II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 December 1992

relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH & Co. KG

(Cases IV/31.533 and IV/34.072)

(Only the German text is authentic)

(93/405/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the notification submitted pursuant to Article 4 of Regulation No 17 by Schöller Lebensmittel GmbH & Co. KG concerning a standard-form 'ice-cream supply contract',

Having regard to the application lodged pursuant to Article 3 (2) of Regulation No 17 by Mars GmbH against Schöller Lebensmittel GmbH & Co. KG on the ground of its being hindered, in restraint of competition, in selling its ice-cream products in Germany,

Having regard to the decision taken by the Commission on 19 December 1991 to initiate proceedings,

Having regard to the Commission Decision of 25 March 1992 — interim measures,

Having given the undertaking concerned, pursuant to Article 19 (1) of Regulation No 17, read in conjunction with 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 [2], the opportunity of being heard on the matters to which the Commission has taken objection,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

1. Purpose of the proceeding

(1) In response to an application lodged by Mars GmbH (hereinafter referred to as 'Mars') on 18 September 1991, the Commission decided on 19 December 1991 to initiate proceedings pursuant to Articles 85 and 86 of the EEC Treaty againt Langnese-Iglo

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

GmbH (hereinafter referred to as 'L-I') and Schöller Lebensmittel GmbH & Co. KG (hereinafter referred to as 'SLG').

(2) The internationally active Mars group of companies manufactures ice-cream bars for the European market exclusively in France. Mars began selling such bars individually and in multipacks throughout Germany in 1990. Mars claims that it is being hindered, in restraint of competition, in selling its ice-cream products in Germany by exclusivity agreements which L-I and SLG have concluded with a large number of retailers.

(3) On 25 March 1992 the Commission stated in a Decision (hereinafter referred to as 'D/25. 3. 92') that the agreements concluded by SLG on the basis of a standard-form contract described either as an 'ice-cream agreement' or as an 'ice-cream supply and special agreement' (hereinafter referred to as 'supply agreement'), in so far as they concerned the sale, without any further service, of SLG's pre-packaged single-item ice-cream products, *prima facie* infringed Article 85 (1) of the EEC Treaty.

(4) SLG had notified its standard-form supply contract to the Commission on 7 May 1985. By letter dated 20 September 1985 the Commission's Directorate-General for Competition informed SLG that, on the basis of the known facts, which were essentially those set out in the notification, the notified standard-form contract was compatible with the competition rules of the EEC Treaty. When this assessment, which was based on the German ice-cream market as a whole, was made, it was assumed that access by other companies to the retail trade would remain assured. By letter dated 29 November 1991 the Directorate-General for Competition announced that the proceeding was being re-opened.

(5) The purpose of this proceeding is, further to D/25. 3. 92, to adopt a final decision pursuant to Article 85 of the EEC Treaty on the supply agreements. The Commission reserves the right likewise to subject to a final scrutiny such other infringements of the Community competition rules as are referred to in D/25. 3. 92.

(6) The compatibility with the Community competition rules of the exclusivity agreements to which L-I is a party is assessed in a parallel proceeding. L-I manufactures and distributes ice-cream and frozen food. It is a subsidiary of Deutsche Unilever GmbH. Foodstuffs account for the bulk of the customer sales of the German Unilever group.

2. The undertaking

(7) SLG manufactures and distributes ice-cream, frozen food and pastries. In 1991 it generated a total turnover of DM [>1 000 (1)] million (1990: DM [> 1 000] million), of which DM [>900] million (1990: DM [>800] million) came from ice-cream. In 1991 the group had a consolidated turnover of DM [>1 500] million.

(8) The majority shareholder of SLG is Mr Konsul Schöller. 49 % of the capital is held directly and indirectly by Südzucker AG, which also owns 75 % of Milchhof Eiskrem GmbH & Co. KG ('Eismann') (see recital 36). During the 1990/91 financial year Südzucker achieved a turnover of DM 4 540 million.

(9) SLG's position in the German market is partly attributable to successful takeovers. In 1978 SLG acquired Südmilch-Eiskrem- und Tiefkühlkost GmbH & Co., in 1987 the 'traditional' ice-cream business of Dr August Oetker Nahrungsmittel, in 1988 Muku Eiscreme Graf GmbH, and in 1989 the 'Motta' trade mark, the 'traditional' ice-cream business of Milli-Eiskrem and Ellingstedter Eiskremfabrik.

