OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 13 November 1997 *

1. This is an appeal by the company Langnese-Iglo GmbH (hereinafter 'Langnese-Iglo') against the judgment of the Court of First Instance of 8 June 1995 in *Langnese-Iglo* v *Commission* [1] (hereinafter 'the contested judgment'). That judgment dismissed an application for the annulment of Decision 93/406/EEC [2] (hereinafter 'the contested decision'), in which the Commission declared that the exclusive purchasing agreements for ice-cream concluded by Langnese-Iglo with retailers in Germany were contrary to Article 85(1) of the EC Treaty.

Facts and procedure

2. The events giving rise to these proceedings were described in paragraphs 1 to 6 of the contested judgment.

3. The German undertaking Schöller Lebensmittel GmbH & Co. KG (hereinafter 'Schöller') notified to the Commission by letter of 7 May 1985 a form of 'supply agreement' governing its relations with its retail distributors. On 20 September 1985, the Commission Directorate-General for Competition sent a comfort letter to Schöller's lawyer, which included the following paragraphs:

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

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

By letter of 23 August 1985, you clearly indicated that the exclusive purchasing obligation imposed on the client by the standard agreement notified, which is accompanied by a

* Original language: Spanish.

1 — Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533.

2 — Commission Decision 93/406/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Langnese-Iglo GmbH (IV/34.072 — OJ 1993 L 183, p. 19).

prohibition of competition, may be cancelled for the first time by giving six months' notice no later than at the end of the second year of the agreement, and thereafter by giving the same period of notice at the end of each year.

It appears from the information available to the Commission, which is essentially based on that given in your application, that the fixed duration of the agreements to be concluded in the future will not exceed two years. The average duration of all your client's "ice-cream supply agreements" will therefore fall well short of the period of five years laid down in Commission Regulation (EEC) No 1984/83 [3] as a precondition for a block exemption to be available in respect of exclusive purchasing agreements.

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

Schöller's "ice-cream supply agreements" which were notified are therefore compatible with the competition rules of the EEC Treaty.

It is therefore unnecessary for the Commission to take action regarding the agreements notified by your client.

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

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

...'

4. On 18 September 1991, Mars GmbH (hereinafter 'Mars') lodged a complaint with the Commission against Langnese-Iglo and against Schöller for infringement of Articles 85 and 86 of the Treaty and asked that protective measures be taken in order to forestall the serious and irreparable damage which, in its opinion, would be caused by the fact that the sale of its ice-creams would be severely hampered in Germany by the implementa-

3 — Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5).

tion of agreements contrary to the competition rules which the applicant and Langnese had concluded with a large number of retailers.

5. The Commission adopted interim measures by decision of 25 March 1992 [4] and dealt with the substantive issues by adopting two very similar decisions, Decision 93/406 in relation to Langnese-Iglo and Decision 93/405/EEC in relation to Schöller. [5]

6. The operative part of Decision 93/406 provides:

'*Article 1*

The agreements concluded by Langnese-Iglo GmbH requiring retailers established in Germany to purchase single-item ice-cream for resale only from that undertaking infringe Article 85(1) of the EEC Treaty.

Article 2

In so far as the agreements referred to in Article 1 qualify for the block exemption declared by Council Regulation (EEC) No 1984/83, the benefit of the block exemption is hereby withdrawn.

Article 3

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

Article 4

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

...'

4 — Commission Decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.072 — Mars/Langnese and Schöller — Interim measures).

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

7. Actions for annulment were brought before the Court of First Instance against Decision 93/406 and Decision 93/405 by Langnese-Iglo and Schöller respectively, in which Mars was granted leave to intervene in support of the Commission. In its judgment in *Schöller* v *Commission* [6] the Court of First Instance upheld only the plea concerning the lawfulness of Article 4 of Decision 93/405, which was annulled, and confirmed the decision in all other respects. No appeal was brought against that decision and it has become definitive. In the judgment in *Langnese-Iglo* v *Commission*, the Court of First Instance also rejected all the pleas in annulment put forward by the applicant with the exception of that relating to Article 4 of the contested decision, which was upheld, entailing the annulment of that article.

