said manufacturer and/or supplier constitute an infringement of the provisions of Article 85(1) and/or Article 86 of the EC Treaty?

3. Are freezer exclusivity agreements protected from challenge under Articles 85 and 86 of the EC Treaty by reason of the provisions of Article 222 of the EC Treaty?'

12. In addition, in the case brought before the Court of First Instance by HB's application of 21 April 1998, by order of 7 July 1998, [2] the President of the Court of First Instance suspended the operation of the Commission decision until the Court of First Instance had given judgment terminating the proceedings in that case (T-65/98).

13. By order of 28 April 1999, the President of the Fifth Chamber of the Court of First Instance, pursuant to the third paragraph of Article 47 of the EC Statute of the Court of Justice, stayed the proceedings in Case T-65/98 until the Court of Justice had delivered judgment in the present case.

2 — Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641.

III — The need to avoid inconsistency between the decisions of national courts and those of Community bodies

14. The central issue arising in the case before the Court is clearly the avoidance of inconsistency between the decisions of national courts and those of Community institutions in the context of the interpretation and application of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC). That danger arises, as the Court observed in *Delimitis*, [3] because in respect of certain issues dealt with by Articles 85 and 86 of the EC Treaty — including the question whether the conduct of an undertaking should be classified as compatible with Articles 85(1) and 86 of the EC Treaty — the Commission does not have exclusive competence but rather shares competence with the national courts.

A — *When does a risk of inconsistent decisions arise?*

(a) Generally

15. The following introductory remarks must be made with regard to the question of when there is a conflict or the risk of a conflict between, on the one hand, a decision of the Commission applying Articles 85(1) and 86 of the EC Treaty to a specific dispute and, on the other, the decision of a national court on the same question.

16. In order to establish such a form of conflict, a connection between the legal problem which arises before the national courts and that being examined by the Commission is not in itself sufficient. [4] Nor is the similarity of the legal problem where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts. [5] The Commission's decision may provide important indications [6] as to the appropriate way to interpret Articles 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions. Such a risk only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the Com-

3 — Case C-234/89 [1991] ECR I-935, paragraphs 43 to 46. See also Case 127/73 *BRT* v *SABAM* [1974] ECR 35 and Case 48/72 *Brasserie de Haecht* [1973] ECR 355.

4 — Such as, for instance, when national courts are examining the legality of an exclusivity clause in respect of the use of ice cream freezer cabinets and the Commission is assessing an exclusivity agreement on the use of a newspaper distribution network.

5 — Such as, for instance, the case in which the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between a particular company and retailers 1, 2 and 3 in Ireland, whilst the Commission is monitoring a similar agreement in respect of the same products in the same market between another company and retailers 4, 5 and 6.

6 — See points 20 and 21 of the Commission's Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, 93/C 39/05, OJ 1993 C 39, p. 6.

mission's decision. [7] Consequently the limits of the binding authority of the decision of the national court and the content of the Commission's decision must be examined every time.

(b) The present case

17. In this case it must be emphasised, by way of introduction, that the subject-matter of the High Court's decision appears prima facie to be the same as that of the Commission's decision; it consists in the determination of the compatibility with Articles 85(1) and 86 of the EC Treaty of the exclusivity clause contained in the freezer agreements between HB and ice cream retailers in Ireland. That does not mean, however, that those decisions, in so far as they reach contrary conclusions, are wholly in conflict with each other.

18. In particular, the High Court's decision, inasmuch as it finds that the contested exclusivity clauses imposed by HB are not contrary to Articles 85(1) and 86 of the EC Treaty as far as their effects on competition are concerned, is based on evidence and assessments which are located, in time, in the period before the delivery of that decision, in other words prior to 1992. However, the legal effects produced by the binding authority of the High Court's decision clearly extend beyond the date of its delivery. The High Court issued a permanent injunction requiring the exclusivity clauses in respect of HB's freezers to be observed and prohibiting Masterfoods from encouraging retailers to contravene those clauses.

19. The Commission's decision is based, principally, on market research carried out in 1996, [8] taking into account in addition the fact that the agreements proposed by HB to retailers for the supply of freezers were revised after 1995. As far as its operative part is concerned, the Commission's decision is clear: the contractual clauses regarding the exclusive use of the freezers supplied by HB to retailers are invalid, because they are contrary to Articles 85(1) and 86 of the EC Treaty; HB is required 'immediately to cease' [9] the said infringements and to inform retailers accordingly within three months of notification of the Decision. [10]

20. From the above the two following conclusions may be drawn. First, the

7 — I do not deny that, in cases where the similarity of the subject-matter of the Commission's decision and that of the decision of the national court is more obvious, the adoption of conflicting solutions by those two bodies does not further the uniform application of Community law. They are not, however, cases of unmixed conflict between the Community and the national decision. Any other interpretation to the effect that the above risk of giving contradictory decisions was limited more broadly would result in the national court being overly bound.

8 — See points 28 to 38 of Commission Decision 98/531.

9 — Article 4 of Commission Decision 98/531.

10 — Article 5 of Commission Decision 98/531.

reasoning in the Commission's decision is not founded on an assessment of the same facts as those before the Irish court. [11] It is theoretically possible that the exclusivity clause in freezer agreements which were in force and applied before 1992 does not contravene the Community competition rules — as the High Court held — but for the opposite to be the case for post-1992 agreements, on which the Commission's examination focused. Secondly, the two decisions are clearly in conflict as regards their legal consequences, at least from the date on which the Commission's decision was issued and notified. In particular, according to the Commission's decision, from 11 March 1998 the exclusivity clause is to cease to apply immediately because it is not in keeping with the Community competition rules. Conversely, the High Court's injunction, which continued to apply after 11 March 1998, requires compliance with the exclusivity clause.

21. Consequently we are faced with a partial conflict between the decision of the High Court and the Commission's decision. [12] The conflict is conditional on the Commission's decision being applied, since by order of the President of the Court of First Instance its operation was suspended. [13] Furthermore, there is a risk that the Supreme Court will hand down a decision contrary to that of the Commission on the basis of the grounds of the decision of the High Court at first instance or of fresh evidence and assessments. I shall examine that possibility in the next point of my analysis.

B — *The case-law of the Court of Justice on dealing with the possibility of conflicting decisions*

22. It has already been mentioned that in its judgment in *Delimitis* [14] the Court of Justice focused on the risk of conflicting decisions on the part of the national courts and the Commission in the context of application of the Community competition rules. It emphasised that the handing down of conflicting decisions was contrary to the fundamental principle of legal certainty and 'must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission'. [15]

23. The Court of Justice then considered it useful to give certain guidance to the

11 — That would be the case if the Commission founded its decision on the conditions prevailing on the ice cream market in Ireland during the period 1990 to 1992 and on the share of the market held by the undertakings involved during that same period.

12 — See also paragraph 7 of the Order of the President of the Court of First Instance of 7 July 1998 referred to above.

13 — See footnote 2 above.

14 — Cited in footnote 3.

15 — Paragraph 47 of *Delimitis*, cited in footnote 3.

national court as to how to deal with such a situation. If the answer with regard to the application of the Community provisions in question is clear, the national court may continue with its judicial task. [16] Where, however, there is a risk of conflict between the decision of the national court and a future decision of the Commission in the context of the application of Articles 85(1) and 86 of the EC Treaty, then '[a] stay of proceedings or the adoption of interim measures should ... be envisaged' [17] by the national court. In addition the Court noted that the national court may seek information from the Commission on the state of any Community monitoring or its assistance on difficulties met in the application of the relevant Treaty articles. [18] Finally, the national court may stay proceedings and make a reference to the Court for a preliminary ruling under Article 177 of the EC Treaty. [19]

24. It should be noted that *Delimitis* was a case in which a national court had to rule on the application of Articles 85(1) and 86 of the EC Treaty at a time when the Commission was dealing with the same problem but had not yet issued a decision. Moreover, the Court's exhortation to use the procedural means of Article 177 of the EC Treaty refers to a stage in the procedure at which the national court is not questioning the legality of an act of the Commission that has already been adopted. In other words, the national court is asked to raise the issue of the interpretation of Community provisions by way of questions to be referred to the Court of Justice rather than any issue of validity in respect of an individual decision adopted by the Commission. That issue arises in the present case, the particular features of which I consider it useful to set out below.

C — *The particular features of this case*

25. The present case is not covered fully by the *Delimitis* case-law. Its particular features and difficulty lie in the following.

First, as already mentioned, there is not merely a potential, but a clear and imminent, conflict between the decision of the first instance Irish court and a decision of the Commission that has already been adopted. [20] That conflict would have occurred already had the Court of First Instance not suspended the operation of the Commission's decision. [21] Furthermore, there will be contradictory decisions of the Commission and the Irish court if, in the

16 — Paragraph 50 of *Delimitis*, cited in footnote 3.

17 — Paragraph 52 of *Delimitis*, cited in footnote 3.

18 — An application of the principle of the duty to cooperate owed by the Commission to national authorities pursuant to Article 5 of the EC Treaty (now Article 10 EC).

19 — Paragraph 54 of *Delimitis*, cited in footnote 3.

20 — It should also be noted that in this case the national court considered that the exclusivity clauses in question were compatible with the Community competition rules, whereas the Commission adopted precisely the opposite view. The consequences of the existence of contrary positions would be less dangerous for the equilibrium of the Community legal structure if it was the national court that had taken a negative position on the exclusivity clauses and the Commission considered them compatible with Articles 85(1) and 86 of the EC Treaty.

21 — See point 12 above.

context of the main proceedings, the Supreme Court adopts views contrary to those formulated in Commission Decision 98/531. That might happen if the Supreme Court, holds, first, that the grounds and operative part of the High Court's decision are correct, or, secondly, that although the grounds of the first instance decision are wrong, nevertheless the operative part is correct, on the basis of other evidence.

Secondly, the question of the legality of the Commission's decision is pending before the Court of First Instance. In the event of the latter dismissing the application before it and the Irish Supreme Court upholding the conflicting order of the High Court, the primacy of Community law will have been undermined twice over by the Irish courts. [22]

Thirdly, the present case may lead the Court of Justice to set out the position on the relationship between legal proceedings under Articles 173 and 177 of the EC Treaty (now Articles 230 EC and 234 EC), and also on the relationship between the Court of Justice and the Court of First Instance.

Fourthly, one of the parties to the main proceedings, HB, which supports the first instance decision of the High Court, is also the addressee of the Commission's decision and has brought an action before the Court of First Instance against it. In that connection, the opposing party in the main proceedings, Masterfoods, intervened before the Court of First Instance in the procedure initiated by HB's application. That fact is likely to influence the answer to the first question referred for a preliminary ruling.

IV — How should the questions referred to the Court for a preliminary ruling be dealt with?

A — *Introductory remarks*

(a) Subject-matter of the dispute in the main proceedings

26. First of all, consideration must be given to the subject-matter of the case pending before the Supreme Court. Although there is no need to enter into details which depend on Irish procedural law, I would point out that the concern of the national court is to assess the correctness of both the grounds and operative part of the first instance judgment. The correctness of the positions taken by the High Court as to the compatibility of the exclusivity clauses at issue with Articles 85(1) and 86 of the EC Treaty will be examined first, in the light of the facts and points of law on which the

22 — On the one hand, because the views of the competent Community administrative authority (the Commission) will not have been taken into account and, on the other hand, because the jurisdiction of the Community judicial bodies will not have been respected — namely the jurisdiction of the Court of First Instance and, if an appeal is lodged, that of the Court of Justice — to rule on the legality of acts of the Community authorities and to ensure that they are complied with.

first instance Irish court was called upon to base its decision. That assessment by the Supreme Court is not necessarily affected by Commission Decision 98/531.