(10) Within the European Community, SLG manufactures ice-cream in a numer of German factories and in one Belgian production plant. The latter supplies the Benelux and French markets. The British market is supplied via wholesalers.

(11) On 24 and 30 September 1991 SLG concluded a cooperation agreement with Jacobs Suchard Manufacturing GmbH & Co. KG (hereinafter referred to as 'Jacobs Suchard'). Jacobs Suchard is a member of the Philip-Morris group, which markets foodstuffs and semi-luxuries throughout the world. The object of the agreement is to develop, manufacture and distribute ice-cream and ice-cream bar products.

3. The product

(12) Ice-cream is produced either industrially or by the craft trade from various raw materials in different combinations. It is intended for comsumption by the consumer — with or without further garnishes — in the material form which it acquires in the course of manufacture.

(1) In the published version of the Decision, some information has been omitted, pursuant to the provision of Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets. However, for a better understanding of the text, some general information has been given in square brackets in those cases where it was possible to do so without violating the non-disclosure requirement for business secrets.

(13) Ice-cream products are divided into individual consumable portions either by the consumer himself, by the seller as a service, or from the outset by the manufacturer. With a few minor exceptions, craft-trade ice-cream falls exclusively into the second category, whereas industrial ice-cream falls into all three categories. Industrial ice-cream is therefore usually categorized by the trade as single-item or impulse ice-cream, take-home ice-cream, and ice-cream for bulk-buying customers or catering ice-cream.

(14) The cold content of an individual portion is quickly used up. Consumption therefore necessarily takes place in the immediate vicinity of the last cold storage facility in which it was kept.

(15) Unlike craft-trade ice-cream, which is offered for sale to the consumer for consumption as a rule at the place of production, industrial ice-cream has at its disposal distribution channels which render the place of consumption independent of the place of production. This ice-cream reaches the consumer on a whole manner of occasions, for which the individual product lines are tailored. In some cases the products differ only in terms of their packaging, in others the composition of the ice-cream is identical but different further ingredients are added to each product, while in others still the products are completely different.

(16) Industrial ice-cream for bulk-buying customers and impulse ice-cream (individual portions or single items prepackaged by the manufacturer) and craft-trade ice-cream are aimed at satisfying the needs of the consumer outside his home, and hence out of reach of his own freezer. Unlike craft-trade ice-cream and catering ice-cream, industrial impulse ice-cream is not suitable in principle as the subject of further servicing by the seller because it is offered for sale in its final form for immediate consumption at or near the point of sale.

(17) If single items are packaged together by the manufacturer in a multipack, it is no longer consumption outside the home that is being targeted but, as in the case of take-home ice-cream, consumption in the home [1]. The same applies to consumers who purchase for storage one or more cartons containing single items. Multipacks or whole cartons containing single items are only rarely purchased for immediate consumption at or near the point of sale.

(18) The differing requirements of the consumer determine the distribution channel for industrial ice-cream. Take-home ice-cream and multipacks are sold in the vast majority of cases through grocery outlets and by doorstep delivery services, catering packs are intended for the catering trade (in the broadest sense), while impulse ice-cream is sold through all distribution channels [2]. The distribution channel for impulse ice-cream besides the grocery trade and doorstep delivery services, and for catering ice-cream, is known in the industry as the 'traditional' trade. Approximately 55 % of all impulse ice-cream is sold through the traditional trade, approximatly 35 % through grocery outlets and approximately 10 % through doorstep delivery services.

(19) SLG's 'price list '91' contains, among other things, impulse ice-cream and multipacks. A comparison of the nine multipack lines with the corresponding impulse lines shows that the price per single item in multipacks is much lower than in the case of impulse ice-cream. Even the grocery trade sells multipacks as a rule at prices which are lower per single item than those of impulse ice-cream.

(20) Industrial ice-cream which is divided into individual portions by caterers out of tubs [3] is cheaper for the retailer per individual portion than impulse ice-cream. However, owing to the service rendered in serving out the ice-cream, selling prices are broadly similar to those charged for single items.

4. The German ice-cream market

(a) *The market as a whole*

(21) In the early 1960s a number of firms, including SLG, began marketing industrial ice-cream. At that time, craft-trade ice-cream had the market almost to itself. SLG and the other firms involved invested considerable sums in opening up this market, spent mainly on making freezer cabinets available to retail outlets.