8. By a document received at the Registry of the Court of Justice on 18 August 1995, Langnese-Iglo brought the present appeal against the judgment in *Langnese-Iglo* v *Commission*, claiming that it should be annulled to the extent to which the Court of First Instance rejected its pleas, and that Articles 1, 2 and 3 of the contested decision should be annulled.

9. In accordance with the second paragraph of Article 93(3) and Article 118 of the Rules of Procedure, Langnese-Iglo requested that certain information in its appeal be treated as confidential. That request was granted by order of the President of the Court of Justice of 20 March 1996 and will be taken into account in this Opinion.

10. The Commission, supported by Mars, which had intervened in the proceedings before the Court of First Instance, contends in its response that the appeal should be dismissed and in addition, by way of cross-appeal, requests that the contested judgment be set aside [7] by the Court of Justice to the extent to which it annulled Article 4 of the contested decision.

The appeal

11. Langnese-Iglo puts forward three grounds of appeal:

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

6 — Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611.

7 — Footnote not relevant to the English translation.

— infringement of Article 85(1) of the EC Treaty;

— breach of the principle of proportionality and the principle of equal treatment.

12. The Commission, supported by Mars, submits that Langnese-Iglo's grounds of appeal are without foundation.

A — *Breach of the principle of the protection of legitimate expectations*

13. Langnese-Iglo considers that in the contested judgment the Court of First Instance misapplied the principle of the protection of legitimate expectations in taking the view that the Commission was entitled to depart from the content of the comfort letter sent to Schöller in 1985 and to adopt the contested decision in which it declared incompatible with Article 85(1) the network of exclusive purchasing agreements between Langnese-Iglo and its retailers. According to the appellant, the principle of the protection of legitimate expectations did not prevent the Commission, having regard to the complaint lodged by Mars, from again examining the factual and legal circumstances prevailing in the German ice-cream market. However, that principle does mean that the Commission must not depart from the comfort letter and prohibit Langnese-Iglo's exclusive purchasing agreements without demonstrating that a significant change had occurred in the factual and legal circumstances prevailing in the German ice-cream market. By confirming the contested decision without checking to see whether there had been any changes in the relevant market, the Court of First Instance, in Langnese-Iglo's opinion, infringed the principle of the protection of legitimate expectations.

14. In support of that assertion, the appellant proceeds to rebut the reasoning relied on by the Court of First Instance in reaching the view that the contested decision did not infringe the principle of the protection of legitimate expectations.

Langnese-Iglo first objects to the fact that the Court of First Instance accepted, in paragraph 39 of the contested judgment, without undertaking any examination, the Commission's argument that there had been appreciable changes in the factual circumstances in the relevant market following the issue of the comfort letter, for two reasons: the entry into the market of two new competitors, Mars and Jacobs Suchard, and the existence, learned

of by the Commission as a result of Mars's complaint, of additional barriers to access to the market, particularly in the grocery trade.

The appellant then states, as it did before the Court of First Instance, that Jacobs Suchard was not present in the German ice-cream market since it merely concluded with Schöller a licence agreement to use the trade mark 'Lila Pause'. As regards Mars, its entry into Germany does not involve an appreciable change in conditions on the ice-cream market: the Court of First Instance did not show that it hampered access to that market for other undertakings and therefore the relevant market continues to be open, as it was in 1985, when the Commission issued the comfort letter.

Finally, the appellant objects to the fact that, in paragraph 38 of the contested judgment, the Court of First Instance accepted the provisional nature of the analysis of the market undertaken by the Commission in order to draw up the comfort letter as an argument in favour of the lawfulness of the contested decision. In its opinion, the principle of the protection of legitimate expectations is infringed if the Commission uses the provisional nature of its market analysis as a reason for departing from the content of the comfort letter when new facts become known.

15. The Commission and Mars have expressed serious doubts as to the compatibility of the arguments advanced by Langnese-Iglo in support of this ground of appeal with the criteria laid down by the Court of Justice for appeals in competition matters to be admissible.