27. Conversely, the legal consequences of the first instance decision of the Irish court, since they continue after the entry into force of Commission Decision 98/531, conflict directly with the latter. Accordingly, *regardless whether the grounds of the first instance decision of the High Court were correct at the time when it was handed down*, it is clear that its continued application even after the entry into force of the Commission's decision would conflict with the latter if the Court of First Instance had not ordered its suspension. The Supreme Court cannot ignore that constant, inasmuch as its own judgment will be final as to whether or not the injunction granted by the High Court will continue to apply after 11 March 1998. In addition the Supreme Court, in view of the fact that it is called upon to examine a first instance judicial decision issuing a permanent injunction, should, if the national legal order so allows, take account of the legal and factual situation as it stood until the time of its own assessment. In that case it cannot ignore the existence of Commission Decision 98/531.

(b) The questions referred to the Court

28. The first question refers to the fact that Commission Decision 98/531, which conflicts with the operative part of the first instance decision of the Irish court, has already been challenged before the Court of First Instance. Is that sufficient to require the national court to await the conclusion of the action for annulment before giving final judgment in the dispute pending before it? Does it matter that HB, whose case was upheld by the first instance decision, is also a party who has brought proceedings against Decision 98/531 under Article 173 of the EC Treaty? The other two questions refer to issues of substance, that is to say, the correct interpretation and application of Articles 85(1), 86 and 222 of the EC Treaty.

29. With regard to the first question, the following introductory remark is called for. If the solution to the national dispute is not influenced by the validity of Commission Decision 98/531, it cannot in any event depend on disposal of the proceedings for the annulment of that decision before the Court of First Instance. That possibility is hypothetically conceivable inasmuch as, as observed, the High Court's decision does not necessarily conflict, as far as its grounds are concerned, with the Commission decision, since it is based on different facts. Is it, however, in reality possible for the main dispute to be heard without touching at all on the question of the correctness of and the need to comply with the Commission decision? A distinction will have to be drawn between the following two situations.

30. (i) Let us assume that, from the guidance on interpretation that the Court will give in the context of the second and third questions referred for a preliminary ruling,

the Supreme Court is led to the conclusion that the High Court's decision, on the basis of the facts found, is legally mistaken, on the ground that it has misinterpreted and/or misapplied Articles 85(1) and 86 of the EC Treaty. The first instance decision will then be set aside, it will cease to produce legal effects and there will no longer be a problem of conflict between that decision and the Commission decision. If, by ascertaining the defect in the first instance decision and lifting the permanent injunction in favour of HB, the main proceedings pending before the Supreme Court will be brought to an end, I consider that it would be best for the national court to complete its judicial task without having to know whether Decision 98/531 is valid or not and without giving rise to the risk of its delivering a decision contrary to that of the Commission.

31. (ii) What will happen, however, in the event — which is also the most likely — that the national court, in the light of national procedural rules that may apply, is called upon to pass judgment on the correctness of the permanent injunction in favour of HB on the basis of the facts as they have evolved up to the time of its decision? In that connection, the Supreme Court might lift the High Court's permanent injunction and be called upon to decide the case on the substance, examining whether, at the time of that fresh assessment, HB's clauses are or are not compatible with Community law. Further, what should happen if the national court, maybe in the light of the replies to the second and third questions referred for a preliminary ruling, upholds the permanent injunction obtained at first instance?

32. In the second set of circumstances I consider that it is not possible for the Supreme Court to ignore Commission Decision 98/531, the content of which must be complied with. *A fortiori* the Supreme Court cannot proceed to give final judgment by upholding the first instance decision or, in any event, requiring the freezer agreements in question to be observed, because such a course would constitute a direct challenge on its part to the validity of the Commission's decision and an infringement of what is required of the Member State in question pursuant to Article 10 EC. [23] It is certain, therefore, that the national court is not in a position to bring the case in the main proceedings to an end without knowing whether Decision 98/531 is valid or not, a question which that court is not competent to decide itself. It can, of course, await the judgment of the Court of First Instance in the action brought against Decision 98/531. If, however, it does not wish to await the outcome of that action for annulment before the Court of First Instance, [24] it has no choice but to raise the question of the validity of Commission Decision 98/531 in an appropriate reference for a preliminary ruling to the Court of Justice, [25] *provided that that is*

23 — Furthermore, the Supreme Court is not, of course, bound to comply yet with the Commission's decision, inasmuch as its operation is suspended. If, nevertheless, the Irish court were to apply that decision, such application would be wrong in so far as that would be to ignore, in a manner contrary to the Community procedural rules in force, the order of the Court of First Instance suspending operation of Decision 98/531 (cited above in point 12).

24 — I presume that the Supreme Court does not intend to await the judgment of the Court of First Instance unless it is bound to do so. Otherwise it would not have referred these questions to the Court for a preliminary ruling and the Court of First Instance would not have been led to stay the proceedings before it.

25 — See, for instance, Case 314/85 *Fotofrost* [1987] ECR 4199; Case C-465/93 *Atlanta* [1995] ECR I-3761; Case C-27/95 *Woods Spring* [1997] ECR I-1847; and Case C-334/95 *Kruger* [1997] ECR I-4517.

possible in this case. [26]

33. Consequently the following question arises in the event that the decision in the main proceedings presupposes an assessment of the validity of Commission Decision 98/531. If it wishes, [27] can the national court submit that question to the Court of Justice by means of the Article 234 EC procedure (formerly Article 177 of the EC Treaty)?

B — *Is review of the validity of Decision 98/531 possible by way of a reference for a preliminary ruling in this case?*

34. In the following analysis I shall attempt to give an answer to the two limbs of the

26 — On that point it is essential to point to a further special feature of the present case which might alter the facts in respect of the legal issue raised: the Court of First Instance has suspended the operation of the Commission Decision in question. Does that development, in so far as suspension of operation does not allow the measure in question to produce its effects, *ipso facto* provide the national court with the possibility of deciding the case pending before it without raising the issue of the validity of the Commission decision in question? I would suggest that the above question should be answered in the negative.
First of all, it is essential to draw a distinction between the question of the validity and applicability of an individual Community decision taken by the Commission and that of its operation, or the legal effects produced by it in practice. Suspension of operation has no consequence as far as the validity of the decision is concerned, nor does it cast doubt on its legality. Suspension is granted in order to regulate provisionally certain situations so that they will not be difficult to reverse if the decision is subsequently annulled. The decision remains part of the legal setting, however, and constitutes the expression of the wishes of the competent Community administrative body, in relation to the application of certain legal rules governing specific situations. Thus legal certainty, but also the principle of the primacy of Community law, require, not that the decision be applied, but nevertheless that it be observed by national judicial bodies. The latter must avoid any act upsetting the legal position expressed in the particular administrative measure, albeit suspended. A final decision of the Supreme Court definitively deciding that the injunction of the High Court should continue to apply in the future would be considered such an act.
The above solution may appear strange. It could certainly be argued that it is contrary to the very logic of suspension of operation, in so far as it allows the Commission's decision to retain some binding character while in reality it has been suspended. Such dogmatic objections ignore, however, the particularity of the problem under examination which does not arise within the context of a single legal order (the national or the Community legal order) but touches upon the relationship between those two legal orders and cannot be dealt with exclusively on the basis of what is generally accepted under national law.
An additional argument for the view that I have put forward is provided by the *Delimitis* case-law. In that judgment the Court of Justice calls upon national judicial bodies to avert any decision that is contrary to a decision of the Commission on the same issue even at a point when the Commission has not yet reached a decision, in other words, when it has not yet issued an administrative measure. That is to say, the mere fact that the Commission is likely to reach a decision on an issue to some degree limits the freedom of the national court in the case pending before it, for the sake of legal certainty and the primacy of Community law. *A fortiori*, therefore, when the Commission has not only examined a particular case but has also adopted a decision on it, the national court must avoid giving a contrary decision, even when the operation of the Commission measure at issue has been suspended.

27 — A reading of the second and third questions referred to the Court, which concern the substance of the case, does not enable me to conclude that the national court does in fact raise the question of the validity of the Commission decision in question. In so far as that issue is fundamental to the correct resolution of the case in the main proceedings and to the extent that the position of the national court is crucial in that respect, it could be argued that the most appropriate solution is to ask that court whether it intends to challenge the validity of Commission Decision 98/531.
The Court of Justice appears, however, to follow a different line of reasoning in its recent judgment in Case C-61/98 *De Haan* [1999] ECR I-5003. Despite the fact that the national court had not raised the question of the validity of the Commission decision, which was essential to the resolution of the case, the Court held that it was necessary to examine that question in order 'to give that court an answer that will be helpful in resolving the dispute before it' (paragraph 47). The Court also stated that 'review of the Commission's decision... conforms, moreover, to the principle of procedural economy, in that the question whether the decision was lawful has also been raised directly before the Court in Case C-157/98 *Netherlands* v *Commission*, the proceedings in which have been stayed pending the delivery of this judgment' (paragraph 49). From that point of view, *De Haan* shows similarities to the present case, in so far as Commission Decision 98/531 has already been challenged in the Court of First Instance, which has stayed proceedings until the Court of Justice has given judgment.
Certain differences between the two cases should, however, be noted. In *De Haan*, the national court was unaware of the Commission decision when it made the order for reference (paragraph 47); in that same case, moreover, the decision had 'been the subject of both written and oral submissions' by the parties (paragraph 49). Conversely, in this case, the Supreme Court is not unaware of the Commission decision, as is clearly shown by the formulation of the first question referred. Also the parties were not asked directly to give their views on the validity of the Commission decision.
Even though the above problems may be put to one side, I consider that review of the validity of the Commission decision at issue comes up against another, more significant obstacle, as I will explain straight away.

first question referred to the Court in the event that an assessment of the validity of Commission Decision 98/531 is a precondition for the decision in the main proceedings.

(a) Introductory remarks

35. I would preface my analysis with the following two remarks.

36. First, it is worth emphasising that if the national court were itself to decide to stay proceedings until final review of the legality of the Commission measure in question by the competent judicial bodies of the Community, that decision would avoid in the best way possible the risk, as far as it was concerned, of reaching a decision contrary to that of the Commission. However, neither from the *Delimitis* judgment nor from any rule of Community law can it *clearly* be concluded that the national court is under an obligation to await the outcome of the action for annulment under Article 230 EC before proceeding to final judgment in the case pending before it. To the contrary, in *Delimitis* the Court of Justice speaks of a discretion not a duty on the part of the national court to stay the national proceedings in order to forestall conflicting decisions.

37. The case before the Court differs significantly from the case in point in *Delimitis*. [28] Nevertheless, it can be concluded from that judgment that, in setting in motion the Article 234 EC procedure, a national court confronted with the risk of reaching a decision contrary to the views of the Commission, on the one hand is meeting the needs of the national proceedings and, on the other, is safeguarding Community legality and legal certainty. [29] Conversely, a solution according to which the bringing of an action against a Commission decision pursuant to Article 230 EC suffices to preclude the procedure under Article 234 EC and to require the national court to stay proceedings in the case until the outcome of the action for annulment so as to avoid the possibility of a conflicting decision would appear problematic. At first sight that solution appears to involve the national court being overly bound, and it is not obvious that that corresponds to the existing division of powers between national and Community bodies, or that it is consistent with the generally accepted view of the relationship between the national and Community legal orders. [30]

38. Secondly, it should be noted that the Court of Justice has also been confronted on other occasions with questions referred to it for a preliminary ruling in which the issue of the validity of a Community measure is raised, where that measure has

28 — See footnote 3 and point 22 et seq.

