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

In Case T-7/93,

Langnese-Iglo GmbH, a company governed by German law, established in Hamburg (Germany), represented by Martin Heidenhain, Bernhard M. Maassen and Horst Satzky, Rechtsanwälte, Franfurt-am-Main, with an address for service in Luxembourg at the chambers of Jean Hoss, 15 Côte d'Eich,

applicant,

v

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

defendant,

supported by

* Language of the case: German.

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

intervener,

APPLICATION for the annulment of Commission Decision 93/406/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),

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

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

Registrar: H. Jung,

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

gives the following

Judgment

The facts

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

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

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

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

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

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

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

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

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

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

...'

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

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

5 It was in those circumstances that, by way of final decision, following the decision of 25 March 1992, on the 'supply agreements' at issue, the Commission adopted on 23 December 1992 Decision 93/406/EEC relating to a proceeding pursuant to Article 85 of the Treaty against Langnese-Iglo GmbH (IV/34.072 — OJ 1993 L 183, p. 19, hereinafter 'the decision'), the operative part of which is as follows:

'*Article 1*

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

Article 2

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

Article 3

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

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

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.

Article 5

... .'

6 On the same date, a decision was adopted in relation to Schöller (Commission Decision 93/405/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH&Co KG (Cases IV/31.533 and IV/34.072 — OJ 1993 L 183, p. 1).

Procedure

7 By application lodged at the Registry of the Court of First Instance on 6 April 1992, the applicant brought an action for the annulment of the decision of 25 March 1992 and, by a separate document received at the Registry of the Court of First Instance on the same date, the applicant also requested the adoption of interim measures (Cases T-24/92 and T-24/92 R).

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

9 By letter received at the Registry of the Court of First Instance on 2 February 1993, the applicant informed the Court, pursuant to Article 99 of the Rules of Procedure, that it was discontinuing the proceedings and, by order of the President of the First Chamber of the Court of First Instance of 1 April 1993, Case T-24/92 was removed from the register of the Court of First Instance.

10 Pursuant to the fourth paragraph of Article 173 of the EC Treaty, which reproduces the second paragraph of Article 173 of the EEC Treaty, the applicant, by a document lodged at the Registry of the Court of First Instance on 19 January 1993, brought the present action for the annulment of the decision.

11 By separate document received at the Registry of the Court of First Instance on the same date, the applicant also applied for suspension of the operation of the decision, pursuant to Article 185 of the Treaty and Article 104 of the Rules of Procedure of the Court of First Instance.

12 By application received at the Registry of the Court of First Instance on 3 February 1993, Mars sought leave to intervene in Case T-7/93 R in support of the Commission. By application lodged at the Registry of the Court of First Instance on 4 February 1993, Mars also sought leave to intervene in Case T-7/93, in support of the Commission.

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

14 By order of 12 July 1993, the President of the First Chamber of the Court of First Instance granted leave to Mars to intervene in Case T-7/93 and granted a request for confidential treatment made by the applicant under Article 116(2) of the Rules of Procedure of the Court of First Instance.

15 Schöller also brought an action for the annulment of the decision addressed to it (Case T-9/93). Mars was also granted leave to intervene in that case.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by letter of 26 September 1994, the Court requested the parties to answer certain questions in writing. The applicant and the defendant responded to those questions by letters of 21 and 19 October 1994 respectively. By order of 9 November 1994, the President of the Second Chamber, Extended Composition, granted a request for confidential treatment submitted by the applicant pursuant to Article 116(2) of the Rules of Procedure of the Court of First Instance in relation to certain particulars contained in the parties' answers to the questions put to them.

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

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

Forms of order sought

19 The applicant claims that the Court should:

— annul the Commission Decision;

— order the Commission to pay the costs;

— order the intervener to pay the costs incurred by the applicant by reason of the intervention.

20 The defendant contends that the Court should:

— dismiss the application as unfounded;

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

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

— dismiss the application as unfounded;

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

22 In support of its application, the applicant puts forward five pleas in law, alleging, first, irregular notification of the decision, in that the Commission failed to notify certain annexes; secondly, breach of the principle of protection of legitimate expectations, in that the Commission did not maintain the position adopted by it in its comfort letter of 20 September 1985; thirdly, infringement of Article 85(1) of the Treaty; fourthly, infringement of Article 85(3) of the Treaty and breach of the principle of proportionality, in that the Commission withdrew the benefit of the block exemption provided for by Regulation No 1984/83 from all the contested supply agreements; and, fifthly, infringement of Article 3 of Council Regulation No 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-1962, p. 87, hereinafter 'Regulation No 17').

The plea concerning irregular notification of the decision

23 The applicant claims that the notification of the decision was defective in that the Commission failed to notify with it certain annexes to which it referred. In its application, it reserved the right to submit additional observations in the event of those annexes being notified to it.

24 According to the Commission, the annexes concerned are Annexes 1 and 2 to the Eurostat tables, referred to in the corresponding passage of the Statement of Objections of 15 July 1992 and forwarded with it to the applicant; the applicant did not raise any objection concerning them during the administrative procedure.

25 The Commission states that the decision was a decision without annexes and was notified as such. Moreover, it does not consider that the decision was vitiated by any inadequacy concerning the statement of the reasons on which it was based.

26 The Court finds that the applicant did not lodge a reply and that, had it done so, it could have made additional observations in support of its complaint and, in particular, responded to the Commission's statement that the annexes in question were forwarded to it during the administrative procedure. Moreover, the applicant did not revert to this matter at the hearing.

27 In those circumstances, the Court finds that the plea is not supported by factual evidence and must therefore be rejected.

The plea of breach of the principle of protection of legitimate expectations

Summary of the arguments of the parties

28 The applicant maintains that, by virtue of the principle of the protection of legitimate expectations, which, according to settled law, is one of the fundamental principles of the Community (judgments of the Court of Justice in Case 112/80 *Dürbeck* [1981] ECR 1095 and Case C-177/90 *Kühn* [1992] ECR I-35), the Commission was required to maintain the position adopted in its comfort letter of 20 September 1985. The applicant considers that where the Commission has sent a comfort letter to undertakings, it is prevented, by virtue of that principle, from departing from the assessment made by its staff unless the factual situation has changed or that assessment was based on incorrect information (see the judgment of the Court of Justice in Case 31/80 *L'Oréal* [1980] ECR 3775 and, in particular, the Opinion of Advocate General Reischl, at p. 3803). According to the applicant, the Commission clearly cannot justify reopening the procedure merely because it changed its legal assessment. Otherwise, it would be pointless to send comfort letters.

29 The applicant then maintains that the factual circumstances prevailing in the relevant market have not changed appreciably since the comfort letter was sent. As regards the entry into the market of Mars and Jacobs Suchard, the applicant states that the arrival of Mars does not constitute an objective justification for reopening the procedure or departing from the position adopted in the comfort letter, since, according to that letter, 'access for third party undertakings to the retail sector remains guaranteed'.

30 In those circumstances, and in view of the fact that the Commission is not able to show that the comfort letter was issued on the basis of incorrect or incomplete information or that the legal or factual situation prevailing in the ice-cream market have undergone any appreciable change since the letter was sent, the Commission is, in the applicant's view, bound by the assessment made in that letter.

31 Finally, the applicant maintains that, even though the comfort letter was addressed to Schöller, the Commission and the participants — including the applicant — in the procedure commenced in response to the Association's letter of 6 December 1984 nevertheless agreed that the notification by Schöller in May 1985 concerning the ice-cream supply agreements which it had concluded and the request made at that time for the issue of a negative clearance were also valid for all the members of the Association. In its view, therefore, the comfort letter covered all the exclusive agreements existing in the ice-cream market.

32 The Commission observes, first, that its comfort letter was addressed to Schöller. For that reason alone, it does not bind the Commission vis-à-vis the applicant. Moreover, according to the Commission, it is clear from the content and context of the letter that it concerned Schöller's notification of its 'ice-cream supply agreements'.

33 Secondly, the Commission contends that, as stated in point 151 of the decision, the entry of Mars and Jacobs Suchard to the market is a material fact justifying

reopening of the procedure. It submits that comfort letters cannot be more binding than the formal decisions of which they take the place from the functional point of view in the practical application of the competition rules. It points out that, under Article 8(3)(a) of Regulation No 17, it is entitled to revoke or amend formal exemption decisions 'where there has been a change in any of the facts which were basic to the making of the decision'. The Commission emphasizes that the comfort letter in question was the result of a provisional examination and contained, in accordance with consistent practice, an express reservation to the effect that the procedure might be reopened in the event that 'there is any appreciable change affecting certain matters of law or of fact on which the present assessment is based'.

34 It was precisely the experience of Mars which disclosed the partitioning of the market and, consequently, gave rise to a review. Furthermore, the Commission is required, by virtue of the procedural guarantees provided for in Article 3 of Regulation No 17 and Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47, hereinafter 'Regulation No 99/63'), to examine carefully the factual and legal particulars brought to its notice by the complainant (judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223).