16. On this point regard must be had to the numerous decisions [8] to the effect that an appeal must specify the alleged flaws in the judgment which it is sought to have set aside and the legal arguments which specifically support that application. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court. In reality such an appeal amounts to no more than a request for a re-examination of the application submitted to the Court of First Instance, which falls outside the jurisdiction of the Court of Justice by virtue of Article 49 of its Statute.

Moreover, the Court of Justice has held that an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts. In consequence, the Court of Justice considers that the appraisal by the Court of First Instance of the evidence put before it does not consti-

8 — See *inter alia* the orders in Case C-244/92 P *Kupka-Floridi* v *ESC* [1993] ECR I-2041, Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, Case C-62/94 P *Turner* v *Commission* [1995] ECR I-3177, and the judgment in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 25 and 26.

tute a point of law which is subject to review in an appeal except where the evidence has been distorted or the material inaccuracy of the findings of the Court of First Instance is clear from the documents before the Court. The Court of Justice has no jurisdiction to examine the evidence which the Court of First Instance has accepted in support of the facts, provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed. On the other hand, it is for the Court to review the legal characterisation of the facts and the consequences in law inferred from them by the Court of First Instance. [9]

17. In my view this ground of appeal does not meet the requirements of the abovementioned decisions of the Court of Justice and must be declared inadmissible. The arguments put forward by Langnese-Iglo to demonstrate contravention of the principle of the protection of legitimate expectations coincide with those it relied on before the Court of First Instance, including those based on facts rejected by that Court. By this ground of appeal the appellant seeks a re-examination of the application submitted to the Court of First Instance but does not clearly identify how the Court of First Instance might possibly have erred in law in applying the principle of the protection of legitimate expectations to the facts of the dispute, as established by it.

9 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 67, and the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40.

Moreover, the appellant questions the findings of fact made by the Court of First Instance in the contested judgment in support of the arguments on which it bases this ground of appeal. The scope of the changes in the factual circumstances prevailing on the relevant market (the entry of new competitors and the discovery of new barriers to access to the market) is part of the assessment of the evidence put before the Court of First Instance, which is a matter for that court and is not subject to review in an appeal. Furthermore, the appellant does not allege that the evidence was distorted by the Court of First Instance or that any material inaccuracy is apparent from the documents before the Court.

18. In any event, I consider that the Court of First Instance was right to decide, in the contested judgment, that there was no breach of the principle of the protection of legitimate expectations: there are a number of arguments which justify the conclusion that it reached.

First, the comfort letter drawn up by the Commission in 1985 was addressed to Schöller and referred to the latter's notification of its 'ice-cream supply agreements'. The protection of legitimate expectations is available only, if at all, to the undertaking receiving the

comfort letter, [10] which is drawn up by the Commission in relation to that undertaking in the course of the administrative procedure. Such comfort letters do not affect third parties and are not binding on national courts, [11] so that it is logical that they likewise cannot be invoked by third parties — in this case Langnese-Iglo — in support of their claims.

Secondly, the Commission may reopen the procedure and depart from the analysis adopted in a comfort letter when it learns of new restrictions of competition or when changes occur in the structure of the relevant market. The Commission had expressly reserved the right to do so by including a *rebus sic stantibus* clause in the comfort letter sent to Schöller. If the Commission is not bound by a negative clearance decision [12] or by a decision to apply Article 85(3) [13] in the event of a substantial change taking place in the relevant market, then *a fortiori* it is entitled to depart from an assessment made in a comfort letter.

10 — The Court of First Instance judgment in *Schöller* v *Commission*, which has become *res judicata*, found that the Commission did not contravene the principle of the protection of legitimate expectations by adopting Decision 93/405, according to which the network of exclusive purchase contracts concluded by Schöller with its retailers was contrary to Article 85(1).

11 — See *inter alia* Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 12.

12 — Case T-116/89 *Prodifarma and Others* v *Commission* [1990] ECR II-843, paragraph 70.

13 — Article 8(3) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959—62, p. 87).

19. In view of the foregoing considerations, I am of the opinion that this ground of appeal should be declared inadmissible or else rejected.