29 — That appears to be suggested by the Commission as well, in points 22 and 32 of its Notice on cooperation between national courts and the Commission, referred to above in footnote 6.

30 — In any event, the appeal to the principle of cooperation between national courts and the Commission implicit in Article 5 of the EC Treaty, (now Article 10 EC) is not, in my opinion, sufficient to impose on the national court a general obligation to stay the main proceedings solely because an action against a Commission decision is pending before the Court of First Instance.

already been challenged in an action for an annulment pursuant to Article 230 EC. In those cases the Court has not considered that the submission of such questions is impossible because of the previous use of the annulment procedure, nor has it asked the national courts to await the outcome of the Article 230 EC procedure. [31] On the contrary, the existence of two parallel procedures with exactly the same subject-matter is dealt with by those Community judicial bodies by staying one set of proceedings until the other has been completed. [32]

39. If we confine ourselves to the above general principles, we are led to formulate a guiding principle to the effect that even in cases where the national court is facing the risk of conflict with a Commission decision that has already been adopted, the validity of which has been challenged pursuant to Article 230 EC, that court is not obliged to await the outcome of the action for annulment, even if it is essential, before it hands down judgment in the main proceedings, for it to know whether the Commission decision in question is valid or not. That question may be dealt with by making an appropriate reference to the Court of Justice for a preliminary ruling.

31 — It is the Court's settled practice to entrust to the national court's judgment the question whether it is necessary to refer for a preliminary ruling a question affecting the validity of a Community administrative measure. The national court is competent to decide whether it is possible to await the outcome of annulment proceedings before the Court of First Instance or Court of Justice or whether it considers it necessary to have recourse to the means provided by Article 177 of the EC Treaty. In the second case, the Court replies as a rule to the questions referred to it with a ruling on the legality of the Community measure in question.

32 — See the third paragraph of Article 47 of the EC Statute of the Court of Justice. It is not excluded that priority will be given to the procedural route of Article 177 as against that of Article 173. That solution will also be followed when an action has been brought before the Court of First Instance. See, for example, Case C-183/95 *Affish* [1997] ECR I-4315, and the order of the Court of First Instance in Case T-136/98 *G*.

40. However, I shall attempt in what follows to show that the above guiding principle is not beyond any doubt. It is possible to put forward significant arguments in favour of the contrary solution, at least as regards the present case, that is to say, in favour of precluding in the case in point the procedural route of Article 234 EC and recognising the obligation of the national court to stay the proceedings before it until the Court of First Instance has delivered judgment on the action for annulment.

(b) The fact that the parties are the same in the main proceedings is an impediment to a reference for a preliminary ruling on the validity of Decision 98/531

41. The national court's discretion to employ the preliminary reference procedure is not limitless. Until now the Court has held that a challenge to the validity of a Community measure via the procedural route of Article 234 EC is not possible when one of the parties to the main proceedings belongs to the following category: on the one hand he is the addressee of the Community measure in question who would certainly be entitled to challenge its validity pursuant to Article 173 of the EC Treaty, but has, however, lost that procedural right by allowing the time-limit prescribed in the last paragraph of that article to elapse; on the other hand, he is a party to the national proceedings who will gain an advantage from a challenge to the validity of the measure at issue by means of a reference of an appropriate question for a preliminary ruling.

42. That settled case-law [33] serves to safeguard correct compliance with Community procedural rules and, by extension, legal certainty. In particular, adoption of the contrary solution would be equivalent to enabling a party who belongs to the above category 'to overcome the definitive nature which a decision necessarily assumed, by virtue of the principle of legal certainty, once the time-limit laid down by Article 173 for bringing proceedings had expired'. [34]

43. The facts of the case under examination differ from those which the Court was considering in the above-cited case-law. HB is the party in the main proceedings which has an interest in questioning the validity of Commission Decision 98/531 by means of the submission of an appropriate question for a preliminary ruling by the Supreme Court. Moreover, the same company, as the addressee of the Community decision at issue, has already lodged an application in the Court of First Instance, seeking its annulment. It is also worth pointing out that HB's opposing party in the main proceedings, Masterfoods, submitted the complaint on the basis of which the Commission's decision in question was adopted and intervened in favour of the validity of that decision before the Court of First Instance.

44. Such an exceptional case does not appear to have been dealt with directly by the Court of Justice. At first sight, however, recognition of the possibility of submitting a question for a preliminary ruling does not give rise in this case to the same risks of infringing the binding character of either the Community measures or the Community procedural rules, risks which clearly existed in the above-cited case-law. The mere fact that the Commission decision at issue has already been challenged before the Court of First Instance is enough to ensure that the legal situation has not been settled absolutely and its recipient has not lost every possibility of challenging its legality. [35]

33 — See the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks* v *British Coal* [1994] ECR I-1209; Case C-188/92 *TWD* [1994] ECR I-833; Case C-178/95 *Wiljo* [1997] ECR I-585; and Case C-408/95 *Eurotunnel* [1997] ECR I-6315.

34 — Paragraph 21 of *Wiljo*, cited in footnote 33. In that judgment the Court emphasises the need to avoid the risk of abuse of process and the distortion of the Community procedural rules, even though the discretion of the national court to determine the questions it will refer to the Court of Justice for a preliminary ruling is thereby limited. In other words, in that special case, there is a deviation from the independent nature of the reference for a preliminary ruling.

35 — The judgment in Joined Cases 133/85 and 136/85 *Rau* v *BALM* [1987] ECR 2289 appears to support recognition of the possibility of challenging the legality of the Commission decision at issue in the context of the national proceedings and, by extension, the possibility of making an appropriate reference for a preliminary ruling. From that judgment it seems to follow that a person who is able to bring an action within the time-limit pursuant to Article 230 EC against a Community measure may challenge the legality of that measure in the context of national law. I have reservations as to whether the solution reached in *Rau* continues to apply after the judgment in *TWD* (see footnote 33 above) and also after the establishment of the Court of First Instance. Regardless of that, however, the facts of *Rau* were not identical to those of the case before the Court. A difference in treatment is established between the case of a person who is a party in national proceedings and theoretically has *locus standi* to bring an action against a Community decision before the Court of First Instance and the case of a party in national proceedings who has already brought an action or has already intervened in an action for annulment in the context of Article 230 EC. As I will explain below, the simultaneous participation in two actions constitutes a situation *sui generis* which should be dealt with in a special way.

45. Nevertheless, I consider that in this particular case it is preferable to accept that an indirect challenge to the validity of the Community measure by the submission of a question for a preliminary ruling is not possible. It is, I believe, contrary to the principle of sound and rational administration of justice to review the validity of a Community measure in two parallel procedures ultimately for the protection of the interests of parties who are present in both cases. [36]

46. The logic of that position is based, first of all, on the observation that cases where exactly the same legal issue is raised in two parallel legal procedures, completely independent of each other, by the same parties, are clearly due to an abnormality of a procedural system. They are undesirable not only because they aggravate the work of the court but also because they increase the risk of conflicting decisions being handed down or at least the risk of distorting the procedural rules and the abuse of legal remedies. [37]

47. In this case the parties confronting each other in the national proceedings before the Supreme Court are already participating in the action for annulment before the Court of First Instance. In particular HB, which would risk suffering unfair damage if the Commission measure in question — should it prove to be unlawful — were applied in the national proceedings, is protected in an effective way from that risk: first, it has activated the procedural rights provided under Article 230 EC by bringing an action before the Court of First Instance; secondly, the operation of the Commission measure at issue has been suspended so that there is no question of

36 — The particular solution which I propose in the light of the facts of this case does not wholly exclude a national court being recognised as having the possibility of challenging the legality of a Community decision by a reference for a preliminary ruling, despite the fact that the same decision has already been challenged by means of the Article 230 EC procedure. Specifically, when parties to the national proceedings are persons who do not have (or it is not certain that they have) *locus standi* to challenge the Community measure before the Court of First Instance directly — a case which is the most common —, it would perhaps be unjust for those persons to have to depend, for their legal protection, on the development of the action for annulment already pending, whose outcome they are unable to influence. For instance, if an applicant under Article 230 EC does not put forward the appropriate grounds for annulment or withdraws from the action instituted, there is the possibility that the measure challenged, albeit unlawful, will not be annulled by the Community judicial bodies; that development may harm third persons who are also affected by the unfavourable consequences produced by the Community measure to their detriment, without being able to oppose its implementation. If, consequently, the submission of a reference for a preliminary ruling on the legality of the measure at issue is prohibited, the parties to the national proceedings who cannot bring an action against that measure before the Court of First Instance will not be able either to defend themselves in an appropriate way against that unlawful measure, as they could if they convinced the national court to set in motion the preliminary reference procedure and subsequently submitted observations to the Court of Justice.
Nevertheless, the solution of a reply to a question referred for a preliminary ruling affecting the validity of a Community measure already the subject of an action for annulment, in particular in cases where the parties to the main proceedings do not have *locus standi* to employ the Article 230 EC procedure, also comes up against serious practical difficulties, which I will explain in the following point of my analysis (see below, point 49 et seq.).

37 — For that reason, with the rules on lis pendens and jurisdiction, each legal system seeks *inter alia* to avoid such cases, not only by requiring each action to be heard by a specific judicial authority, but also by precluding the possibility of bringing a further action on a dispute that is already pending before the courts.

its being directly applied by the Irish court. [38]

48. Moreover, if HB and Masterfoods were recognised as having the option of obtaining review of the validity of Commission Decision 98/531 by means of a reference for a preliminary ruling to the Court of Justice by the Supreme Court, that would create, in my opinion, the risk of abuse of process. Both the applicant and the intervener before the Court of First Instance would be enabled to transfer review of the validity of the Commission decision in question to the Court of Justice, thereby bypassing the annulment procedure. I do not think that such a development, by means of which certain parties would or could obtain indirectly the possibility of choosing the Community judicial procedure in which it would be decided whether a decision of Community bodies was lawful, [39] is procedurally permissible. It is not consistent with the effective administration of justice. I therefore consider that, in the light of the particular circumstances of the case before the Court, it is preferable to exclude the possibility of a challenge to the validity of Commission Decision 98/531 by way of a reference for a preliminary ruling from the Supreme Court. [40]

38 — The second remark has particular significance. If operation of the Commission decision had not been suspended by the Court of First Instance, submission of a reference for a preliminary ruling by the national court might have had a further practical value apart from raising again the question of the validity of the decision in question; it would have given the national court the possibility of itself suspending application of the Community measure in accordance with what was held in *Atlanta*, cited in footnote 25.

39 — There is a risk that one of the parties to an action for annulment being heard before the Court of First Instance might think that its interests would be better served if it obtained a reference for a preliminary ruling on the legality of the measure already under challenge, so that priority was given to review of legality under Article 234 EC as opposed to full review of the substance under Article 230 EC. In that case, however, the conduct of that party would be obstructive and an abuse, and lead to distortion of the rules of Community procedure. I do not, of course, mean to imply that anything of the kind is occurring here; however, the risk of abuse of process, at least theoretically, exists.