Findings of the Court

35 Without its being necessary to consider whether the applicant could legitimately expect that the Commission's assessment in the comfort letter addressed to Schöller should also apply to its legal situation or hearing witnesses on this point, as requested by the applicant, it need merely be stated that, in any event, the comfort letter does not constitute any obstacle to examination by the Commission of the complaint lodged by Mars.

36 It is settled law that a comfort letter of the kind sent to the applicant following the notification of its supply agreements in 1985 constitutes neither a decision granting negative clearance nor a decision applying Article 85(3) of the Treaty within the meaning of Articles 2 and 6 of Regulation No 17, the comfort letter not having been adopted in accordance with the provisions of that regulation (see the judgments of the Court of Justice in Joined Cases 253/78 and 1 to 3/79 *Guerlain and Others* [1980] ECR 2327; Case 99/79 *Lancôme* [1980] ECR 2511; Case 37/79 *Marty* [1980] ECR 2481; and Case 31/80 *L'Oréal* [1980] ECR 3775). In those cases, the Court of Justice placed emphasis on the fact that the comfort letters in question had been sent without recourse to the publicity measures provided for in Article 19(3) of Regulation No 17 and that there had been no publication under Article 21(1) of that regulation.

37 It must also be emphasized that the comfort letter was a communication informing the applicant that the Commission considered it inappropriate to take action regarding the agreements at issue, those agreements being, in view of the circumstances, compatible with the competition rules of the Treaty, and that the case could therefore be shelved. The Court considers that the fact that the Commission mentioned the issue of that comfort letter, and commented on it, in its 1985 *Fifteenth Report on Competition Policy* does not change its legal nature. The Court also observes that the applicant itself acknowledged, in its written pleadings, that, pursuant to paragraph VII of the supplementary note to Form A/B, a comfort letter merely indicates how the Commission's departments view the case on the facts currently in their possession.

38 The Court finds, finally, that it is apparent from the arguments presented by the Commission at the hearing that, at the material time, it undertook only a provisional analysis of the market conditions, based essentially on the information provided by Schöller, including the particulars leading to the delimitation of the market considered to constitute the relevant market at that time and calculation of the extent of tieing-in. In that context, the Commission also reserved the right, in its comfort letter, to reopen the procedure if there was any appreciable change

affecting certain matters of law or of fact on which its assessment was based. Moreover, the inclusion of such a reservation is in accordance with the Commission's administrative practice in that regard.

39 As to whether any appreciable changes occurred following issue of the comfort letter, the Court finds, first, that it is apparent from the documents before it that two new competitors, Mars and Jacobs Suchard, subsequently entered the market. In addition, as far as the intervener, Mars, is concerned, it is common ground that it is a special kind of competitor, offering only a limited range of products, which adopted a commercial strategy different from that of its main competitors. The Court also finds that, after Mars lodged its complaint, the Commission became aware of the existence of additional barriers to access to the market, particularly in the grocery trade, relating first, to the obligation imposed by the applicant on retailers to use exclusively for its products the freezer cabinets which it made available to them and, secondly, to the grant of rebates for observing the exclusivity arrangements.

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

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

42 It follows that the plea must be rejected.

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

43 This plea comprises four parts. The applicant criticizes the Commission for adopting too narrow a definition of the relevant market and disregarding the effects of the supply agreements on competition. It maintains that, contrary to the Commission's contention, the exclusive agreements are not liable appreciably to affect trade between Member States and, finally, that the Commission is not empowered by Article 3 of Regulation No 17 to prohibit all the existing exclusive agreements, including those not covered by the prohibition contained in Article 85(1) of the Treaty.

The first part of the plea: delimitation of the market

44 In point 90 of its decision, the Commission defined the product market as comprising industrial impulse ice-cream sold through all distribution channels with the exception of doorstep delivery services.

Summary of the arguments of the parties

45 The applicant maintains that that delimitation of the market is too narrow. It states that on several occasions, the Commission made not insignificant changes to the delimitation of the relevant product market. According to the applicant, the relevant market must be delimited solely by reference to the question whether, and if so to what extent, certain products 'are considered by users as equivalent in view of their characteristics, price and intended use'. It refers in that connection to

Articles 3 and 14 of Regulation No 1984/83 and Articles 3 and 6 of Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1, hereinafter 'Regulation No 1983/83') and the judgment of the Court of Justice in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.

46 It follows, according to the applicant, that the relevant market in this case includes all ice-creams produced industrially or by the craft trade, ice-creams sold in packages containing several single items, known as 'multipacks', and some ice-cream for bulk-buying customers, intended to be served in scooped portions. Ice-creams sold in individual portions in the street are, in its view, perfectly interchangeable from the consumer's point of view. They are intended to satisfy the same need on the part of the consumer, who in that respect acts on impulse.

47 The diversity of the distribution channels, the place of consumption, the manner in which ice-cream is presented and the other particular features of ice-cream distribution considered by the Commission are, consequently, not decisive as regards delimitation of the relevant market.

48 According to the applicant, consumers frequently find different types of ice-cream at the same place and are not in a position to determine the type of ice-cream involved. Some single-item ice-creams from 'multipacks' are consumed at the place where they are purchased, namely in the street. The applicant considers therefore that the Commission's statement that 'multipacks' are intended 'only to satisfy need at home' and that therefore, together with take-home packs, they form a separate market, is incorrect.

49 As regards industrial ice-cream for bulk-buying customers intended to be served in individual portions, known as 'scooping' ice-cream, the applicant maintains that the

Commission's statement that scooping ice-cream acquires its characteristics only by being served up is not relevant. The applicant concedes that the manner in which that ice-cream is marketed does display certain peculiar features. However, it is wrong to infer that scooping ice-cream and impulse ice-cream belong to different markets. Moreover, the mere division of ice-cream into individual portions by a trader in the traditional trade cannot be compared to the provision of a catering service within the meaning of the judgment of the Court of Justice in Case 234/89 *Delimitis* [1991] ECR I-935. Scooping ice-cream sold in the street is interchangeable with impulse ice-cream. The applicant maintains that about 50% of industrial ice-cream delivered to bulk buyers is served in individual portions and sold in the street.

50 As regards craft-trade ice-cream, the applicant submits that the consumer is frequently offered craft-trade ice-cream and industrial ice-cream at the same place. It is therefore wrong to claim that there is a specific market for craft-trade ice-cream since, according to the Commission, there is no trading in it on a market where the supply comes from producers and wholesalers and the demand from retailers. It cannot be inferred from the fact that that ice-cream is not distributed through the traditional specialized trade that it is not in competition with industrial impulse ice-cream. Craft-trade ice-cream therefore does form part of the relevant product market.

51 Finally, the applicant claims that its delimitation of the relevant market is confirmed by a survey carried out in June and July 1992. According to that survey, the various kinds of ice-cream purchased on impulse do not, from the consumer's point of view, fall within different markets.

52 The Commission bases its definition on the consumer's point of view. Thus, it is first necessary, according to the Commission, to exclude ice-cream sold as part of a catering service, since, according to the case-law of the Court, that market is

separate (*Delimitis*). According to the Commission, such ice-cream comprises partly industrial ice-cream intended for large consumers and craft-trade ice-cream.

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

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

55 However, the consumer's point of view is not, in the Commission's view, the only decisive factor. Account must, it considers, also be taken both of the various distribution channels through which ice-creams are sold to consumers and of the different conditions of competition which characterize the various stages of distribution, since the supply agreements at issue concern access to the retail trade between producers and/or wholesalers. Since Article 85(1) of the Treaty prohibits any restriction of competition at any stage of trade between the producer and the final consumer (see the judgment of the Court of Justice in Joined Cases 209/78

to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125), the consumer's viewpoint cannot, in this case, be the only decisive factor in assessing the effects on competition of the supply agreements.

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

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

58 The intervener, Mars, considers that it is appropriate to subdivide the market defined by the Commission into two sub-markets: the traditional trade, on the one hand, and the retail trade on the other, since the present proceedings essentially concern only the sub-market of impulse ice-cream, which is distributed in the traditional trade, access to that sector being closed to new competitors because of the existence of exclusive agreements.

59 According to Mars, it should also be noted that more than 60% of all impulse ice-cream is distributed through the traditional trade. Mars adds that the Commission has also demonstrated significant structural differences between the two submarkets, which are such as to justify, under German law, a subdivision. According to

Mars, the same products may, when sold through different distribution channels, be classified as falling within different markets.

Findings of the Court

60 In order to establish whether the definition of the market adopted by the Commission in point 90 of its decision is correct, the Court observes, at the outset, that delimitation of the relevant market is essential in order to analyse the effects of the exclusive agreements on competition and, in particular, to analyse the possibilities available to new domestic and foreign competitors to establish themselves in the ice-cream market or to increase their market shares thereof (*Delimitis*, paragraphs 15 and 16).