B — *Infringement of Article 85(1) of the EC Treaty*

20. Langnese-Iglo considers that the conclusion reached by the Court of First Instance in paragraphs 94 to 114 of the contested judgment in relation to the effect on competition of the exclusive purchasing agreements is incompatible with Article 85(1). The Court of First Instance took the view that the network of exclusive purchasing agreements between Langnese-Iglo and its retailers appreciably restricted competition in the relevant market and was therefore incompatible with Article 85(1), as the Commission concluded in the contested decision.

21. According to the appellant, the Court of First Instance's conclusion is based on various findings that were not based on the documents before it and derive from an incorrect legal appraisal of the factual situation. Langnese-Iglo states, first, that the existence of tying-in exceeding in the aggregate 30%, which the Court of First Instance accepts as proved in paragraph 105 of the contested judgment, cannot be inferred from the documents before the Court, which show tying-in of less than 30%, the latter being the limit

regarded by the Commission as acceptable in the comfort letter sent to Schöller in 1985.

Secondly, the appellant questions other factual aspects of the relevant market, established by the Court of First Instance in paragraphs 107 and 109 of the contested judgment. It refers, first, to the system whereby a large number of freezer cabinets were lent by Langnese-Iglo to its retailers on the condition that they used them solely for its products and, second, to the grant of rebates to guarantee itself a percentage of sales of single-item ice-creams. Those matters of fact cannot be inferred from the documents before the Court and correspond to statements made by the Commission which were challenged by the appellant before the Court of First Instance.

Finally, Langnese-Iglo considers that the Court of First Instance was wrong to conclude, in paragraph 113 of the contested judgment, that its network of exclusive purchasing agreements and that of Schöller gave rise to an appreciable restriction of competition on the relevant market because overall tying-in somewhat in excess of 30% does not impede access to a market or convert it into a closed market, particularly if the market is expanding, as the German ice-cream market was.

22. This ground of appeal is inadmissible since the appellant confines itself simply to questioning outright the findings of various matters of fact definitively established by the Court of First Instance in the contested judgment, following an appraisal of the evidence properly carried out in accordance with the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence. The Court of Justice has no jurisdiction, in an appeal, to scrutinise the assessment of the evidence duly undertaken by the Court of First Instance.

23. This ground of appeal must therefore be declared inadmissible.

C — *Contravention of the principle of proportionality and the principle of equal treatment*

The principle of proportionality

24. The appellant's objection to the contested judgment in this ground of appeal is based on its view that the Court of First Instance did not properly apply the principle of proportionality, according to which measures adopted by the Commission must not exceed what is appropriate and necessary to attain the objec-

tive sought. [14] In its view, the Court of First Instance infringed the principle of proportionality by accepting as valid the course followed by the Commission, which withdrew the benefit of the block exemption granted by Regulation No 1984/83 from all its exclusive purchasing agreements and treated them all as contrary to Article 85(1), without first informing the appellant how it could adapt its network of agreements so as to conform with the requirements of that provision.

25. The Court of First Instance approved, in the first place, the withdrawal of the block exemption and the prohibition of the entire Langnese-Iglo network of agreements. In the second place, the Court of First Instance states in paragraphs 207 and 208 of the contested judgment that Article 85(1) does not, as a general rule, preclude the conclusion of exclusive purchasing agreements, provided that they do not contribute significantly to any partitioning of the market, and that the Commission is not empowered, by means of an individual decision, to restrict or limit the legal effects of Regulation No 1984/83 if that regulation does not expressly provide a legal basis for that purpose. The appellant considers that the two conclusions reached by the Court of First Instance are clearly contradictory.

26. Langnese-Iglo submits that the Commission did not need to withdraw the benefit of the block exemption and prohibit all its exclusive purchasing agreements in order to attain its objective, which was to bring to an end the infringement of Article 85(1). The Commission could have attained that objective by means of less drastic measures such as reducing the number of exclusive purchasing agreements or cutting down the tying-in to a level compatible with Regulation No 1984/83, which would not have involved prohibition of the appellant's entire network of agreements.