40 — It could be objected to the above reasoning that the suggested solution involves delaying the national proceedings, which are independent of the Community action for annulment, and that it encroaches on the jurisdiction of the national court to determine when it is essential to obtain a preliminary ruling in order to reach a decision in a dispute pending before it.
In fact to exclude the possibility of referring a question for a preliminary ruling in this case amounts to obliging the national court to wait until the procedure before the Court of First Instance is terminated before giving final judgment. It is not often that the Court of Justice intervenes on the question of the necessity and usefulness of submitting a reference for a preliminary ruling, because that is related to the jurisdiction of the national court to deal with the cases pending before it. However, it follows from the case-law on the admissibility of references for a preliminary ruling that such jurisdiction is not absolute but is limited by the Court of Justice in certain exceptional circumstances. Moreover, the national court's need for assistance on a question of Community law is not judged *in abstracto* but on the basis of the facts of the particular dispute. Consequently if, from those facts, as is the case here, the conclusion can be drawn with certainty that a reply to the question raising the issue of the validity of Commission Decision 98/531 is not essential, and indeed perhaps procedurally 'dangerous', precisely because the parties to the main proceedings can and should seek the appropriate legal protection before the Court of First Instance, to which an application has already been made, it cannot be accepted that the national court is nevertheless entitled to refer the question at issue to the Court of Justice for a preliminary ruling.
As regards the possible delay provoked by exclusion of the possibility of making a preliminary reference in conjunction with the obligation to await the outcome of the action for annulment, the following should be borne in mind. That delay does not amount to a denial of justice on the part of the national court but constitutes a temporary stay of the national proceedings. Stays of that kind are not, of course, beneficial to the effective administration of justice. They may be necessary, however, in particular when they affect the relationship between two legal orders (Community and national), and the relationship between the national and Community courts. The Court of Justice did deal, moreover, with the eventuality of similar delays in *Delimitis*, cited above, when it asked the national court to examine whether a stay of the national judicial proceedings and the provisional fixing of the legal relations of the parties to the main proceedings was required whilst the investigation in the context of the Community administrative procedure was under way. *A fortiori* the same observations apply when the parallel development of the cases brings the national court up against the competent judicial authority of the Community legal order, that is to say the Court of First Instance, rather than the administrative authority, in other words the Commission. Lastly, the delay caused is not so very significant. Even if the possibility of submitting a preliminary question in cases such as this were accepted, the national court should nevertheless postpone its decision in the main proceedings until a ruling has been given by the Court of Justice on the questions referred to it. Usually, of course, such a ruling is more speedy than judgment in an action under Article 230 EC. Once again, however, any time gained from bypassing the Article 230 EC procedure does not, for the reasons already given, justify the adoption of that solution.

(c) The general problems caused by review of the validity of a Community decision such as that before the Court by way of the Article 234 EC procedure

49. I consider it necessary to set out some further considerations in order to explain why, in my opinion, review of the validity of decisions such as that at issue is problematic in the context of a reference for a preliminary ruling pursuant to Article 177 where an action against the same measure is pending.

50. I would begin my reasoning with the following question. Is it possible for the Court of Justice to consider a Commission decision lawful, assessing it within the limits of the review which it may carry out under Article 234 EC, and for the Court of First Instance to annul the same decision, having found, for example, a defect in the findings of fact, in the context of the full review of the substance carried out by that judicial body? In that situation, if, in other words, the Court of First Instance finds a defect in the decision which falls outside the powers of review of the Court of Justice, the declaration of invalidity will be wholly correct albeit in direct contradiction to the replies given by the Court of Justice to the questions referred for a preliminary ruling. If there is such a possibility, the mere chance of the above undesirable situation of conflicting Community judicial decisions arising should dissuade the Court of Justice from reviewing the validity of the Commission decision by way of its reply to the questions referred for a preliminary ruling.

51. That risk is, I believe, a real one. It could be avoided only if the Court of Justice, if it decided to proceed to examine the validity of the Commission decision in the context of its reply to the question referred to it for a preliminary ruling, was in a position to do so by carrying out the same review of legality as the Court of First Instance does under Article 230 EC. I do not consider that that is possible.

52. I would refer, first, to the difference between the procedure under Article 234 EC and that under Article 230 EC. The approach taken by the Court of Justice in the first case is purely legal. It is confined to the interpretation and assessment of the legality of legislative and individual acts of the Community institutions. [41] Conversely, the procedural route of Article 230 EC may lead to the Community court reviewing issues of substance such as the finding and assessment of facts. [42]

41 — From that point of view it resembles the appeal function also conferred upon it.

42 — It should also be noted that the procedural position of the parties to an action for annulment under Article 230 EC is clearly distinct from that of the parties who submit observations in the context of the Article 234 EC procedure. The pleas, submissions and arguments put forward in an action for annulment influence its outcome, whereas conversely the observations submitted in the context of the Article 234 EC procedure clearly have less procedural weight.
I would add the following remark to the above: the court hearing the substance on an Article 230 EC case has discretion as to the evidence it will ask to examine in order to determine the facts of the case; conversely, when it replies to a reference for a preliminary ruling, the Court of Justice is bound, in principle, by the facts described in the order for reference; those facts are not necessarily those giving rise to doubt as to the validity of the Community measure.

53. The differences between the two procedures are not of great practical importance when the subject of judicial review is the validity of a Community legislative measure, such as a regulation or a directive. The assessment of the legality of those measures is confined principally to the exercise of pure judicial review without its being necessary to examine questions of substance. Conversely, in the case of individual administrative measures such as that before the Court, the exercise of full review of the substance is capital for the effective provision of judicial protection.

54. Further, the Commission decision before the Court in this case has another special feature. It relates to the application in a particular case of the provisions of Articles 85(1) and 86 of the EC Treaty. It presupposes, in other words, complex technical and economic assessments which, if they are to be correct, require exhaustive review of the substance by a specialised judicial authority. In order to meet that need, *inter alia*, the Community legislature on constitutional matters was led to set up the Court of First Instance. By its systematic hearing of actions for the annulment of Commission decisions resembling the decision at issue here, that Court has succeeded in deepening and strengthening judicial review of those decisions, thus contributing to the improvement of the Community system for the provision of judicial protection. [43]

55. In conclusion, I consider that judicial review in an action for annulment, both before the Court of Justice and before the Court of First Instance, of individual administrative measures, such as that at issue, is more effective than that achieved by way of a reply to a reference for a preliminary ruling pursuant to Article 234 EC. [44] Moreover, it would not be wise to transform the nature of the Article 234 EC

43 — As the Court of Justice emphasised in its recent judgment in Case C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, paragraph 41, 'the purpose of attaching the Court of First Instance to the Court of Justice and of introducing two levels of jurisdiction was, first, to improve the judicial protection of individual interests, in particular in proceedings necessitating close examination of complex facts, and, second, to maintain the quality and effectiveness of judicial review in the Community legal order...'.

44 — I do not wish, by that remark, to underestimate the importance of the preliminary reference procedure. As Advocate General Jacobs stated in his Opinion in *Extramet*, there are categories of legal disputes which, because of their nature and special characteristics, it is preferable to submit for judicial assessment by way of an action for annulment — in cases where that is procedurally possible — rather than bringing a case before the Court of Justice by way of the Article 234 EC procedure (Opinion of Advocate General Jacobs in Case C-358/89 *Extramet* [1991] ECR 1-2501): 'a reference from a national court on the validity of a regulation does not always give the Court as full an opportunity to investigate the matter as a direct action against the adopting institution ...' (point 73). If nothing else it is neither logically nor legally consistent to maintain in those special cases that the Article 234 EC procedure may replace that of Article 230 EC.

procedure so as to constitute a faithful copy of Article 230 EC. [45]

C — *Conclusions*

56. From the above analysis the following conclusions may be drawn.

57. The national court is not bound to stay proceedings and await the outcome of the action for annulment simply because an action has already been brought against Commission Decision 98/531 before the Court of First Instance. There is such an obligation, however, if the solution to the main dispute presupposes that the national court knows whether the decision at issue is valid or not, in so far as that question cannot be brought before the Court of Justice by way of the Article 234 EC procedure for the reasons set out above. In any event, the national court or the court to which the case may be remitted for a decision on the substance ought to avoid giving a judgment which would be contrary to Decision 98/531/EC unless the latter is annulled by the Community court. [46]

58. After the above has been ascertained, the question arises of the way that the second and third questions referred to the Court for a preliminary ruling should be dealt with. I consider it probable that the

45 — In the hypothetical case of the Court of Justice acting as a court of annulment in the context of a reply to a question referred to it for a preliminary ruling, that would throw into question the very existence of the Court of First Instance. In particular, if a party could turn directly to the Court of Justice pursuant to Article 234 EC and obtain judicial review to the same extent as that ensured before the Court of First Instance, it is clear that that party would prefer to bypass the Article 230 EC procedure, thereby avoiding the possibility of an appeal against the decision of annulment.
I would not labour further the arguments set out immediately above, from which it appears to follow nevertheless that the Court of Justice may well examine generally whether a reply to a question referred for a preliminary ruling raising the issue of the validity of a Commission decision on the application of Articles 85(1) and 86 of the EC Treaty to a particular case would be useful where the validity of the same decision has been challenged before the Court of First Instance. As I explained in the previous point of my analysis, despite the possible imperfections of judicial review exercised in the context of a reply to a question referred for a preliminary ruling, examination of the validity of Community administrative measures by way of that procedural avenue is likely to constitute the only means of judicial protection for persons who do not have *locus standi* pursuant to Article 230 EC to bring a direct action against that measure before the Court of First Instance.
I consider, nevertheless, that the answer to that thorny question is not necessary to the present case. The particular features of this case, which focus on the individual parties to the main proceedings, are sufficient to justify my view that it is not possible for the Supreme Court to raise the question of the validity of Commission Decision 98/531 before the Court of Justice.

46 — The following question arises: is the Irish court unable to challenge the validity of Commission Decision 98/531 only while the annulment action is pending before the Court of First Instance or should it await the outcome of an appeal? On that point it is essential to make the following distinction. If neither HB nor Masterfoods appeals against the Court of First Instance decision, it is not then possible to challenge its correctness in the context of the national proceedings. In application of *TWD* (see footnote 33), it would not be procedurally correct for one of the parties to the proceedings before the Court of First Instance which had lost the right to lodge an appeal to be able to challenge the Court of First Instance judgment indirectly before the national courts.
Conversely, if an appeal has already been lodged against the decision of the Court of First Instance, a reference by the Irish court for a preliminary ruling in which the position of the Court of First Instance is challenged appears less problematic in practice. It was explained previously that a reply to questions referred for a preliminary ruling, with regard to the degree and elements of the judicial review carried out, appears similar to a judgment on an appeal. The joinder of the two cases by the Court of Justice is possible under certain conditions. Again, however, for reasons already explained, the issue arises whether it is appropriate to allow HB and Masterfoods, on the one hand, to lodge an appeal and, on the other hand, to challenge the correctness of the Court of First Instance judgment in the context of a reference for a preliminary ruling which the Irish court would submit.
In any event, I would prefer not to deal at this stage with that particular question, in other words whether the Irish court may refer questions for a preliminary ruling while an appeal is pending.

Supreme Court will not able to hand down a decision in the case before the action for annulment in the Court of First Instance has been concluded, because the issue of the validity of Decision 98/531 appears to constitute a preliminary to the resolution of the main proceedings. If that is, in fact, right, a reply to the following two questions is redundant. Since it is not for the Court of Justice to touch upon the question of the validity of Decision 98/531, which — for the reasons explained above — it is not possible for the national court to raise, that answer is not necessary for a resolution of the case in the main proceedings.