61 In that connection, it is settled law that account must also be taken of the consumer's point of view. Thus, the Court of Justice held, in a case concerning the application of Article 86 of the Treaty, that the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products *(Euroemballage and Continental Can* v *Commission*, cited above). As regards the product market, the Court of Justice has held, more specifically, that that concept implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market (*Hoffmann La-Roche*, cited above). Moreover, as regards the possibility of taking account of other factors, it is settled law that an examination limited to the objective characteristics of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (*Michelin*, cited above, paragraph 37).

62 The Court must therefore examine the definition of the product market adopted by the Commission in the light of those considerations. It must be borne in mind that, in point 83 of its decision, the Commission stated that scooping ice-cream and craft-trade ice-cream served for immediate consumption in the street, that is to say without the provision of any catering services, and impulse ice-cream sold at the same place are, from the consumer's point of view, equivalent products.

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

64 The Court also considers that it is also necessary to exclude, as contended by the Commission, ice-creams stored in private freezers at consumers' homes, since they are not available to satisfy a need arising away from home, in particular an impulse need, and are only to a limited extent interchangeable with products sold in the street (*Michelin*, cited above, paragraphs 48 and 49). They are take-home ice-cream, which in general is purchased with a view to home storage, and single-item ice-creams delivered to the doorstep. The Court considers that the place of consumption was correctly considered by the Commission to be a decisive factor in determining the market in this case, since the products in question can be stored for only a very limited time without refrigeration and must therefore necessarily be consumed in the immediate neighbourhood of the last place where cold storage was possible.

65 Next, with regard to ice-cream sold in 'multipacks', it must be borne in mind that ice-cream of that kind is as a general rule sold by the grocery trade for storage at home and by doorstep delivery services. According to the Commission, it is not therefore generally available for the satisfaction of impulse needs away from home. The Court finds that the applicant, having merely claimed that some ice-cream in individual portions from 'multipacks' is consumed at the place of purchase, which may be the street, but without providing any supporting figures, has not produced sufficient evidence to counter the Commission's statement. It follows that the Commission was right to exclude ice-cream sold in 'multipacks' from the relevant market.

66 It is apparent from point 84 et seq. of the decision that, according to the Commission, in view of the different conditions of competition which characterize the various stages of distribution and the parallel distribution channels through which the products in question are offered to consumers, it is also necessary to exclude, first, craft-trade ice-creams as a whole, that is to say craft-trade ice-creams which are sold in the street without the provision of catering services, on the ground that, in a market involving only sales to retailers, there is no trading in those ice-creams, and secondly, industrial ice-cream for bulk-buying customers, on the ground that ice-cream in that form displays several peculiar features as compared with impulse ice-cream.

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

68 As regards industrial ice-cream for bulk-buying customers, intended for sale in individual portions, that is to say 'scooping' ice-cream, it should be borne in mind that its exclusion from the product market is explained, in points 87 to 89 of the decision, by three considerations. First, the decision indicates that the retail trade performs various marketing functions which are dependent on different product characteristics, with the result that there is only a slight overlap between the distribution channels for these two categories of article. Secondly, it is stated in the decision that the further processing operation, namely serving up in portions, required for scooping ice-cream, means that impulse ice-cream and scooping ice-cream are offered together to a significant extent only in the catering sector. Moreover, the grocery trade and the traditional specialized trade, which sell by far the greater part of industrial impulse ice-cream, are generally not geared to selling catering ice-cream. Thirdly, the decision states that there are differences between the two categories of products from the point of view of product technology.

69 The Court finds that the Commission has not put forward any evidence to show that there are different patterns of demand for the two categories of product, within the meaning of the *Michelin* judgment, which could in themselves justify a delimitation of the market which excludes scooping ice-cream sold in the street. The Court considers that, although there are various channels of distribution, that fact is not in this case sufficient in itself to exclude ice-cream for bulk-buying customers sold in individual portions for consumption outside catering establishments. The Court considers that the applicant was right to claim that the mere division into individual portions carried out by a trader in the traditional trade does not constitute a 'catering service' within the meaning of *Delimitis*. Moreover, the Commission has not shown that the operation of serving up in portions affects the consumer's choice between scooping ice-cream and impulse ice-cream at points of sale where such ice-creams are offered together, namely in the street. The Commission even stated that those two types of ice-cream constitute equivalent products from the consumer's point of view (see paragraph 62 above). The Court also considers

that the fact that the products may differ from the point of view of product technology is not sufficient in itself to distinguish two separate markets where that difference is not taken into account by the consumer as a decisive factor.

70 The Court finds, next, that it is clear from the documents before it and, in particular, from the information provided by the applicant concerning sales in the traditional trade, in response to questions put by the Court, that about 22% of the volume of this kind of ice-cream is sold in the street otherwise than in a catering establishment, that is to say in the specialized trade. That represents about half of all the ice-cream sold in the traditional trade. It is also apparent from the applicant's answers that not only kiosks but also bakeries and cake shops, confectioners, ice-cream vendors, cinemas, swimming pools and service stations and small grocery stores have the equipment necessary to sell scooping ice-cream and that they are also able to offer impulse ice-cream. The Commission, for its part, recognized in its pleadings, at least by implication, that some ice-cream for bulk buying customers is offered for sale in the form of scooping ice-cream for immediate consumption elsewhere than in a catering establishment.

71 Consequently, the question arises whether the Commission should have included the proportion of catering ice-cream sold in individual portions and in competition with impulse ice-cream in the street in several types of outlet, those two categories of product being interchangeable from the consumer's point of view. However, it must be borne in mind that it is apparent from point 141 of the decision, to which the applicant has not taken objection, that ice-cream for bulk-buying customers is distributed in the traditional trade under exclusive agreements. In those circumstances, the Court considers that the decision not to include scooping ice-cream in the relevant market did not substantially affect the assessment made of the effects on competition of the supply agreements at issue, in particular as to whether access to the market was closed or considerably hindered by the existence of the

agreements. The Court considers, therefore, that it is not necessary to annul the decision for failure to include scooping ice-cream in the product market.

72 It follows that, without its being necessary to hear the witnesses suggested by the applicant, the first part of the plea, alleging incorrect delimitation of the market, must be rejected.

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

Summary of the arguments of the parties

73 The applicant claims, referring to the comfort letter, that the supply agreements 'even if account is taken of the number of agreements of the same nature ... do not have the effect, in particular, of eliminating competition for a substantial part of the products concerned ...' and are therefore compatible with Article 85(1) of the Treaty.

74 In support of that view, the applicant maintains that, in considering whether the exclusive agreements concluded both by it and by its competitors have the effect of preventing, restricting or distorting competition within the meaning of Article 85(1) of the Treaty, it is necessary, in accordance with the case-law, to take account first of all of the number of sales outlets tied by such agreements as compared with those not so tied, the quantities of products distributed by the tied sales outlets and the duration of those agreements (*Delimitis*, cited above).

75 As regards the extent of tieing-in, the applicant observes that, regardless of whether the Commission's delimitation of the market or that suggested by the applicant is adopted, such dependence is, on the basis of information on which the decision was based, less than 30%, the figure considered acceptable by the Commission in its comfort letter and in its *Fifteenth Report on Competition Policy*, 1985, paragraph 19.

76 The applicant considers therefore that the Commission was wrong, in point 130 of the decision, to find that the extent of tieing-in is [...] %, which can only be explained by the fact that the Commission has abandoned the meaning hitherto attributed to that term. In determining the extent of tieing-in, the Commission took account only of the ice-cream sold by the applicant through the traditional trade.

77 As regards the average duration of the supply agreements, the applicant maintains that it is only about two-and-a-half years, that is to say half the period of five years considered acceptable in Regulation No 1984/83. According to the applicant, the managers of sales outlets as a general rule terminate their contracts as early as possible in order to negotiate better conditions.

78 The applicant also submits that the existence of a bundle of similar agreements cannot, according to the view taken by the Court in *Delimitis*, even if its impact on the possibility of access to the market is considerable, in itself support the conclusion that the relevant market is inaccessible. It is the factual and legal situation as a whole which is decisive. That also applies, according to the applicant, to exclusive agreements concluded by an undertaking holding a strong position on the market. The applicant adds that its market share falls far short of the share attributed to it in point 95 of the decision.

79 As regards the overall factual and legal situation that should have been taken into account, the applicant submits that the decision disregards certain essential matters relating to freedom of access to sales outlets.

80 First, according to the applicant, there are numerous sales outlets not tied by exclusive agreements. Many such outlets are immediately accessible to any competitor. Moreover, it is open to producers who are prepared to make the necessary investments to create new outlets.