The Court of First Instance did not agree to that option because it considered, in paragraphs 129 and 193 of the contested judgment, that it was arbitrary to consider separately, within Langnese-Iglo's network of agreements, those which did not significantly contribute to the possible cumulative effect on the market produced by similar agreements.

27. The arguments relied on by the appellant in support of this ground of appeal display a considerable misapprehension, as has been pointed out by Mars and the Commission. The appellant refers without distinction to the statements made by the Court of First Instance regarding the network of existing exclusive purchasing agreements (paragraphs 188 to 196) and to those concerning the prohibition of concluding exclusive purchasing agreements in the future, contained in Article 4 of the contested decision (paragraphs 197 to 210). The Court of First Instance draws a clear distinction between the application of Article 85(1) to the existing agreements and the scope of Article 3 of Regulation No 17 regarding any exclusive purchasing agreements which Langnese-Iglo might conclude in the future. Thus, the alleged contradiction

14 — Case 15/83 *Denkavit Nederland* [1984] ECR 2171 and *RTE and ITP* v *Commission*, cited above, paragraph 93.

in the Court of First Instance's reasoning is non-existent: the considerations set out by the Court of First Instance, to which the appellant refers, differ because they relate to different circumstances.

28. Quite apart from that misapprehension, I consider that this ground of appeal should be rejected, since the Court of First Instance correctly applied the principle of proportionality in the contested judgment.

29. The appellant does not dispute the Commission's competence to withdraw the benefit of the block exemption under Article 14 of Regulation No 1984/83, the legal basis of which is Article 7 of Regulation No 19/65/EEC. [15] Nor does it question the Court of First Instance's application of the cumulative-effect test, developed by the Court of Justice in the *Brasserie de Haecht* and *Delimitis* judgments, [16] in order to determine whether the network of Langnese-Iglo's exclusive purchasing agreements was compatible with Article 85.

The appellant merely considers that the consequence of the withdrawal of the block exemption for its network of agreements cannot be the prohibition of the totality of such agreements. That, in its view, is a disproportionate result since compliance with Article 85 could have been achieved if the Commission had granted an individual exemption for those agreements in the network which had little effect on competition and prohibited the rest.

30. In my opinion, when the cumulative-effect test is applied for the purposes of an overall analysis of a network of exclusive purchasing agreements, the resultant sanction must also be of an overall nature [17] and it is not possible to draw distinctions between the various agreements making up the network for the purpose of not applying Article 85(1) to some of them and enabling the Commission to grant them an individual exemption. It would, as the Court of First Instance made clear, be arbitrary to distinguish between different types of agreement within the network established by Langnese-Iglo. If account is taken of the network of agreements in its entirety in order to establish an infringement of Article 85, it is not possible to distinguish within that network between different types of agreement for the purpose of imposing a penalty or possibly granting an individual exemption, which must likewise affect the entirety of the network. [18]

15 — Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965—66, p. 35).

16 — Case 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407 and Case C-234/89 *Delimitis* [1991] ECR I-935.

17 — See L. Idot and C. Momège, 'L'Affaire des Barres Glacées Mars: une vague de froid sur les contrats d'exclusivité', *La Semaine Juridique — Édition Entreprise*, Supplement No 6, p. 7.

18 — In *Brasserie de Haecht*, cited above, at p. 415 the Court of Justice stated in relation to exclusive supply agreements for beer that 'it would be pointless to consider an agreement, decision or practice by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation'.

The principle of equal treatment

31. The appellant considers that the total prohibition of its exclusive purchasing agreements is in breach of the principle of equal treatment, recognised as a general principle of Community law. In paragraph 209 of the contested judgment, the Court of First Instance states that Article 4 of the contested decision infringes that principle since it does not allow the appellant the benefit of the block exemption under Regulation No 1984/83 for any future exclusive purchasing agreements. According to Langnese-Iglo, the prohibition of all its existing agreements discriminates against it as well, as compared with its competitors, who do not have to dismantle their agreements with sellers.