59. It is not, however, excluded that the Supreme Court referred the questions for the purpose of an assessment of the correctness of the grounds of the first instance decision of the High Court exclusively on the basis of the facts and legal background on which it was handed down. For that reason, moreover, the only evidence concerning the facts submitted to the Court of Justice with the order for reference are those found at first instance by the High Court. I consider that that particular aspect of the case may be examined here in the context of the reply to the second and third questions referred to the Court. This does not, of course, involve my assessing the correctness of the content of Decision 98/531 or taking account of evidence contrary to that decision.

V — The second question referred to the Court

60. In the second question the issue of the compatibility of the exclusivity clauses in question with Article 85(1) and 86 of the EC Treaty (now Articles 81(1) EC and 82 EC) is raised.

A — *The price of ice cream and the compatibility of the agreements at issue with the provisions of Article 86 of the EC Treaty*

61. Before I examine the arguments of the parties who submitted observations in the present proceedings, I consider it necessary to emphasise the following particular issue raised by the Swedish Government.

62. It appears from the facts found by the first instance Irish court as follows: at the material time on which the court's examination focused, the sale price of HB's ice cream to retailers was the same, regardless whether those retailers had entered into the freezer cabinet supply agreements at issue with HB or not. Consequently, the price of its ice cream is presumed to include, apart from the value of the ice cream, the cost of the freezer and its maintenance. On that assumption, with the above aggregate pricing policy, in conjunction with the imposition of the exclusivity clause regarding the use of the freezers, differences between retailers were introduced. Retailers who had their own freezers were charged for a service which they were not

given; in addition, the cost of supplying HB's freezers to other retailers without consideration (or for symbolic consideration) was passed on to them.

63. Taking HB's dominant position on the market [47] into account, I consider that the conduct of the company described above — assuming still that the facts are as set out — was contrary to Article 86(c) of the EC Treaty. According to that provision, abuse of a dominant position includes 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. [48] In the case in point, retailers who do not wish to have freezers supplied by HB and to be bound by the exclusivity clauses in question suffer a clear competitive disadvantage as compared with retailers who enter into agreements for the supply of freezers with HB. [49] Moreover the Commission reached that same conclusion in its statement of objections sent to HB in 1993. Moreover, the conflict between the above commercial policy and the competition rules would appear indirectly to be accepted by HB itself, which amended the policy in 1995, introducing a system of differential pricing corresponding to whether the retailer was supplied with a freezer by HB or not in addition to being supplied with ice cream. [50]

64. Consequently, the above abuse of a dominant position by HB, on the assumption that it could affect trade between Member States, [51] is contrary to Article 86 of the Treaty. Further, the exclusivity clauses in question, in conjunction with

47 — See below, at point 90 et seq.

48 — The Court of Justice is usually confronted with cases in which arbitrary discrimination consists in the imposition of different prices for the same product or service. See, for instance, Case 85/76 *Hoffmann-La Roche* [1979] ECR 215. In this case exactly the opposite has occurred: the same price is imposed in different situations in such a way as to benefit some contracting parties at the expense of others.

49 — In other words, there is abusive conduct on the part of HB, which creates conditions of unfair competition. That observation suffices, I think, for that conduct to be considered contrary to Article 86 of the EC Treaty without there being any need to examine further whether free competition is undermined by the closing off of the market.

50 — Retailers who are not supplied with a freezer are given a lump-sum refund which presumably corresponds to HB's purchase and maintenance expenses on the supply of a freezer.

51 — It is worth pointing out that the effect on intra-Community trade is a condition for the application of Article 86 of the EC Treaty, which is as a rule interpreted broadly in legal theory and case-law. That effect need not be appreciable, direct or actual but merely indirect or potential (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 and Joined Cases 6/73 and 7/73 *Commercial Solvents* [1974] ECR 113).
In the present case the following remarks should be made: if it is ascertained, in accordance with the above, that HB's conduct is an abuse, the following situation on the market is created: because of HB's dominant position on the market, most retailers in Ireland purchase ice cream from HB, regardless whether the latter supplies them with a freezer at the same time. Two categories of such retailers can be distinguished. On the one hand, those who are bound by the exclusivity clause and therefore cannot be supplied with or stock ice cream from any domestic or foreign producers other than HB; those retailers obtain a competitive advantage through the abusive conduct of HB. On the other hand there are those retailers who, apart from HB's ice cream, could purchase similar products from other domestic or foreign producers; those retailers are reduced to a disadvantageous competitive position as against the former category.
Consequently, by its conduct HB achieves the following: first, because of its dominant position, it deals with the majority of retailers in Ireland. Secondly, because of its abusive conduct, it is thereby able to drive into a disadvantageous competitive position those retailers with whom it is dealing who may be supplied with ice cream by other producers as well, whether foreign or not. In that way it adversely affects the opportunities of foreign suppliers to set up on the Irish market for impulse ice cream. That last remark is enough, in my opinion, to support the argument that HB's policy on the one hand of selling ice cream at a uniform price and on the other of imposing an exclusivity clause in respect of the freezers it supplies is likely to affect intra-Community trade.

the policy of uniform ice-cream pricing, were contrary to the above Community provision and an obligation to comply with them could not be imposed by a court.

B — *The exclusivity clauses at issue and Article 85(1) of the EC Treaty*

65. The Court has been asked to examine whether a series of exclusivity agreements constitute an infringement of Article 85(1) of the EC Treaty. [52]

(a) The *Delimitis* judgment

66. The legal route by which the issue will be judged is mapped out by the above-mentioned *Delimitis* judgment. [53]

67. The Court of Justice held that exclusivity agreements by which both the supplier and the reseller obtain benefits are not *per se* contrary to Community competition law, but that 'it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition'. [54] In assessing such agreements it is necessary to take account of 'the context in which they occur and where they might combine with others to have a cumulative effect on competition'. That cumulative effect constitutes 'one factor amongst others' for the purpose of ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected.

68. Examination of the cumulative effects of an agreement together with similar agreements presupposes, first of all, definition of the relevant market. Subsequently, in order to ascertain whether the existence of several exclusivity agreements impedes access to the market so defined, it is

52 — The particular feature of the case consists in the fact that the exclusivity clause does not concern the supply of the product in question (HB does not prohibit the supply to retailers in Ireland of other commercial brands of ice cream) but the use of the freezers for stocking products (HB prohibits the stocking in the freezers of other commercial brands). Again, however, the agreements in question have as their object to hinder, restrict or distort competition on the ice cream market and are capable of affecting inter-State trade, which is prohibited pursuant to Article 85(1) of the EC Treaty.
The link between the agreements for the exclusive use of freezers used for storing ice cream and the conditions of competition prevailing on the same ice cream market is demonstrated by the judgment in Case T-7/93 *Langnese-Iglo* [1995] ECR II-1533. That judgment examined the legality of a Commission decision concerning the compatibility with Article 85 of exclusive supply agreements entered into between ice-cream manufacturers and sellers of ice cream for street consumption. Investigating the question whether, apart from the agreements in question, there were other significant factors contributing to the partitioning of the market, the Commission found that entry of new competitors to the market was hindered by the existence of a system of giving away a large number of freezer cabinets which were placed at the disposal of retail businesses in exchange for their promising to use the freezers exclusively for stocking the supplier's products. The Court of First Instance considered '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 persuade the retailer to install an additional freezer cabinet, which may prove impossible, particularly because of lack of space in small sales outlets' (paragraph 108).

53 — That judgment concerned exclusivity agreements for the supply of beer entered into between the supplier (the brewery) and the reseller (restaurants or public houses). The former supplied the latter with certain financial and economic benefits such as the granting of favourable loans, the leasing of premises and the supply of equipment; the latter committed itself to being supplied with beer exclusively by the former and to avoiding selling competing products on its premises.

54 — Paragraph 13 of *Delimitis*, cited in footnote 3.

necessary to examine 'the nature and extent of those agreements in their totality'. Their effect on access to the market depends *inter alia* on the number of outlets tied by the exclusivity agreements in relation to the number of outlets not so tied, the duration of the commitments entered into, and the quantities of the product handled by 'tied outlets' in relation to the quantities sold by free distributors. [55] The Court of Justice points out that '[t]he existence of a bundle of similar (exclusivity) [56] contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised.' [57]

69. Subsequently the need to examine whether 'there are real concrete possibilities for a new competitor to penetrate the bundle of contracts' is emphasised. [58]

70. If, from the above analysis, it is concluded that the bundle of agreements gives rise, as 'a cumulative effect', to closing off the market to new domestic and foreign competitors, responsibility for the effect of closing off the market and for contravening the prohibitions in Article 85(1) has to be attributed to the businesses which 'make an appreciable contribution thereto'. [59] In order to assess that latter question, or the extent to which certain exclusivity agreements contribute to producing the cumulative market closing-off effect, 'the market position of the contracting parties' must be taken into consideration. [60] That is calculated on the basis of the supplier's share of the market, the number of retail outlets which it controls in relation to the total number of retail outlets and the duration of the agreements in question.

71. To summarise, an exclusivity agreement is prohibited if it is ascertained that, first, the network of similar agreements, in the light of the general economic and legal context in which they are applied, has as its cumulative effect the closing off of the market and, secondly, the specific agreement contributes appreciably to that result.

(b) Application of the *Delimitis* case-law to this case

72. The Court is asked, first, to examine the nature and significance of the body of

55 — Paragraph 19 of *Delimitis*, cited in footnote 3.

56 — My parenthesis.

57 — Paragraph 20 of *Delimitis*, cited in footnote 3.

58 — Paragraph 21 of *Delimitis*, cited in footnote 3. The Court refers to criteria such as, first, the rules on the acquisition of producer companies and the creation of outlets, secondly, the minimum number of retail outlets necessary for the economic operation of a distribution system, thirdly, the presence of intermediaries and independent distribution networks, and fourthly, the conditions under which competitive forces operate in the relevant market. With regard to that latter criterion, important factors are the number and size of producers present on the market, the degree of saturation of that market and brand loyalty.

59 — Paragraph 24 of *Delimitis*, cited in footnote 3.

60 — Paragraph 25 of *Delimitis*, cited in footnote 3.

agreements for the supply of freezers with an exclusivity clause entered into between companies supplying ice cream and retailers.[61] Such agreements constitute a settled practice in Ireland. Even if they are not *per se* contrary to Article 85(1) of the EC Treaty, they are likely to bring about restrictions on competition since they exclude the products of other competitors from certain retail outlets.

73. First of all it is essential to examine the characteristics of the retail outlets. From the High Court's findings in its judgment under appeal in the Supreme Court, it appears that retailers make up the majority of outlets;[62] these effect the majority of sales. In addition a very small number of retailers have their own freezers, that is to say freezers in which they may stock ice cream of other commercial brands.[63] The great majority of retailers only have one or two freezers for exclusive use from one supplier. The limited number of freezers seems to result from lack of space in retail premises and the absence of commercial interest on the part of shopkeepers; the latter do not expect to obtain a substantial increase in their profits from the addition of another freezer even if that were practically possible.[64] As far as HB is concerned, according to the evidence supplied by the national court, that company controls approximately 12 000 of the 18 000 freezers in the relevant market. The first instance Irish court calculated that approximately 80% of freezers in small retail outlets are controlled by HB.