81 Secondly, according to the applicant, the Commission failed to take sufficient account of the fact that the ice-cream market has grown rapidly in recent years, particularly in the territory of what was the German Democratic Republic. However, the creation of new outlets means that it is necessary for producers to be able to offer a wide range of ice-creams, provide the requisite distribution facilities and lend to sales outlets in the specialized traditional trade the freezer cabinets needed to store products.

82 The difficulties encountered by Mars in penetrating the market are not therefore attributable to the exclusive agreements concluded by the applicant and its competitors but to the strategy adopted by Mars, one aspect of which is to refrain from making the necessary investments and confining its business to sales outlets which already sell ice-cream.

83 Thirdly, with regard to the other barriers to access to the market alleged by the Commission in point 135 of the decision, namely the technology needed for the production of impulse ice-cream and the consumer preferences created by advertising in previous years, the applicant submits, first, that there is no doubt that

Mars has at its disposal all the requisite technological and other facilities to produce ice-cream and that it can turn to account its considerable renown, which is greater than that of the applicant.

84 In view of those circumstances, in the applicant's view entry to the traditional specialized trade is neither hindered nor prevented by the existing network of exclusive agreements.

85 In points 71 to 74 of its decision, the Commission finds, first, that the exclusive purchasing obligation imposed by the applicant on resellers constitutes a restriction of competition both between products of the same brand and between products of different brands. Offers of products from other suppliers cannot therefore, in the Commission's view, be entertained by the reseller because of the contractual prohibition to which he is subject. According to the Commission, the exclusive purchasing obligations make it more difficult or impossible to set up independent distribution structures such as are necessary if new entrants are to gain access to the relevant market or if an existing market position is to be consolidated. The contractual obligation to buy only contractual products *ipso facto* carries with it the obligation not to distribute competitors' products. The combination of both arrangements strengthens the restriction of competition.

86 In point 104 of its decision, the Commission finds that the applicant's sales volume and market share represented by the contested supply agreements far exceed the ceilings indicated in the Notice of 3 September 1986 on Agreements of Minor Importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2, hereinafter 'the Notice on Agreements of Minor Importance'). It may be inferred from those facts that the supply agreements appreciably limit the scope for German competitors and

competitors from other Member States to establish themselves in the relevant market or consolidate their market share and that, consequently, they are caught by the prohibition contained in Article 85(1) of the Treaty. According to the Commission, an examination of the effects of the network of agreements of a similar nature concluded by other undertakings in the reference market is unnecessary in the present case.

87 In its pleadings and at the hearing, the Commission added that it is only where the network of agreements of the same nature of the undertaking whose agreements are under review does not in itself meet the condition of having an appreciable effect that the cumulative effects of parallel networks must be taken into account, in accordance with the case-law (Case 23/67 *Brasserie de Haecht* [1967] ECR 525 and *Delimitis*, cited above).

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

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

90 In the traditional trade, according to the studies carried out by the intervener, the extent of tieing-in amounted in 1990 to more than 70%. Moreover, account should

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

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

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

93 In response to the applicant's assertion that the relevant market is growing, Mars contends that, in general, in order to assess the scope for an undertaking entering the market to gain access to the specialized traditional trade, it is inappropriate to rely on the theoretical possibility of creating new outlets. According to Mars, it should be borne in mind that the most attractive sales outlets from the economic point of view are precisely those tied by exclusive agreements.

Findings of the Court

94 It should be noted at the outset that the Commission was right, in paragraphs 71 to 73 of the decision, to state that the clause contained in the supply agreements whereby the retailer undertakes to sell through its sales outlet only products purchased directly from the applicant contains both an exclusive purchasing obligation and a prohibition of competition, which are capable of giving rise to a restriction of competition within the meaning of Article 85(1) of the Treaty both between products of the same brand and between products of different brands.

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

96 The Court finds that the applicant holds a strong position on the relevant market. As is apparent from the documents before the Court, the applicant, which is a subsidiary of Deutsche Unilever GmbH, which in turn is part of the Unilever international group, is one of the world's largest producers of consumer goods, achieved a turnover in ice-cream in 1990 and 1991 of more than one thousand million German Marks. According to points 27, 33 and 95 of the decision, the share of the relevant market held by the applicant amounted in 1991 to about [...] % (more than 45%) both in the grocery trade and in the traditional trade. In that connection, it should be observed that, although the applicant has denied holding that market share, in its belief that the delimitation of the market should be wider and extend to all ice-cream produced industrially or by the craft trade, it has not, in fact, expressly challenged the market share in industrial impulse ice-cream which the Commission attributed to it in its delimitation of the market. As regards the quantitative importance of the contested agreements on the relevant market, the

Court finds, on the basis of the documents before it, that, in the relevant market as a whole, as defined by the Commission, about [...] % (more than 15%) of the sales outlets are tied to the applicant and the turnover achieved by the applicant through those sales outlets also represents [...] (more than 15%) of the total volume of sales on the market.

97 According to the Commission, the latter figures confirm that the agreements appreciably limit the scope for German competitors and competitors from other Member States to establish themselves on the relevant market or consolidate their market shares, without there being any need to examine the cumulative effect of the parallel networks set up by the other suppliers of ice-cream, since the market share covered by the contested agreements, in itself representing around [...] % (more than 15%) of the relevant market, and the turnover achieved by the participating undertakings, are well in excess of the ceilings laid down in the Notice on Agreements of Minor Importance.

98 It must be borne in mind that that notice is intended only to define those agreements which, in the Commission's view, do not have an appreciable effect on competition or trade between Member States. The Court considers that it cannot however be inferred with certainty that a network of exclusive purchasing agreements is automatically liable to prevent, restrict or distort competition appreciably merely because the ceilings laid down in it are exceeded. Moreover, it is apparent from the actual wording of paragraph 3 of that notice that it is entirely possible, in the present case, that agreements concluded between undertakings which exceed the ceilings indicated affect trade between Member States or competition only to an insignificant extent and consequently are not caught by Article 85(1) of the Treaty.

99 As to whether the exclusive purchasing agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, according to the case-law,

to consider whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market for new domestic and foreign competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements as a whole cannot undermine competition within the meaning of Article 85(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is necessary to assess the extent to which the contested agreements contribute to the cumulative effect produced, on the basis that only agreements which make a significant contribution to any partitioning of the market are prohibited (*Delimitis*, paragraphs 23 and 24).

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

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

102 As regards the extent of tieing-in, the Court considers that it must be determined in this case by reference to the extent to which it is possible to gain access to

retailers throughout the relevant market, as previously defined by the Commission, that is to say both in the traditional trade and in the grocery trade, the delimitation of the market serving to define the context in which the effects of the contested agreements on competition must be assessed.

103 The Court finds, first, that, as indicated above (paragraph 96), if account is taken of the volume of sales of impulse ice-cream achieved in the relevant market, a figure is arrived at for the extent of tieing-in of about [...] % (more than 15%) attributable to the exclusive purchasing agreements concluded by the applicant and that, if account is taken of the ratio between the number of sales outlets tied to the applicant and the total number of sales outlets, the extent of tieing-in amounts to about [...] % (more than 15%).

104 As regards the cumulative effect of other similar agreements on the market, the Court finds, secondly, that the similar exclusive purchasing agreements concluded by Schöller, the other main ice-cream producer in Germany, cover around [...] % (more than 10%) of the independent relevant market if account is taken of the percentage of tied sales outlets or the turnover achieved by those sales outlets.

105 It must therefore be held that the networks of exclusive purchasing agreements set up by the two main producers affect about [...] % of the market, which exceeds the extent of tieing-in of 30% considered acceptable by the Commission in the comfort letter sent to Schöller, and later commented on in paragraph 19 of the 1985 *Fifteenth Report on Competition Policy*.

106 However, as stated above (paragraph 101), the extent of tieing-in is only one factor among others pertaining to the economic and legal context in which the network of agreements must be assessed. It is also necessary to analyse the conditions prevailing on the market and, in particular, real and specific possibilities for new

competitors to penetrate the market despite the existence of a network of exclusive purchasing agreements.

107 With respect to those factors, the Commission has drawn attention to the existence of additional substantial barriers to access to the market, both in the grocery trade and in the traditional trade. It is apparent from points 135 to 138 of the decision that access to the market for new competitors is made more difficult by the existence of a system under which a large number of freezer cabinets are lent by the applicant to retailers both in the grocery trade and in the traditional trade (about [...] in all, comprising [...] in the traditional trade and [...] in the grocery trade, according to the decision — point 58), the retailers being obliged to use them exclusively for the applicant's products.

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

109 In addition, the Court finds, on the basis of the documents before it, that, at least until the 1992 season, the applicant safeguarded [...] % of impulse ice-cream sales in the grocery trade by granting rebates for observing the exclusivity arrangement.