32. In my opinion, this part of the ground of appeal must be rejected for three reasons. In the first place, the appellant again seeks to apply the Court of First Instance's reasoning concerning future agreements to the existing agreements. In the second place, Decision 93/405, which is largely upheld in the Court of First Instance judgment in *Schöller* v *Commission*, also prohibited the entire network of exclusive purchasing agreements which Schöller had established with its retailers. In the third place, according to paragraph 39 of the judgment, it is clear that Mars offered only a limited range of products and that its commercial strategy was different from that of Schöller and Langnese-Iglo. Moreover, the appellant did not claim before the Court of First Instance that its competitors' distribution systems were similar to its own, and that new issue of fact may not therefore be raised in an appeal since that would entail a change to the subject-matter of the dispute, contrary to Article 113(2) of the Rules of Procedure.

33. In view of the foregoing considerations, this ground of appeal should be rejected.

The cross-appeal: infringement of Article 3 of Regulation No 17

34. The Commission, supported by Mars, has brought a cross-appeal against the contested judgment to the extent to which it annulled Article 4 of the contested decision. In its view, the Court of First Instance erred in law in considering, in paragraph 205 of that judgment, that Article 3 of Regulation No 17 '... confers on the Commission only the power to prohibit existing exclusive agreements which are incompatible with the competition rules'.

35. The actual wording of Article 4 of the contested decision is as follows: 'Langnese-Iglo GmbH may not conclude agreements of the kind referred to in Article 1 until after 31 December 1997.' Before the Court of First Instance, the Commission advocated a broad interpretation of that article, maintaining that it prevented Langnese-Iglo from concluding any kind of exclusive purchasing agreement for a period of five years, whether or not similar to the agreements making up the network declared by Article 1 of the contested decision to be contrary to Article 85(1). Article 4 of the decision prevented the appellant from concluding new exclusive purchasing agreements which might qualify for the block exemption under Regulation No 1984/83 for the period of time regarded by the Commission as necessary for a substantial change to be made in the relationships existing in the relevant market and the structure of that market. In that way, according to the Commission, the appellant was prevented from evading the prohibition contained in Article 1 of the contested decision by setting up a new network of exclusive purchasing agreements.

36. The Court of First Instance rejected the Commission's argument and upheld Langnese-Iglo's contention, declaring Article 4 to be void because it exceeded the penalising powers conferred on the Commission by Article 3 of Regulation No 17. In paragraphs 205 to 210 of the contested judgment, the Court of First Instance puts forward three reasons for its conclusion, namely:

— According to the *Delimitis* judgment, only exclusive purchasing agreements whose contribution to a cumulative effect is significant are caught by the prohibition contained in Article 85(1).

— Regulation No 1984/83 provides no legal basis for the benefit of the block exemption to be withheld from future agreements and the Commission cannot do so by means of individual decisions since that would be contrary to the hierarchy of norms.

— It would be contrary to the principle of equal treatment to prevent an undertaking from concluding exclusive purchasing agreements and not prevent its competitors from doing so.

37. In my opinion, the course taken by the Court of First Instance regarding Article 4 of the contested decision, having regard to the way in which the Commission itself interpreted the scope of that article at first instance, seems to me to be perfectly valid and com-

patible with the case-law of the Court of Justice on the scope of the Commission's power to impose penalties in competition matters. [19] In the Commission's additional observations in this case, it too accepts the Court of First Instance's reasons for annulling that article, interpreted extensively.

38. However, in its cross-appeal, the Commission explicitly abandons the broad interpretation of Article 4 which it advocated at first instance and adopts a restrictive interpretation of that part of the contested decision as a basis for the contested judgment to be set aside.

The Commission now considers that the sole aim of Article 4 is to prevent Langnese-Iglo from reconstructing the same network of exclusive purchasing agreements with its retailers but that it in no way prevents it from concluding new exclusive purchasing agreements with other retailers. The prohibition in Article 4 thus constitutes a means of guaranteeing compliance with Articles 1 and 2 of the contested decision, supplementing the means laid down in Article 3, under which Langnese-Iglo must inform its retailers of the decision and notify them that the exclusive purchasing agreements are void.