74. I consider that the agreements to supply freezers to retailers significantly affect the possibility of a new competitor entering the market. Taking into account the small to non-existent likelihood of persuading a retailer to replace a freezer that is already installed or to install an additional freezer (owned by him or for another commercial brand) there are serious indications that the retail outlets controlled by means of the exclusivity clauses by one supplier are *de facto* tied to it. Since there are many more retail outlets in respect of which freezer agreements with an exclusivity clause have been entered into than there are outlets with their own 'free freezers', it is clear that the great majority of retail outlets in Ireland are *de facto* tied to a supplier.

61 — The primary concern of those responsible for applying the law is the definition of the product market and the geographical market. The formulation of the second question referred to the Court indicates that the national court appears to consider the relevant market to be the market in single-wrapped items of impulse ice cream in Ireland.

62 — They are mostly small general stores, kiosks and petrol stations. There are approximately 9 000 outlets out of a total of 10 279 (market research conducted in 1990).

63 — The basic reason for the lack of a larger number of freezer cabinet owners is the cost of purchase and maintenance and the ease with which a freezer can be supplied by an ice-cream producing company even though there is a binding exclusivity clause.

64 — On that point it is also worth examining whether the market in question is saturated as far as freezers are concerned. If, in other words the number of freezers already installed has reached its greatest relative value, it cannot be expected that retailers will have an interest in installing extra freezers in their shop.

75. In particular, in the case of HB, it has yet another advantage because of its position in the market. It is the ice-cream manufacturer with the greatest range of products and the most popular. Consequently, retailers — who, as stated, do not usually own their own freezer — have every interest, when deciding to buy ice cream, to turn to HB; the latter, because of its position on the market, presumably ensures that they achieve a greater volume of sales. For the same reason, there are very few cases where HB freezers are installed and then replaced with freezers for the exclusive use of another commercial brand. Lastly, the addition of an extra freezer for the purpose of stocking another commercial brand of ice cream is not likely to substantially increase retailers' profits; HB's ice cream will continue to constitute the main volume of sales in the shop. The above is also confirmed by the first instance Irish court.

76. With regard to the possibilities of new competitors entering the existing distribution network and, by extension, the relevant market, HB puts forward a number of arguments to show that the agreements in question do not have as their cumulative effect the closing off of the market to new competitors. HB maintains that, for the correct application of Article 85(1) to the present case, it is essential to define the 'threshold level of market access' that should be given to new competitors. If such minimum access is ensured in this case, the exclusivity clauses in questions are not contrary to the Community provisions on competition.

77. I do not disagree with the above reasoning. Nevertheless, the large number of retail outlets *de facto* tied by reason of the clauses requiring exclusive use of freezers constitutes a significant indication — which it is for the national court to confirm — that the restriction of competition caused by the bundle of agreements in question is so serious that there is not the necessary (minimum) margin for access to the market. That finding is not invalidated by the fact that certain competitors, such as Mars, despite the existing restrictions, manage to enter a small part of the market. Moreover, it is not right to maintain — as HB tries to do — that entry on the market of suppliers of ice cream in Ireland presupposes that a newly-arrived supplier of ice cream should consider setting up its own 'fleet of freezers' so as to obtain control of certain retail outlets. The above approach appears to justify the further tying of the market as a precondition to freeing it up; it is worth emphasising that the relevant market is that of the supply of impulse ice cream rather than a single market for the supply of ice cream and freezers.[65] Lastly, HB makes the telling

65 — The proper functioning of the competition rules does not permit manufacturers of ice cream to be forced to provide freezers in order to exercise their activities in the ice cream market. Competition between brands may not be replaced by competition for access to retail shops.

point that the exclusivity agreements are not considered to contribute to closing off the markets in a manner contrary to the Community competition rules if newly-arrived suppliers of ice cream have the possibility of recourse to alternative methods of strengthening their position on the market. It is not, however, clear that such alternatives exist in the ice cream market in Ireland, [66] but that is a question which it is for the national court to decide. [67]

78. From the above analysis it follows that — if the facts and legal points assessed are correct — the bundle of freezer agreements with an exclusivity term concluded by ice-cream suppliers in Ireland with retailers has the cumulative effect of altering the healthy conditions of competition within the relevant market and leads to the closing off of that market. The system of exclusivity clauses, as it operates in this case, appears to be liable to strengthen to an excessive extent the supplier with a stronger position in the market, to make it practically impossible for new suppliers to enter the market (in particular small to medium-size suppliers, those suppliers, in other words, who do not have a large range of products and cannot commit themselves to the cost of setting up a freezer network) and to harm the consumer, in the final analysis, because it does not encourage competition on the basis of the quality and price of the products. I do not doubt that that system may, from a certain point of view, be regarded as operating for the benefit of those participating in the freezer agreements in question or that it might also have a positive impact on the market; [68] even on that view, however, the subversive negative consequences for free competition, which are tantamount to closing off the market, are not reversed.

79. There remains to be examined the question whether application of the *de minimis* proviso set out in the *Delimitis* judgment is called for; whether, that is to say, the freezer agreements concluded by HB in particular 'make an appreciable contribution' [69] to producing the above negative effects on the market. On the basis, at least, of the evidence referred to in the first instance decision of the Irish court, I consider that that question should be answered in the affirmative. Of all the said freezer agreements, the lion's share is held by HB. That company appears to be the

66 — It could be considered that an alternative method of entry on the market might be, in accordance with *Delimitis*, the addition of new retail outlets, the creation of a profitable distribution network, or the use of an existing system of independent intermediaries. From the documents in the file it does not appear, however, that there is an independent impulse ice cream wholesale trade in Ireland which would give newly-arrived suppliers access to distribution. Furthermore, if the relevant market as regards the number of retail outlets and the total number of freezers installed is in fact saturated, it is clear that alternative solutions open to newly-arrived operators (particularly small to medium-sized businesses) are significantly restricted. In my opinion, the acquisition of other existing undertakings with a distribution network, as suggested by HB, cannot be regarded as such a solution; even if there were such a possibility, the cost of entry on the market would in all probability be a deterrent for the economic operators interested. Also it could not be considered compatible with the Community competition rules for operators already established to be allowed to tie the market in such a way that the only prospect for a new competitor to enter the market would be for it to buy out one of the already existing competitors; freedom of competition would not then exist.
The question whether the present position of existing ice-cream suppliers and their reputation with consumers constitute an insurmountable obstacle to new arrivals must also be examined.

67 — The national court will examine that question in the light of paragraph 21 of *Delimitis*, cited in footnote 3.

68 — See point 85 et seq. below.

69 — Paragraph 24 of *Delimitis*.

most important supplier established on the market, has long been consolidating that position, has the largest network of freezers and thereby offers its products from the greatest number of retail outlets. I would repeat that, in accordance with the assessments of the first instance Irish court, two thirds of freezers in retail outlets in Ireland have been supplied by HB on the basis of agreements for exclusive use and 80% of retail shops are *de facto* tied to HB.

80. The above observations are not undermined by HB's contentions.

81. That company refers, first, to the criterion of the length of the exclusivity clauses, which the Court of Justice employed in *Delimitis*. It argues that, in contrast with the facts in *Langnese Iglo*,[70] the agreements for the exclusive use of freezers are freely entered into by retailers and can, on request, be terminated by them without further commitment to the supplier company. According to HB, that factor indicates that those agreements are compatible with Article 85(1) of the EC Treaty.

82. I do not find myself in agreement with that view. In any case, it is expedient to examine the actual duration of the agreements. If the average duration is long and it is ascertained that there is a disinclination on the part of retailers to terminate the agreements in question within a short period of time, it cannot be maintained that the possibility of 'termination on request' provided for suffices for those agreements to be regarded as not bringing about a closing off of the market in a manner contrary to Article 85(1).

83. HB also states that for the proper determination of the way in which its own agreements contribute to closing off the market, it is essential to make the following distinction. The total number of the retail outlets which are removed from free competition because they are *de facto* tied to HB should not include the cases of retailers who, although they have one or more of HB's freezers, are also not interested in selling any other commercial brand of ice cream for purely commercial reasons, in particular the low demand for ice cream other than HB's on the part of consumers.

84. I cannot agree with that line of reasoning, which the High Court appears in the main to support. The effects of an agreement restricting competition must be assessed objectively, independently of the reasons for which those taking part in the restrictive agreement enter into it. The significant exclusion from the market of other suppliers may, in principle, constitute an infringement of Article 85(1) of the EC

70 — Cited in footnote 52.

Treaty, even if the retailer who accepts the exclusivity clause states at some point in time that he is not interested in widening the circle of his suppliers. Consequently, for the correct calculation of the restrictive effects of the freezer agreements in question on competition, in the light of the preceding analysis, all retail outlets with only HB freezers and accordingly not purchasing any other commercial brand of ice cream should be regarded as *de facto* dependent on HB.

(c) Objective justification for the exclusivity clauses in question

85. HB maintains that the clauses in question introduce a minor restriction on competition which is entirely legitimate because it is objectively justified. It relies in that connection on *Pronuptia* [71] and the theory of objective justification for certain reciprocal conduct which, for that reason, falls outside the scope of application of Article 85(1) of the EC Treaty.

86. In particular, HB argues that the agreements for the use and maintenance of freezers, free of any direct charge, benefit both it and the retailers contracting with it. For instance, the total cost of the activity involved in the sale of ice cream is reduced, [72] a better distribution of products is achieved [73] and retail outlets for the products are increased. [74]

87. Furthermore, HB maintains that the exclusivity clause accompanying the above agreements is essential for the proper operation of the system and brings about only minor and legitimate restrictions on competition. Without the clause, observes HB, the proper organisation of the market in impulse ice cream and appropriate distribution of the products would be jeopardised. By means of those clauses suppliers ensure better access to their products, have latitude to shoulder the cost of the freezers because they anticipate a greater volume of sales, better monitor the hygiene and refrigeration conditions of the ice cream, facilitate advertising and the general promotion of their products and are protected from abusive conduct on the part of their competitors, [75] while safeguarding their property rights in the

71 — Case 161/84 *Pronuptia* [1986] ECR 353.

72 — Retailers avoid the heavy charges of purchasing and maintaining a freezer. HB, as a subsidiary of Unilever, purchases freezers at wholesale prices from the manufacturers at much better prices than individual purchases would obtain. Also, the fact that the freezers and ice-cream are not invoiced separately makes dealings easier.

73 — HB can better monitor the means of distribution and stocking of its products and obtains better geographical cover of the market.

74 — Many retailers would not accept the business risk involved in the purchase, rental and maintenance of an ice cream freezer because of the marginal character of the particular activity. HB maintains that free supply and maintenance of freezers is in many cases the only way to ensure the availability of ice cream in certain retail outlets.

75 — Who would obtain an illegitimate competitive advantage if they could distribute their ice cream using HB's freezers.

freezers. All the above is achieved, according to HB's assertions, without excessive restriction of competition.