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

111 In view of all the foregoing, and having regard also to the effective duration of the contested agreements, which is around two-and-a-half years, the Court considers, from its examination of all the similar agreements concluded in the relevant market and the other aspects of the economic and legal context in which the agreements operate, as analysed above in paragraphs 107 to 110, that the exclusive purchasing agreements concluded by the applicant are liable appreciably to affect competition within the meaning of Article 85(1) of the Treaty.

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

113 In view of all the foregoing, the Court considers that the Commission was right to conclude that the contested agreements give rise to an appreciable restriction of competition on the relevant market. It is therefore unnecessary to hear witnesses on that point, as proposed by the applicant and the intervener.

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

The third part of the plea: absence of any effect on trade between Member States

Summary of the arguments of the parties

115 The applicant claims that the supply agreements are not liable to have an appreciable adverse effect on trade between Member States. The exclusive purchasing obligation is capable of having such an effect only in the event of reimports by foreign intermediaries, which, according to the applicant, do not exist and will not in all probability exist in the future.

116 As regards the obligation of non-competition contained in the agreements, the applicant also claims, first, that the Commission has produced no evidence of the existence in other Member States of undertakings wishing to sell their products on the German market and, secondly, that the few cross-border deliveries of ice-cream are, for the most part, supplies within a group of undertakings, which do not therefore constitute trade between Member States within the meaning of Article 85(1) of the Treaty. Referring to point 75 of the decision, the applicant adds that a German undertaking which manufactures products to be disposed of on the German market on premises in France does not thereby become a French undertaking.

117 The Commission finds, in the decision, that the exclusive purchasing obligation and the obligation of non-competition contained in the contested agreements constitute a restriction of competition liable to affect trade between Member States, since those agreements are liable to partition the German market as regards ice-creams from other Member States such as, in this case, Mars ice-cream products which are manufactured in France.

118 Finally, according to the Commission, it is settled law that it does not need to produce evidence that the agreements have in fact appreciably affected trade between Member States. It points out that Article 85(1) of the Treaty does not require such evidence, 'which would ... be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect' (judgment of the Court of Justice in Case 19/77 *Miller* v *Commission* [1978] ECR 131).

Findings of the Court

119 It must be borne in mind, at the outset, that both the Court of Justice and the Court of First Instance have consistently held that, in order that an agreement between undertakings may affect trade between Member States within the meaning of Article 85(1) of the Treaty, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market between Member States (see, most recently, the judgment of the Court of First Instance in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 39, and the judgment of the Court of Justice in Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22).

120 The Court considers that the cumulative effect of the existence of a network of exclusive agreements, covering the whole territory of a Member State and about [...] % of the relevant market (see paragraph 105 above) is liable to prevent penetration by competitors from other Member States and therefore consolidate partitioning on a national basis, thereby holding up the economic interpenetration

which the Treaty is designed to bring about (see, to the same effect, the judgment of the Court of Justice in Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977).

121 The Court considers therefore that the decision correctly finds, in point 75, that the contested agreements tend to insulate the German market from ice-cream products from other Member States, for example Mars ice-cream products which are produced in France.

122 As regards the applicant's argument that the products delivered by the intervener, Mars, are cross-frontier deliveries within a group of undertakings, not constituting trade between Member States, it must be pointed out that it is settled law (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 49) that, even where there is no partitioning of markets, price agreements between undertakings established in a Member State and covering only the market of that State affect trade between Member States within the meaning of Article 85 of the Treaty if they concern, even partly, a product imported from another Member State, even where the parties obtain the product from a company belonging to their own group.

123 The Court considers that that authority also applies to cross-frontier supplies delivered by an economic agent not party to exclusive agreements.

124 It follows that the third part of the plea is unfounded.

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

Summary of the arguments of the parties

125 The applicant claims that the Commission is not empowered by Article 3 of Regulation No 17 to prohibit exclusive agreements not covered by the prohibition laid down in Article 85(1) of the Treaty. In its view, it follows from the judgment in the *Delimitis* case that Article 85(1) of the Treaty does not apply to a particular number or a particular category of exclusive agreements, regardless of the manner in which that number or category is defined. The Commission was therefore wrong, in point 107 of its decision, to prohibit all the existing agreements, without considering or determining which of the agreements fall within the scope of Article 85(1) of the Treaty.

126 According to the applicant, it is also wrong to assert that, for reasons of legal certainty, Article 85(2) of the Treaty militates against separate consideration of the agreements forming part of a network, as is clear from the order made by the President of the Court of First Instance of 16 June 1992 in the case which preceded the present application (see paragraph 8 above).

127 The Commission, for its part, contends that, as determined in point 107 of the decision, the appreciable effect on competition noted in this case concerns all the supply agreements concluded by the applicant. Where there is a network of agreements of the same kind concluded by a single producer, there either is an appreciable effect or there is not, and it is impossible to consider certain factors separately. Article 85(1) of the Treaty does not admit of a division of individual

agreements or networks of agreements so that an 'inappreciable' part can be removed from the prohibition laid down in that article, such a division being, in any event, arbitrary.

128 The Commission adds that Article 85(2) of the Treaty militates against such a division for reasons of legal certainty, in particular in the case of a network of agreements.

Findings of the Court

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

130 As regards the order of the President of the Court of First Instance of 16 June 1992, to which the applicant refers in support of its argument that reasons of legal certainty do not preclude a division of its contracts, it must be borne in mind that that order, which suspended operation of the Commission decision of 25 March 1992

except as regards the applicant's and Schöller's sales outlets at service stations, was made in response to an application for interim measures. That measure, which was decided upon after the various interests of the parties to the proceedings were considered, was intended to mitigate the risk of serious and irreparable damage to both Mars and the applicant. The order was thus made for a specific purpose and the Court considers therefore that it cannot be relied on in support of the contention that the Commission was under an obligation to consider the individual agreements separately with a view to deciding whether they were caught by Article 85(1) of the Treaty.

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

132 It follows that the plea of infringement of Article 85(1) of the Treaty must be rejected.

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

133 The applicant maintains that, even if the contested agreements fall within the prohibition contained in Article 85(1) of the Treaty, they qualify either for a block exemption under Regulation 1984/83 or for an individual exemption. The plea is divided into four parts. The applicant submits, first, that the Commission was wrong to consider that all the contested agreements are concluded for an indefinite duration and that, therefore, the exemption provided for in that regulation is not applicable to them. Secondly, the applicant maintains that the Commission cannot withdraw the benefit of the exemption available under Regulation 1984/83, pursuant to Article 14(a) and (b) of that regulation, since those provisions are not

applicable to this case, the applicant having raised an objection of illegality on that point. Thirdly, the applicant claims that, even if those provisions were applicable, the Commission was not entitled to withdraw the benefit of the block exemption since the conditions in Article 85(3) of the Treaty are fulfilled. In that connection, it also claims that the agreements are eligible for an individual exemption. Fourthly, the applicant maintains that, by withdrawing the benefit of the block exemption for all the contested agreements, the Commission breached the principle of proportionality.

The first part of the plea: concerning the duration of the contested agreements

Summary of the arguments of the parties

134 As regards the duration of the exclusive agreements, the applicant states, first, that since the fixed duration of two years provided for in some of the contested agreements in practice reflects their effective duration, despite the clause providing for automatic extension of one year, in that the managers of sales outlets terminate their contracts as early as possible, seeking to obtain improved contractual conditions, the Commission was wrong to consider that all the supply agreements are concluded for an indefinite duration and that, consequently, pursuant to Article 3(d) of Regulation No 1984/83, the exemption available under that regulation is not applicable to them. The applicant considers that, if the manager of a sales outlet terminates his agreement and if the contractual relationship is subsequently restored, there is a new agreement providing for a fresh fixed duration.

135 In any event, the reservations made by the Commission in that connection in point 112 of the decision will soon, according to the applicant, become entirely academic. The only agreements raising problems are those which provide for a fixed duration

of two years and automatic extension of one year at each expiry date. The applicant stated, in the course of the written procedure, that it is in the process of changing its contractual practice, adopting a clause providing that the duration of the agreement may in no case exceed five years.

136 The Commission contends that, as indicated in point 112 of its decision, the agreements of the kind 'concluded for a set duration of not more than two years, to be renewed automatically thereafter' are concluded 'for an indefinite duration' within the meaning of Article 3(d) of Regulation No 1984/83, their termination being conditional on an uncertain future event. The possibility of terminating those agreements each year, on giving specified notice within the period of the automatic extension, does not alter the legal assessment. The Commission is therefore of the opinion that such supply agreements do not qualify for a block exemption under Regulation No 1984/83.