39. In my opinion, the question whether the cross-appeal should be upheld depends on how Article 4 of the contested decision is interpreted. If a restrictive interpretation were adopted of the scope of that article, the cross-appeal lodged by the Commission, supported by Mars, could be upheld. Indeed, if it is considered that that article does no more than prohibit reconstruction of the same network of exclusive purchasing agreements previously established by Langnese-Iglo, there would be no problem in accepting it as compatible with the case-law of the Court of Justice on the powers conferred on the Commission by Article 3 of Regulation No 17 in order to bring to an end infringements of the competition rules. [20] A prohibition of that kind guarantees the effectiveness of the contested decision, since it prevents a return in the future to the anti-competitive practice which was penalised and removes the need for the Commission to initiate a similar procedure having the same subject-matter. The inclusion of a provision of that kind in Commission decisions may be useful but is not, in my opinion, necessary to ensure non-recurrence of the condemned practice in the future since the need to guarantee the useful effect of the decision would itself be sufficient to enable the national courts to declare void future agreements identical to those prohibited by the decision.

If, on the contrary, it is considered that Article 4 precludes Langnese-Iglo from entering into

19 — See *inter alia* Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45; *RTE and ITP* v *Commission*, cited above, paragraph 90, and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 50 to 54.

20 — See, to that effect, M. Waelbroeck and A. Frignani, *Concurrence. Commentaire J. Mégret. Le droit de la CEE*, Vol. 4, Éditions de l'Université de Bruxelles, Brussels, 1997, pp. 410 to 412.

any kind of exclusive purchasing agreement until 31 December 1997, whether or not similar to those prohibited in the contested decision and whether or not they form part of a network similar to the appellant's previous one, the Commission's cross-appeal, as the Commission itself recognises, must fail for the reasons set out by the Court of First Instance in the contested judgment.

40. In my opinion, the scope of Article 4 can be interpreted only as it was by the Court of First Instance in the contested judgment, that is to say as preventing Langnese-Iglo from concluding any kind of new exclusive purchasing agreement with retailers until 31 December 1997. There are several reasons for this conclusion.

First, the literal wording of Article 4 generally prohibits Langnese-Iglo from concluding 'agreements of the kind referred to in Article 1'. That wording, unlike that used by the Commission in other decisions, does not require the penalised undertakings not to conclude in the future agreements having the same or similar subject-matter or effect as those prohibited by the decision. [21] Article 4 prohibits the appellant from concluding any new exclusive purchasing agreement, regardless of its characteristics and the cumulative effect on competition in the relevant market of the new network of contracts of that kind of which it might form part.

Secondly, the Commission states in point 154 of the contested decision that 'the order ... would serve no purpose if L-I were permitted immediately to replace the current agreements by new ones. L-I must therefore be prohibited from concluding fresh agreements of their kind for a period sufficient to allow a substantial change in market structures'. That point of the contested decision, which is the basis for Article 4, makes it clear that the latter article prohibits the appellant from concluding any new exclusive purchasing agreements whatsoever.

Finally, it would be illogical to conclude that Article 4 prohibits only the reconstitution of Langnese-Iglo's old network of exclusive purchasing agreements because that prohibition

21 — See, *inter alia*, Article 3 of Commission Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange (OJ 1992 L 68, p. 19), and Article 4 of Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement (OJ 1994 L 376, p.1).

would apply until 31 December 1997 and, after that date, the Commission would have admitted by implication that such reconstitution would not infringe Article 85(1) and would be justified by the block exemption under Regulation No 1984/83.

41. Consequently, I consider that the Commission's cross-appeal should be dismissed.

Costs

42. Pursuant to Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, where more than one party is unsuccessful the Court is to decide how the costs are to be shared. Therefore, if, as I propose, the appellant's grounds of appeal and the cross-appeal brought by the Commission, supported by Mars, are dismissed, I consider that each party should bear its own costs.

Conclusion

43. Having regard to the foregoing considerations, I consider that the Court of Justice should:

(1) declare the appeal partially inadmissible and dismiss the admissible grounds of appeal;

(2) dismiss the cross-appeal.