88. My comments on the above line of argument are as follows:

First, I would observe that it is hard to construe and apply the criterion of objective justification in practice; it is questionable whether it constitutes an apt criterion for construing the Community competition provisions. [76] Nevertheless, it is not completely absent from the case-law of the Court. [77]

Secondly, contrary to the case examined by the Court in *Pronuptia*, the exclusivity clause does not appear here to constitute an objectively necessary precondition for the functioning of a system whose retention unchanged is completely justified. On the one hand I accept that the agreements for the supply of a freezer to retailers present advantages for the contracting parties and the consumer; that does not mean, however, that the existence and correct operation of the market in impulse ice cream in Ireland depends on those agreements. [78] On the other hand, and more importantly, the exclusivity clause accompanying the supply of freezers does not constitute a *conditio sine qua non* for the conclusion of freezer agreements. Despite what was said to the contrary by HB, it has not been shown that the organisation by ice cream suppliers of a functional distribution network with the supply of freezers to retailers cannot exist without the free supply of a freezer together with an exclusivity clause as regards its use. [79]

76 — In my Opinion in Case C-235/92 P *Montecatini* of 15 July 1997 (point 45) I expressed my reservations in connection with the possibility of transferring the 'rule of reason', with its American origin, to the Community legal order, in particular as regards application of Article 85(1) of the EC Treaty.

77 — Apart from *Pronuptia*, cited in footed 71, I would cite my Opinion in Case C-83/98 P *Ladbroke*, [2000] ECR I-3271, in which I referred to the criterion of objective justification in review of State aid. See also Case 258/78 *Nungesser* [1982] ECR 2015 and Case 262/81 *Coditel (II)* [1982] ECR 3381.

78 — That is demonstrated as well by the fact that HB is also in a position to distribute successfully to retail outlets in which its freezers have not been installed.

79 — It has not been shown that the existing practice is essential for the functioning of an ice cream distribution network in Ireland. HB's arguments by no means lead to the conclusion that removing the requirement of exclusive use of the freezers will undermine the situation to such an extent that, on the one hand, there will be no further possibility of entering into freezer agreements with retailers and, on the other hand, the market will be irremediably disturbed because of the effect on the distribution system and the loss of retail outlets. The causal link between removal of exclusivity and undermining of the system has not been sufficiently demonstrated.
As regards the defence of HB's property rights in the freezers, I would observe that the supply of a freezer without charge with the parallel imposition of the exclusivity clause does not constitute the only way to achieve that goal, but a choice which HB has made for commercial reasons. Instead of incorporating the cost of the freezers in the price of ice cream it could have conceived other methods of writing off the cost of its investment in freezers; the charge to retailers of an independent rental for the use of freezers is one of the possible solutions (see below, point 105 et seq.).
That solution might lead to a number of retailers abandoning the activity which consists in the sale of ice cream. The supposed extent of the loss of retail outlets is not, however, borne out. The retailers may be subject to the additional cost of renting a freezer cabinet, but would purchase cheaper ice cream (since the cost of the freezer would no longer be included in the price of the ice cream) and would be able to increase their commercial activity by using the freezer for stocking and refrigerating other ice cream. In any case, the loss of retail outlets does not *per se* render legitimate the restrictions on competition brought about by the exclusivity clauses.

Thirdly, I consider that even on the construction that certain restrictions on competition could be justified on the ground of maintaining a system which ultimately functions for the benefit of the market and those participating in the market, those restrictions cannot go beyond a limit which may be determined by applying the principle of proportionality. [80] Where, consequently, in accordance with the preceding analysis, from the overall assessment of the legal and factual context of HB's agreements, it is ascertained that they contribute significantly, with other similar agreements, to producing a cumulative negative effect on competition so as to close off the market, those agreements, despite the positive aspects emphasised by HB, are contrary to Article 85(1) of the EC Treaty. First, because of the gravity of the negative consequences for competition, the restrictions in question exceed a specific limit beyond which they cannot be regarded as justified. [81] Secondly, as I have already explained, it has not been shown that the restrictions in question to which the agreements on exclusivity before the Court give rise are essential for achieving the goal sought, even if it were legitimate. [82]

89. In conclusion, in respect of the first limb of the second question referred to the Court for a preliminary ruling, the following answer should be given: In the light of the legal and factual features of the relevant market, an agreement or practice such as that being examined in the main proceedings is contrary to Article 85(1) of the EC Treaty if three conditions are satisfied: first, in conjunction with similar agreements or practices in the same market it *de facto* precludes access by other competitors to a particularly large share of the existing retail outlets, leading to closing off of the market; second, it contributes appreciably to the said closing off of the market; third, the

80 — It is often maintained that *Pronuptia* enables an agreement or practice to be classified as compatible with Article 85(1) of the EC Treaty without requiring assessment of the gravity of the restrictions entailed for competition, solely by reason of the fact that it constitutes a necessary precondition for the functioning of a system which, by itself, is not contrary to Article 85(1). I do not agree with that approach. If the restrictions on competition are particularly serious they cannot be classified as 'complementary' or 'minor'. *Pronuptia* is aimed at the better application of Article 85(1) of the EC Treaty and does not indicate a way to avoid application of those provisions.
It is, consequently, essential that the benefits of free competition, which is affected by the agreement or practice in question, and the benefits which the latter seeks to protect, are balanced against each other. The objective of legitimate goals does not always justify infringement of the conditions of competition, particularly when that infringement is serious. Furthermore, in the application of the criteria which make up the principle of proportionality (suitability, necessity, proportionality *stricto sensu*), it will have to be investigated whether the agreement or practice in question affects competition to an excessive degree.

81 — I defended a related position as regards the impossibility of justifying particularly severe restrictions on competition by way of the 'rule of reason', which it appears both the Community and American competition courts adopt, in my Opinion in Case C-235/92 P *Montecatini*, cited in footnote 76. In the same case the Court held that '[o]n this point, it need merely be stated that, even if the rule of reason did have a place in the context of Article 85(1) of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market. The Court of First Instance did not therefore commit an error of law when it considered that the clear nature of the infringement in any event precluded the application of the rule of reason' (Case C-235/92 P *Montecatini*, paragraph 133).

82 — It is clear that if the legal and factual features of the market were different, HB's arguments on the utility of the exclusivity clauses would have greater weight and would possibly warrant being tolerated from the point of view of Article 85(1) of the EC Treaty.

restriction on competition in question may affect trade between Member States. [83]

C — *The exclusivity clauses in question and Article 86 of the EC Treaty*

90. The position of an undertaking on the market may be classified as 'dominant' when it enables it to prevent effective competition being maintained and to conduct itself to an appreciable extent independently of its competitors, its customers and consumers. [84] A large share of the market, save in exceptional circumstances, in principle constitutes evidence of the existence of a dominant position. [85]

91. HB's share of the market for single-wrapped items of impulse ice cream in Ireland has for many years hovered around the level of 70% and above. That fact, in conjunction with other factors, [86] leads to the natural conclusion that HB has a dominant position in the above market. [87]

92. Abuse of a dominant position, which is prohibited by Article 86, is 'an objective concept relating to the behaviour of an undertaking... which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition... has the effect of hindering the maintenance of the degree of competition still existing in the market ...'. [88] An undertaking in a dominant position is prohibited from 'eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality'. [89] As regards the correct application of Article 86, the Court considers that 'the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show a weakened competitive situation'. [90] With respect to exclusivity agreements, there is settled case-law to

83 — If the market is found to be closed off in such a way as to make access to retail outlets impossible for new ice cream suppliers, regardless of the geographical position and the origin of the products of that supplier, in my opinion trade between Member States is likely to be affected. The restriction of competition at issue makes it more difficult for foreign competitors to penetrate the Irish market.

84 — See Case 27/76 *United Brands* v *Commission* [1978] ECR 75 and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461.

85 — See Case 85/76 *Hoffmann-La Roche*, cited in footnote 84 (paragraph 41) and also Case 62/86 *Akzo-Chemie* [1991] ECR I-3359, paragraph 60, and Case C-52/92 P *Hilti* [1993] ECR I-2961.

86 — The absence of any competitor of equivalent strength, acceptance by consumers, control over a large share of retail outlets, access to know-how and other advantages resulting from its belonging to Unilever's multinational group of companies.

87 — The first instance Irish court reached the same conclusion.

88 — See *Hoffmann-La Roche*, cited in footnote 84, paragraph 91.

89 — See *Akzo-Chemie*, cited in footnote 85, paragraph 70.

90 — See Case C-333/94 P *Tetra Pak* [1996] ECR I-5951, paragraph 24.

the effect that 'if an undertaking having a dominant position on the market ties buyers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements from that undertaking, this constitutes an abuse of a dominant position'. [91]

93. HB proposes the following agreement to retailers: it supplies them with freezers (free of any direct charge), the cost of purchase and maintenance of which it bears itself; it lays down, however, as a condition, that the freezers must be used exclusively for stocking its own products. In that way it encourages retailers who do not have a freezer, either their own or from another supplier, to conclude with it supply agreements containing an exclusivity clause. I have already explained that the retailers who enter into the above agreements as a rule will not agree to replace HB freezers with freezers from another supplier or with their own freezers, nor are they willing to install further freezers. [92] In consequence the retail outlets covered by the agreements in question are *de facto* retail outlets exclusively for HB's products. From the foregoing analysis, it follows that the number of retail outlets in question is particularly high, and appears to amount to 80% of small shops. [93]

94. In that way HB's dominant position is reinforced and competition, which is in any case weakened by the dominant position of HB, dwindles even further. More generally, HB's policy is not compatible with conditions of healthy competition in the supply of consumer products: first, it makes penetration of and consolidation on the market difficult for other suppliers competing with HB; secondly, the freedom of retailers to choose their suppliers on the basis of the advantages which they offer is impaired; thirdly, the freedom of consumers to choose the products in question on the basis of their quality and price is impaired. In other words, at none of the market levels is competition between brands of single-wrapped items of impulse ice cream a function of the characteristics of the products in question but depends on whether the retail outlets in question are or are not *de facto* tied to HB. In conclusion, I consider that the conduct of HB under examination constitutes an abuse of a dominant position.

95. The correctness of the above conclusion is not undermined by HB's contentions to the contrary.

91 — See *Hoffmann-La Roche*, cited in footnote 84, paragraph 89, and *Akzo-Chemie*, cited in footnote 85, at paragraph 149. In Case T-65/89 *BPB* v *British Gypsum* [1993] ECR II-389, paragraph 68, the Court of First Instance held that 'where, as in the present case, an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market'.

92 — See points 74 and 75 above.

93 — See point 73 above.

96. That party maintains, first of all, that the conclusion of freezer agreements containing an exclusivity clause constitutes a settled practice of suppliers in the market in question which is not a departure from healthy competition but rather affects the conditions of competition in a positive way. Moreover, any prohibition of the agreements at issue as contrary to Article 86 of the EC Treaty would require HB to harm its own interests, which is not possible. [94] HB also cites *Bronner* [95] from which it follows that an undertaking holding a dominant position is not bound to open up its product distribution system to competitors, even for reasonable payment, where denial of access, first, does not have the effect of excluding competition from the undertaking asking for access, secondly, it can be objectively justified and, thirdly, there is an actual or potential alternative solution. Lastly, HB maintains, on the one hand, that the agreements in question do not disturb the conditions of competition, ensuring exclusivity in respect of only a negligible number of retail outlets, and, on the other hand, that in any event the conduct under examination is objectively justified.

97. There is no doubt that freezer agreements constitute a normal commercial phenomenon in the relevant market and that from a certain point of view they are advantageous to the contracting parties. That observation does not, however, suffice for HB's agreements not to be regarded as contrary to Article 86 of the EC Treaty; that might be accepted in markets where normal conditions of competition prevail but not in the case under examination where, precisely because of HB's dominant position, competition is already reduced. Moreover, HB's arguments do not undermine the findings of the foregoing analysis, in particular the finding to the effect that HB's freezer agreements do not allow competition to function normally, as is essential in the case of the supply of consumer goods.