Findings of the Court

137 It must be borne in mind that, according to Article 3(d) of Regulation No 1984/83, the block exemption provided for by that regulation does not apply where the agreement in question is concluded for an indefinite duration. The Court considers that, in practice, there is no difference between, on the one hand, an agreement expressly concluded for an indefinite duration, under which the parties may terminate their contractual relationship, a form excluded by Article 3(d) of Regulation No 1984/83 from the benefit of the block exemption available under that regulation, and, on the other, an agreement which is, as in this case, tacitly renewed after a period of two years until such time as it is terminated by one of the parties. In both cases, the parties are not bound, but are free, if they wish, to reconsider their contractual relationship and evaluate the other opportunities available on the market. That review, which it is the purpose of Article 3(d) of Regulation No 1984/83

to bring about, may provide new competitors with an opportunity to gain access to retailers who are no longer subject to any commitment. Moreover, it must be concluded, as the Commission does at point 113 of the decision, that the decisive factor in assessing such agreements for the purposes of competition law is that their duration, depending as it does on the initiative of either party to it, is uncertain.

138 It follows that agreements subject to tacit renewal which may endure beyond five years must be regarded as having been concluded for an indefinite duration and cannot therefore qualify for a block exemption under Regulation No 1984/83. The first part of the plea must therefore be rejected.

The second part of the plea: inapplicability of Article 14(a) and (b) of Regulation No 1984/83

Summary of the arguments of the parties

139 The applicant claims that, as regards agreements whose duration meets the requirements of Article 3 of Regulation 1984/83 and therefore qualify for a block exemption under that regulation, the Commission is not entitled to withdraw the benefit of that exemption on the ground that entry to the specialized traditional trade is significantly hampered by the exclusive agreements which the applicant's competitors and the applicant itself have concluded, or on the ground that the ice-cream products distributed through the traditional specialized trade are not 'subject to effective competition' from other ice-cream products, because the corresponding provisions, namely Article 14(a) and (b) of Regulation No 1984/83, have no legal basis and are therefore inapplicable.

140 In support of that claim, the applicant maintains that the legal basis of Article 14 of Regulation No 1984/83, namely Article 7 of Council Regulation No 19/65/EEC 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), provides that the Commission may only withdraw the benefit of a block exemption where the agreements enjoying such an exemption 'are incompatible with the conditions laid down in Article 85(3) of the Treaty'.

141 Nevertheless, according to the applicant, Article 14(a) of Regulation No 1984/83 additionally requires that the products in question should be subject to 'effective competition' from other products. However, Article 85(3) of the Treaty merely requires, for an agreement to qualify for an exemption, that it does not afford the undertakings concerned 'the possibility of eliminating competition in respect of a substantial part of the products in question'. Furthermore, Article 14(b) of that regulation imposes the condition that the exempted agreement must not 'make access by other suppliers to the different stages of distribution' difficult to a significant extent, a requirement not found in Article 85(3) of the Treaty. Although it is doubtless possible to interpret Article 14(a) in a manner conforming to Article 85(3) of the Treaty, the same cannot be said, according to the applicant, of Article 14(b). Accordingly, the Commission was wrong to include in the statement of the reasons for its decision a reference to Article 14 of Regulation No 1984/83, since a Commission regulation which is not covered by the provision on which it purports to be based is illegal and, therefore, is inapplicable, wholly or in part, unless it can be interpreted in conformity with that provision (judgment of the Court of Justice in Case 38/70 *Tradax* [1971] ECR 1435).

142 According to the Commission, the legislative content of Article 14 of Regulation No 1984/83 and that of Article 7 of Regulation No 19/65 are identical, so that there is no question of the first-mentioned provision being inapplicable. First, Article 14(a) and (b) of Regulation No 1984/83 are merely indicative, in that they describe some of the situations in which the Commission may use its power to withdraw the benefit of the exemption provided for by the regulation (see the Notice

concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements (OJ 1984 C 101, p. 2). Furthermore, according to the Commission, it is settled law that, whilst elimination of competition in respect of a substantial part of the products concerned constitutes an obstacle to exemption, the same applies to the different stages of distribution within the meaning of Article 14(b) of Regulation No 1984/83 (judgments of the Court of Justice in Case 32/65 *Italian Republic* v *Council and Commission* [1966] ECR 389 and Case 6/72 *Europemballage and Continental Can*, cited above).

143 The Commission also considers that it follows from the judgment in the *Europemballage and Continental Can* case that the concern of the authors of the Treaty to uphold the possibility of actual or potential competition in the market in cases where restrictions of competition are allowed does not exclude the various stages of distribution.

Findings of the Court

144 It must be borne in mind at the outset that the question whether the Commission was wrong to withdraw the benefit of a block exemption, under Article 14(a) and (b) of Regulation No 1984/83, on the ground that those provisions do not apply to the present case, concerns only agreements which were concluded for a maximum period of five years and therefore, according to the Commission, fulfil the conditions laid down in Article 3(d) of that regulation (see point 114 of the decision), agreements of the kind 'concluded for a set duration of not more than two years, to be renewed automatically thereafter' and agreements of a duration exceeding five years not being covered by the exemption provided for by Article 1 of that regulation.

145 The Court finds, first, that it is apparent from Article 14(a) and (b) of Regulation No 1984/83 that the Commission is empowered to withdraw the benefit of the exemption provided for by that regulation, which is not conditional, by definition, upon verification that the exemption conditions laid down by Article 85(3) of the Treaty are in fact fulfilled, where it finds, after individual examination of a specific case, that the agreements exempted by the regulation do not fulfil all the conditions laid down by Article 85(3) of the Treaty.

146 Those rules conform with Article 7 of Regulation No 19/65, the legal basis of Article 14 of Regulation No 1984/83, which provides that the Commission may withdraw the benefit of the application of a block exemption regulation where it finds that agreements or concerted practices have certain effects which are incompatible with the conditions laid down by Article 85(3) of the Treaty.

147 It is also apparent from the wording of Article 14 of Regulation No 1984/83 that the provisions of paragraphs (a) and (b), preceded by the adverbial phrase 'in particular', list by way of example cases in which undertakings may expect the Commission to adopt a decision withdrawing from them the benefit of the block exemption.

148 It must also be borne in mind that the Court of Justice held in its judgment in the *Europemballage and Continental Can* case, with regard to the fourth precondition for an exemption from the prohibition laid down by Article 85(1) of the Treaty, that 'the endeavour of the authors of the Treaty to maintain in the market real or potential competition even in cases in which restraints on competition are permitted, was explicitly laid down in Article 85(3)(b) of the Treaty'. The condition of maintaining effective competition, within the meaning of Article 14(a) of Regulation No 1984/83, is therefore covered by the authorization given by Article 7 of Regulation No 19/65.

149 It follows that the applicant's assertion that Article 14(a) of Regulation No 1984/83 is inapplicable cannot be upheld.

150 It is also settled law, first, that the principle of freedom of competition concerns the various stages and manifestations of competition (see the judgment in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299) and that the wording of Article 85(1) of the Treaty draws no distinction between businesses operating in competition with each other at the same level or between businesses not competing with each other and operating at different levels and that it is not possible to make a distinction where the Treaty does not make one (*Italian Republic v Commission*, cited above).

151 It follows that Article 85(1) of the Treaty falls to be applied at all stages of the economic process and also to competitive relationships between suppliers relating, as in this case, to access to different sales outlets.

152 Since, by virtue of Article 85(3)(b) of the Treaty, Article 85(1) cannot be declared inapplicable to agreements which 'afford ... undertakings the possibility of eliminating competition in respect of a substantial part of the products in question', the Court considers, in the light of the foregoing considerations, that the Commission may also, where appropriate, withdraw, under Article 85(3)(b) of the Treaty, the benefit of a block exemption where access by other suppliers to the various sales outlets is made difficult to a significant extent within the meaning of Article 14(b) of Regulation No 1984/83.

153 The applicant's argument that Article 14(b) of Regulation No 1984/83 is not covered by the authority granted by Article 7 of Regulation No 19/65 is therefore without foundation.

154 Accordingly, the second part of the plea must be rejected.

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

Summary of the arguments of the parties

155 The applicant argues that Article 7 of Regulation No 19/65, which refers to Articles 6 and 8 of Regulation No 17, must be interpreted as meaning that the Commission may not withdraw the benefit of a block exemption unless it proves that the conditions laid down in Article 85(3) of the Treaty were not satisfied at the outset, or subsequently ceased to be satisfied, and that it has not done so in the present case.

156 The applicant infers that, until the Commission proves that one of the conditions for the application of Article 8(3) of Regulation No 17 is fulfilled, it is not entitled to withdraw the benefit of the block exemption provided for by Regulation No 1984/83.

157 According to the applicant, the exclusive agreements at issue continue to be covered by Article 85(3) of the Treaty and therefore qualify for an individual exemption. In that context, the applicant states that the supply agreements concluded by it are not required to be notified to the Commission. In its view, those agreements fall within the category referred to by Article 4(2)(1) of Regulation No 17, even though it is part of an international group.

158 First, referring to the fifth and sixth recitals in the preamble to Regulation No 1984/83, the applicant asserts that the supply agreements give rise to an improvement in the distribution of products. It submits that those agreements have made possible regular supplies throughout the territory and the supply of a wide range of high quality ice-creams. Without the creation of the existing distribution networks, an essential component of which is the exclusive arrangement between the sales outlets and a given producer, a large number of small and medium sized sales outlets would never have agreed to sell ice-creams. If every sales outlet were free to sell the products of other producers from time to time, the effectiveness of the distribution system could not be assured, since its profitability could not be maintained. Consequently, constant supplies of complete product ranges to sales outlets would be jeopardized. The applicant claims that the creation, by the exclusive agreements, of new outlets for ice-creams also constitutes, contrary to the Commission's contention, an objective advantage in the public interest.

159 The applicant also submits, referring to the case-law of the Court of Justice (Case 26/76 *Metro* v *Commission* [1977] ECR 1875), that regular supplies represent a sufficient advantage to consumers for them to be considered to constitute a fair share of the benefit resulting from the improvements brought about by the restriction of competition permitted by the Commission. It also maintains that, if the exclusive agreements were eliminated, distribution costs and consumer prices would increase considerably, to the detriment of consumers.

160 Finally, according to the applicant, the existence or otherwise of effective competition on the relevant market does not depend on whether, and if so to what extent, access to the traditional specialized trade is made difficult to a significant extent by the existing exclusive agreements. Even if that were so — which the applicant denies — effective competition could nevertheless prevail in the ice-cream market. According to the applicant, there is effective competition regarding prices, quality, product range and services in the ice-cream market, as clearly evidenced by the fluctuations in its market share and that of Schöller.

161 The applicant considers that, in view of the foregoing observations, the benefit of the block exemption could likewise not be withdrawn even if, contrary to its contention, the provisions of Article 14(a) and (b) of Regulation No 1984/83 were applicable.

162 The Commission considers, on the contrary, that it was appropriate to withdraw the block exemption available under Regulation No 1984/83, pursuant to Article 14 thereof, because the supply agreements do not fulfil the conditions laid down by Article 85(3) of the Treaty.

163 The Commission states, in that connection, that block exemptions, unlike individual exemptions, are not, by definition, subject to case-by-case verification that the preconditions for exemption laid down in the Treaty are in fact fulfilled. It is therefore wrong to claim that the conditions laid down in Article 8(3) of Regulation No 17, regarding the revocation of an individual exemption, are decisive in relation to the withdrawal of a block exemption under Article 14 of Regulation No 1984/83. According to the Commission, it was necessary, by virtue of the last-mentioned article, to consider whether, in the present case, the supply agreements had effects incompatible with the conditions laid down by Article 85(3) of the Treaty, and that was precisely what it did.

164 The Commission maintains, first, that the supply agreements do not contribute to improving the distribution of products within the meaning of Article 85(3) — they do not give rise to specific and objective advantages in the public interest, as defined in the judgment in the *Consten and Grundig* case, cited above, of such a character as to compensate for the disadvantages which they cause in the field of competition.

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

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

167 Finally, the Commission considers that the negative condition in Article 85(3)(b) of the Treaty is fulfilled, since there is no effective competition on the relevant market. With respect to the grocery trade, the Commission states that the predominant positions occupied by the applicant and Schöller, which together account for more than two-thirds of sales through that channel of distribution, and the con-

centration of demand constitute a substantial barrier to entry to the market. With respect to the traditional trade, access to the market is made difficult to a significant extent by the cumulative effect of the totality of the exclusive agreements in force. If account is taken of the sales made by the applicant through resellers tied by exclusive agreements, including wholesalers, as compared with the total quantities sold by the applicant in 1991, the percentage of sales outlets tied by exclusive agreements is, according to the Commission, [...] % (more than 50%).

168 The partitioning of the market resulting from the exclusive agreements could be attenuated if the duration of the agreements was relatively short; however, they are not in this case, their fixed duration being of up to two years, with the possibility of extension for an indefinite duration. Moreover, the Commission considers that the system of lending freezer cabinets, introduced by the applicant and Schöller throughout the market, also entails restrictions of competition.

169 The intervener, Mars, contests that the conclusion of exclusive agreements and the operation of a distribution system belonging to the producer are necessary to achieve efficient and rational distribution of industrial ice-cream in the relevant market. Mars submits that transport systems belonging to the manufacturers, of the kind established by the applicant and Schöller, represent a wholly exceptional situation. 'Impulse' products are, as a rule, delivered by the producer to wholesalers' central warehouses, and the wholesalers process orders in batches and deliver orders to the various sales outlets.

170 Mars observes that the Unilever Group, to which the applicant belongs, asked its Irish subsidiary, by letter of 30 October 1974, to terminate its exclusive agreements covering sales outlets and to confine the exclusive arrangements to the use of freezer cabinets. That shows that exclusive agreements are unnecessary.

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

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

Findings of the Court

173 It is necessary, first, to examine the applicant's argument that Article 7 of Regulation No 19/65 must be interpreted as meaning that the Commission must, in the exercise of the power conferred on it by Article 14 of Regulation No 1984/83, comply with the conditions laid down in Article 8(3) of Regulation No 17, with the result that it may withdraw the benefit of a block exemption only if there has been a change in any of the facts which were basic to the grant of the exemption.

174 The Court points out that, pursuant to Article 8(3)(a) of Regulation No 17, the Commission may revoke or amend an exemption decision if there has been a change in any of the facts which were basic to the making of the decision. Being a condition concerning the revocation of formal decisions taken under Article 85(3) of the Treaty, that provision does not fall to be applied where the Commission

decides to withdraw the benefit of a block exemption since, in such cases, there is no formal decision to revoke. Furthermore, the Court finds that, as the Commission pointed out, a block exemption is not, by definition, subject to case-by-case verification that the exemption conditions laid down by the Treaty are actually fulfilled (judgment of the Court of First Instance in Case T-51/89 *Tetrapak* v *Commission* [1990] ECR II-309).

175 In those circumstances, it must therefore be held that Article 7 of Regulation No 19/65 cannot be interpreted as meaning that a decision withdrawing the benefit of a block exemption may be adopted only in compliance with the condition laid down in Article 8(3)(a) of Regulation No 17. The applicant's argument to that effect cannot therefore be upheld.

176 In order to decide, next, whether the Commission was entitled to withdraw the benefit of the block exemption, it is necessary to examine how the Commission decided whether or not the contested agreements fulfilled the conditions laid down by Article 85(3) of the Treaty, to which Articles 7 of Regulation No 19/65 and 14 of Regulation No 1984/83 refer. It must be emphasized that, if it is found that the contested agreements do not fulfil the conditions laid down in Article 85(3) of the Treaty, it will also follow that, contrary to the applicant's assertion, they cannot qualify for an individual exemption.

177 In that connection, it must first be borne in mind that the grant of an individual exemption by the Commission is conditional, in particular, upon fulfilment by the agreement of all four conditions laid down by Article 85(3) of the Treaty, with the result that an exemption must be refused if any of the four conditions is not met (see, for example, the judgment of the Court of First Instance in Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104).

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

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

180 As regards the first of the four conditions laid down by Article 85(3) of the Treaty, the Court points out that, according to that provision, the agreements capable of being exempted are those which contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'. It must be observed in that regard that it is settled law that the improvement cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the

disadvantages which they cause in the field of competition (*Consten and Grundig* v *Commission*).

181 The Court notes that in the present case that first condition was examined in points 116 to 122 of the decision. Although it is apparent from the fifth recital in the preamble to Regulation No 1984/83 that exclusive purchasing agreements lead in general to an improvement in distribution, in that they enable the supplier to plan the sale of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement, and even if it is assumed that it would be necessary for the applicant, for reasons of cost, to terminate supplies to certain small sales outlets if it were obliged to give up supplies to them on an exclusive basis, the Commission considers nevertheless that the contested agreements do not give rise to objective and specific advantages for the public interest such as to compensate for the disadvantages which they cause in the field of competition.

182 In support of that argument, the Commission states, first, that, in view of the fact that the applicant holds a strong position on the relevant market, the contested agreements do not, contrary to the expectation expressed in the sixth recital in the preamble to Regulation No 1984/83, have the effect of intensifying competition between different brands of products. The Commission rightly took the view that the network of agreements at issue constitutes a major barrier to access to the market, with the result that competition is restricted. Although the applicant stated that the creation of new outlets for ice-cream entails objective advantages in the public interest, as defined by the case-law, the Court considers that the applicant has failed to produce any factual evidence such as seriously to challenge the Commission's analysis regarding the barriers to entry to the market raised by the supply agreements and, consequently, the resultant weakening of competition.

183 Also, it is clear from point 121 of the decision that the Commission considered that supplies to any small sales outlets abandoned by the applicant, for reasons of costs, would be taken over either by other suppliers, for example small local producers, or by independent dealers selling several ranges of products.