98. Furthermore, the suggested application of Article 86 of the EC Treaty may indeed deprive HB of the possibility of exploiting all the advantages which flow from its position on the market, but it does not, however, require it to act to the detriment of its interests. It is wholly legitimate to limit a company's leeway in its business strategy pursuant to Article 86, in so far as an undertaking with a dominant position always has the particular responsibility of not harming, by its conduct, legitimate undistorted competition in the common market.

94 — HB cites the Opinion of Judge Kirschner, of the Court of First Instance, who acted as Advocate General in Case T-51/89 *Tetra Pak* [1990] ECR II-309, at point 63. In that Opinion he maintained that no company, even if it has a dominant position, can be forced to harm its own interests.

95 — Case C-7/97 [1998] ECR I-7791.

99. Moreover, the logical consequences of *Bronner*[96] and the principle of 'essential facilities' do not affect the case before the Court. *Bronner* concerned the right of access of a competitor to the existing distribution network of another competitor who had a dominant position, when participation in that network was stated to constitute an essential facility for the exercise of the activity in question and for the existence of competition. The central question here is different; it concerns the alteration of the conditions of competition by the imposition of an exclusivity clause on retailers in connection with the supply of products as a precondition for their obtaining freezers free of any direct financial charge. The problem of essential facilities does not arise in this case.[97]

100. In connection with HB's argument to the effect that the number of retailers who are tied by reason of the exclusivity clauses in question is negligible, I would observe that the criteria on which HB makes the relevant calculations and reaches the above conclusion are not correct. HB appears not to include in its research the retailers who only have HB freezers but state that they are not in any case interested in selling any other commercial brand of ice cream for purely personal and business reasons. As I have explained in my analysis of Article 85(1) of the EC Treaty, all retail outlets which have only HB freezers must be regarded as *de facto* tied to HB by the freezer agreements.[98] I would point out that, according to the evidence provided by the national court, 80% of small shops in Ireland sell only HB ice cream and cannot extend their range of products, even if they wished to do so, because they are equipped with HB freezers.

101. As concerns the argument relating to 'objective justification' for HB's conduct, I would emphasise, first of all, that the case-law does not appear to use that express concept in its interpretation of Article 86 of the EC Treaty. Nevertheless, I agree that it would be difficult to accept that an objectively justified business measure was also an abuse.[99] The question whether conduct is justified or not is assessed on the basis of the principle of proportionality.[100] A company which holds a dominant position is not entitled to bring about disproportionate restrictions to free competition, even if the goals sought are wholly legitimate. In

96 — See footnote 95 above.

97 — In particular, in *Bronner*, cited in footnote 95, the publisher holding a dominant position had set up a distribution network which did not prevent other competitors from setting up their own distribution network. In addition, the network in question did not prevent retailers from being supplied with or selling other newspapers. Conversely, the distribution network set up by HB with the exclusivity clauses in question, on the one hand prevents other competitors from setting up their own network and, on the other hand, ultimately precludes retailers from being supplied with similar products of another commercial brand.

98 — See point 84 above.

99 — From that point of view, the concept of objective justification appears as a factor that could be taken into consideration in determining whether the conduct of undertakings in a dominant position is an abuse or not.

100 — On the meaning of the principle of proportionality in the context of Article 86, see the analysis in the Opinion of Judge Kirschner acting as Advocate General in *Tetra Pak*, cited in footnote 94, at points 67 to 74, which includes particularly useful case-law and bibliographical references.

relation to the freezer agreements at issue, I consider that the seriously negative consequences ascertained above for the functioning of the market, the extent of the restrictions caused to competition and the supervening impossibility of ensuring conditions of healthy and normal competition make it a foregone conclusion that HB's conduct is unjustified. [101] Even if the 'presumption of abuse' as set out above is not accepted, the activities of HB under examination are not objectively justified because they introduce obstacles and distortions to free competition which go beyond the goal sought and are not essential for its achievement. [102]

102. Consequently I would draw the following conclusion: an undertaking supplying single-wrapped items of impulse ice cream which holds a dominant position on the relevant market, in encouraging retailers to enter into agreements with it for the supply of freezers free of any direct charge that contain a clause requiring the freezers to be used exclusively for stocking its products, given the characteristics of the market succeeds *de facto* in tying a large number of retail outlets and restricting further the already weakened competition by not allowing the market to function in conditions of healthy competition, and has thereby infringed its obligations under Article 86 of the Treaty.

VI — The third question referred to the Court

103. The national court asks whether the protection of property ownership which is provided for in Article 222 of the EC Treaty (now Article 295 EC) prevents a challenge to HB's freezer agreements on the basis of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).

104. The above question calls for a reply in the negative.

105. I would point out that the right to property ownership is safeguarded in

101 — I would maintain that there are limits on the negative consequences for competition and if a company in a dominant position goes beyond those limits its conduct is presumed to be an abuse and unjustified.

102 — On that point HB puts forward a number of the arguments which have already been discussed in the context of my analysis in respect of Article 85(1) of the EC Treaty. In particular it considers that the agreements in question ensure better promotion and availability of the products, reduce the cost of distribution, achieve better geographical cover for the products, ensure that the distribution system functions more effectively, provide retailers with freezers which otherwise they would not be in a position to acquire, simplifies and facilitates dealings in so far as the cost of the freezer and the products is included in the total price of the ice cream and safeguards HB's property rights in the freezers.
In relation to those arguments it is pointed out that the provision of a freezer without a direct charge, but with an exclusivity clause, has not been shown to be the sole and necessary means of achieving the above goals. Removing exclusivity may bring about changes to the entire system of freezer agreements and constitute, from a purely business point of view, a less attractive solution, but it does avert the very serious infringement of the conditions of competition which the agreements in question bring about. Accordingly the latter are contrary to Article 86 of the EC Treaty.

accordance with the principles found in the Constitutions of the Member States; those fundamental national rules distinguish the core of the right in question, infringement of which is in principle prohibited, from the exercise of that right, which may be restricted on the ground of the general interest in so far as that is necessary. [103] There is no doubt that Articles 85 and 86 of the EC Treaty occupy an important position in the system of the Community legal order and serve the general interest which consists in ensuring undistorted competition. [104] Consequently, it is perfectly comprehensible for restrictions to be placed on the right to property ownership pursuant to Articles 85 and 86 of the EC Treaty, to the degree to which they might be necessary to protect competition. Article 222 of the EC Treaty may in no event be used as a shield by economic operators to avoid application of Articles 85 and 86 to their detriment.

106. In this case Articles 85 and 86 of the EC Treaty, as interpreted above, do not touch the core of HB's property rights in the freezers, [105] but introduce limits on the contractual clauses laid down by HB in connection with the use of the freezers which are provided to retailers, limits which are necessary to safeguard conditions of competition in the relevant market. That company can seek means of protecting its property [106] other than by the imposition of the exclusivity clauses; it cannot, however, rely on Article 222 of the EC Treaty in order to avoid conforming to what is required under the correct interpretation and application of Articles 85 and 86.

103 — See Case 44/79 *Hauer* [1979] ECR 3727, paragraph 18.

104 — Article 3(g) of the EC Treaty (now Article 3(1)(g) EC) provides that in order to achieve the purposes of the Community, its activities are to include 'a system ensuring that competition in the internal market is not distorted'. It is, I consider, clear that those activities — which include the application of Articles 85 and 86 — constitute one of the aspects of the Community general interest.

105 — That would be the case if HB was required, pursuant to Articles 85 and 86, to tolerate competing suppliers using its freezers without consideration. Such an eventuality does not arise here; HB is not deprived of the right to protect its property, but may not do so by way of agreements which contravene Articles 85 and 86.

106 — It may, for instance, sell the freezers or rent them to retailers. I have already stressed (see footnote 79 above) that HB's decision to provide the freezers without a direct charge and with the exclusivity clause is not the only means of protecting its rights arising from ownership of the freezers, but rather a commercially strategic move. Other methods of covering the cost represented by investment in the freezers can be devised without the exclusivity clause.
HB maintains, however, that the rental solution is not feasible, given the features of the market, while it would incur losses if it resold the freezers. Even assuming that that is true, it does not weaken the conclusion drawn in the foregoing analysis. On the one hand the fact that an economic operator cannot use its property in the way it wishes is not equivalent to depriving it of ownership or attacking the core of its property rights. On the other hand, the fact that it is likely to be required to suffer damage to its business from the use of that property does not suffice to lead me to interpret Articles 85 and 86 of the EC Treaty any differently; responsibility for that damage rests exclusively with itself and its choosing to devise a commercial policy contrary to the competition rules.

VII — Conclusions

107. In conclusion, for the reasons explained above, the above analysis in respect of the second and third questions referred to the Court enable an answer to be given on the issues of Community law raised without a review of the legality and validity of Commission Decision 98/531. In my opinion, however, the Court could perfectly well not reply to those questions if it considers that the dispute in the main proceedings should not be heard before a ruling on the validity of Decision 98/531, and that, as I have explained, in the light of the particular features of the case, will be given by the Court of First Instance in the context of the action for annulment pending before it. However, if the Court of Justice considers that it must give a reply to the second and third questions referred to it for a preliminary ruling, examining at the same time the validity of Decision 98/531, I would confine myself in the alternative to observing that that decision, examined in the light of the judicial review possible in the context of the Article 234 EC procedure, is correct and that the freezer agreements concluded by HB with retailers in Ireland are contrary to Articles 81 and 82 EC.

VIII — Conclusion

108. In the light of the foregoing, I would suggest that the Court reply as follows to the first question:

The national court is not bound to stay proceedings and await the outcome of the action for annulment simply because an action has already been brought against Commission Decision 98/531/EC before the Court of First Instance. There is such an obligation, however, if the solution to the main dispute presupposes that the

national court knows whether the decision at issue is valid or not, in so far as that question cannot be brought before the Court of Justice by way of the Article 234 EC procedure, but will be examined by the Court of First Instance in the action for annulment pending before it. In that connection, the national court ought to avoid giving a judgment which would be contrary to Commission Decision 98/531 unless the latter is annulled by the Community Court.

If the Court considers that there are grounds for examining the second and third questions referred for a preliminary ruling, I would suggest the following replies:

In the light of the legal and factual features of the relevant market, an agreement or practice such as that being examined in the main proceedings is contrary to Article 85(1) of the EC Treaty (now Article 81(1) EC) if three conditions are satisfied: first, in conjunction with similar agreements or practices in the same market it *de facto* precludes access by other competitors to a particularly large share of the existing retail outlets, leading to closing off of the market; second, it contributes appreciably to the above closing off of the market; third, the restriction on competition in question may affect trade between Member States.

An undertaking supplying single-wrapped items of impulse ice cream which holds a dominant position on the relevant market, in encouraging retailers to enter into agreements with it for the supply of freezers free of any direct charge that contain a clause requiring the freezers to be used exclusively for stocking its products, given the characteristics of the market succeeds *de facto* in tying a large number of retail outlets and restricting further the already weakened competition by not

allowing the market to function in conditions of healthy competition, and has thereby infringed its obligations under Article 86 of the EC Treaty (now Article 82 EC).

Protection of property ownership, as provided for in Article 222 of the EC Treaty (now Article 295 EC), does not preclude exclusivity agreements such as those under examination by the national court from being classified as contrary to Articles 85(1) and 86 of the EC Treaty (now Articles 81(1) and 82 EC).