184 Against that background, it must be borne in mind that the intervener, Mars, stated that it is wholly exceptional for impulse products to be distributed using a transport system owned by the producers. And in fact the parties agree that it is only in Germany, Denmark and Italy that the companies in the Unilever Group have concluded exclusive agreements covering sales outlets.

185 It should be noted, with regard to the letter of 30 October 1974, referred to by Mars, in which the Unilever Group asked its Irish subsidiary to terminate the exclusive agreements relating to sales outlets and to limit the exclusive arrangement to the use of freezer cabinets, that the applicant explained, in the written procedure, that, in the past, the companies in the Unilever Group have found different solutions to the problem of achieving the best distribution system for ice-cream in the different Member States. The applicant added that it adopted its own approach by reference to the conditions prevailing on the German market.

186 However, the applicant has not produced any convincing evidence of the special conditions in Germany which made it necessary to create an ice-cream distribution system belonging to the producers, nor has it produced any evidence to counter the Commission's contention that wholesalers are willing and able to ensure ice-cream distribution throughout the territory. The Court therefore considers that the

applicant has not shown that the Commission committed a manifest error of assessment in considering that the contested agreements did not fulfil the first condition laid down by Article 85(3) of the Treaty. The Court takes the view that sufficient information is available to it from the documents in its possession and that it is therefore unnecessary to hear witnesses as to the need for a distribution system belonging to the producers or the intervener's commercial strategy, as requested by the applicant, nor as to the willingness and ability of wholesalers to supply retailers in the traditional trade or the restrictions of competition deriving from the exclusive agreements, as requested by the intervener.

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

The fourth part of the plea: whether the prohibition of the supply agreements outright is contrary to the principle of proportionality

Summary of the arguments of the parties

188 The applicant claims that, in withdrawing the benefit of the block exemption, the Commission is entitled, under Article 3 of Regulation No 17, to prohibit the hitherto exempted exclusive agreements only to the extent to which they are incom-

patible with Article 85(1) of the Treaty or are ineligible for an exemption. The fact that the Commission withdrew the entire benefit of the block exemption, without granting any partial exemption, is, in its view, not only incompatible with the principles laid down by the Court of Justice in the *Delimitis* judgment but also with the principle of proportionality. According to the applicant, the Commission is required to verify, on its own initiative, whether some of the supply agreements might nevertheless qualify for an individual exemption on the ground that they do not produce the cumulative effect referred to by the Court in the *Delimitis* case.

189 In that connection, the applicant refers to the order of the President of the Court of First Instance of 16 June 1992, which, in its view, indicates one of the numerous possibilities available for bringing down a network of exclusive agreements to a level acceptable under the competition rules.

190 The Commission took the view, in point 148 of the decision, that, because of the strong position occupied by the applicant in the market and the manifold protection enjoyed by it, the agreements as a whole failed to satisfy the tests of Article 85(3) of the Treaty.

191 The Commission also contended, in the written procedure, that withdrawal of the benefit of the block exemption is not a disproportionate measure. The Commission added that it is under no legal obligation, when undertaking an examination in relation to Article 85(3) of the Treaty, to indicate possible alternative solutions.

Findings of the Court

192 It must first be borne in mind that, by virtue of the principle of proportionality, measures adopted by Community institutions must not exceed what is appropriate and necessary to attain the objective pursued (judgment in Case 15/83 *Denkavit Nederland* [1984] ECR 2171).

193 As regards, first, the question whether the Commission is required on its own initiative to check whether certain supply agreements may, after withdrawal of a block exemption, nevertheless benefit from an individual exemption through lack of the cumulative effect referred to by the Court in its judgment in the *Delimitis* case, it must be borne in mind that it is incumbent primarily upon the undertakings concerned to provide the Commission with evidence to show that an agreement satisfies the tests of Article 85(3) of the Treaty (see paragraph 179 above). Whilst it is true that the Commission may indicate possible alternative solutions to undertakings, it is under no legal obligation to do so, still less to agree to proposals which it considers incompatible with Article 85(3) (judgment in *VBVB and VBBB* v *Commission*, cited above). The Court considers that that authority necessarily applies to the present case, so that the Commission is not required, in applying Article 85 of the Treaty, to indicate which agreements do not make a significant contribution to any cumulative effect caused by similar agreements on the market. Moreover, as indicated in paragraph 129 above, such separate consideration of similar agreements might involve a degree of arbitrariness, the Commission being required specifically to examine the actual impact of the network of agreements on competition.

194 For the reasons set out in paragraph 130 above, the order of the President of the Court of First Instance of 16 June 1992 cannot be invoked in support of the applicant's argument.

195 In the present case, the Commission considered that all the agreements failed to satisfy the tests of Article 85(3) of the Treaty. The Court finds that the applicant has produced no evidence to show that certain agreements fulfilled the conditions laid down in Article 85(3) of the Treaty. Accordingly, the Court considers that the applicant has not shown that the Commission's decision is vitiated by a manifest error of assessment or constitutes a breach of the principle of proportionality. The fourth part of the plea must therefore be rejected.

196 In view of all the foregoing considerations, the fourth plea must be rejected.

The plea of infringement of Article 3 of Regulation No 17

Summary of the arguments of the parties

197 According to the applicant, Article 4 of the decision has no legal basis whatsoever. There is no legal basis empowering the Commission to prohibit the applicant from concluding any exclusive agreements in the future.

198 Referring to the judgment in *Delimitis*, the applicant maintains that it is inconceivable that any exclusive agreements which it might conclude in the future with a sales outlet in the traditional specialized trade would be incompatible with Article

85(1) of the Treaty, regardless of the effect of all similar contracts concluded in the relevant market and the other aspects of the economic and legal context.

199 The applicant also maintains that agreements incompatible with Article 85 or Article 86 of the Treaty may be prohibited only under Article 3 of Regulation No 17. However, in its view, that provision empowers the Commission only to prohibit existing agreements and not to prohibit future agreements. The applicant also observes that neither Article 85(1) of the Treaty nor Article 14 of Regulation No 1984/83 constitutes a legal basis for the prohibition of future agreements.

200 The applicant further claims that, in that respect, the decision gives rise to unequal treatment, in that its competitors may continue to conclude exclusive agreements which are either not covered by Article 85(1) of the Treaty or may enjoy the block exemption available under Regulation No 1984/83.

201 The Commission explained in point 154 of the decision that the prohibition whereby the applicant may not conclude, until 31 December 1997, new supply agreements of the kind now in existence, which have been declared incompatible with Article 85(1) of the Treaty, is justified by the fact that the 'order not to invoke the supply agreements (laid down in Article 1 of the decision) would serve no purpose if L-I (the applicant) were permitted immediately to replace the current agreements by new ones'.

202 The Commission denies that Article 3 of Regulation No 17 does not constitute a valid legal basis. The power conferred on the Commission by that article must, in its view, be exercised in the most efficacious manner best suited to the circumstances of each given situation (order of the Court of Justice in Case 792/79R *Camera Care Ltd* v *Commission* [1980] ECR 119).

203 According to the Commission, that power implies the right to address certain orders to undertakings, requiring them to take or refrain from certain action, with a view to bringing the infringement to an end. The particular obligations thus imposed must, according to the Commission, be defined by reference to what is needed to restore legality (see the judgment of the Court of Justice in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and Others* v *Commission ('Woodpulp')* [1993] ECR I-1307).

204 In the present case, the prohibition is justified in its view by the need to prevent any attempt to circumvent the prohibition laid down in Article 1 of the decision. The applicant could, by relying on Regulation No 1984/83, at any time obtain the benefit of a block exemption for new exclusive agreements if Article 4 of the decision had not been adopted. The period for which that prohibition applies should be sufficiently long to allow a substantial change in the market conditions.

Findings of the Court

205 It must be borne in mind that, according to Article 3 of Regulation No 17, 'where the Commission ... finds that there is an infringement of Article 85 or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'. The Court considers that that provision confers on the Commission only the power to prohibit existing exclusive agreements which are incompatible with the competition rules.

206 As regards the reintroduction of a network of exclusive purchasing agreements, it must be noted that it is apparent from the case-law on Article 85(1) that, even

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

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

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

209 The Court also considers that it would be contrary to the principle of equal treatment, one of the fundamental principles of Community law, to exclude for certain

undertakings the benefit of a block exemption regulation as regards the future whilst other undertakings, such as the intervener in this case, could continue to conclude exclusive purchasing agreements such as those prohibited by the decision. Such a prohibition would therefore be liable to undermine the economic freedom of certain undertakings and create distortions of competition on the market, contrary to the objectives of the Treaty.

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

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

Costs

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

On those grounds,

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

hereby:

1) Annuls Article 4 of Commission Decision 93/406/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Langnese-Iglo GmbH (IV/34.072);

2) For the rest, dismisses the application;

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

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

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 8 June 1995.

H. Jung D. P. M. Barrington

Registrar acting as President

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