(22) The process of the unification of the two parts of Germany which began in November 1989 afforded

[1] The *Bundesverband der Deutschen Süßwarenindustrie e.V. — Fachsparte Eiskrem* (ice-cream section of the Association of the German Confectionery Industry) defines 'multipack' as follows: 'The contents consist of small packages, several of which are combined to form a take-home pack' (commentary on product classification, as at 21 May 1990).

[2] The commentary referred to in footnote [1] implies that doorstep delivery services deliver small packages, not as single items, but in cartons containing several items. These cartons may be regarded as multipacks.

[3] Ice-cream for bulk-buying customers includes items divided into portions beforehand by the manufacturer, intended for the catering trade (gateaux, petits fours, pre-cut ice-cream bombes, etc.).

the manufacturers of industrial ice-cream new marketing opportunities in the former German Democratic Republic. Those opportunities were seized, especially by SLG. Quite apart from this, it is expected that ice-cream sales will increase in future in Germany. SLG estimates that the total number of sales outlets opened up could increase in the medium term by 10 to 15 %.

(23) There are no statistics available regarding the sale of craft-trade ice-cream. Estimates have, however, been made by the ice-cream section of the Association of the German Confectionery Industry (hereinafter referred to as 'ice-cream section'). According to these, between 1970 and 1990 sales increased from 85 million to 133 million litres.

(24) The ice-cream section collects from its members [1] statistics on the sale of industrial ice-cream, broken down by quantity (litres/items) and value. The data relating to values are based on the manufacturer's recommended retail price inclusive of VAT. Only the data relating to quantities are given below [2]:

(million litres)

	1988	1989	1990	1991
Impulse ice-cream	89,8	98,5	131,8	155,0
Multipacks	17,9	20,8	26,0	34,6
Take-home packs	183,4	194,1	212,0	244,6
Catering packs	65,3	68,3	69,6	72,1
	356	382	439	506

(b) *Schöller Lebensmittel GmbH & Co. KG*

(25)

(million litres)

	1988	1989	1990	1991
Impulse ice-cream	[...]	[...]	[...]	[...]
Multipacks	[...]	[...]	[...]	[...]
Take-home packs	[...]	[...]	[...]	[...]
Catering packs	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]

(26) SLG markets its ice-cream under the names 'Schöller', 'Mövenpick' and 'Motta'. Part of its output is sold as own-brands:

(million litres)

	1988	1989	1990	1991
Impulse ice-cream	[...]	[...]	[...]	[...]
Multipacks	[...]	[...]	[...]	[...]
Take-home packs	[...]	[...]	[...]	[...]
Catering packs	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]

(27) SLG has a presence in all product categories and is represented throughout the country in every distribution channel. A breakdown by distribution channel of sales of impulse ice-cream produces the following picture for 1991 (million litres):

— doorstep delivery services: [...]

— traditional trade: [...]

— grocery outlets: [...]

[...]

63 % of customers purchase each year from SLG goods worth at most DM 5 000 gross. This group of customers accounts for less than 10 % of SLG's gross turnover. By contrast, 1 % of all customers account for almost 60 % of turnover.

(c) *Other suppliers*

(28) The list of members of the ice-cream section of the trade association of German industrial

[1] The figures given here for the market as a whole are slightly too low because a few suppliers of industrial ice-cream, including Mars, do not take part in the surveys.

[2] In the case of SLG, which produces mainly branded goods, this basis of assessment leads to some underestimation of the market position.

manufacturers of ice-cream contains 14 names. No other sizeable companies marketing industrial ice-cream in Germany are known to exist.

(29) Besides SLG, only L-I occupies a clearly prominent position on the market. Even the largest of the other companies have a share of less than 10 %, whether of total sales or of sales in product categories other than multipacks. These companies are, moreover, to a large extent suppliers of own brands to the retail trade and to doorstep delivery services. Oetker, L-I and, of late, Mars are the leading suppliers of multipacks.

(d) *Distribution channels*

— The grocery trade

(30) Almost half of all the ice-cream sold in Germany through the grocery trade is manufactured by L-I (SLG approximately 20 %, Oetker approximately 9 %, own brands approximately 11 %, all others approximately 10 %).

(31) As already indicated (recital 18), approximately 35 % of all impulse ice-cream sales are made through grocery outlets (1991: approximately 54 million litres), of which there are some 92 000. In this distribution channel, SLG's share of the volume of sales comes to approximately [...] %. In this product category L-I's position is particularly strong with a share of approximately [...] %.

— The traditional trade

(32) The traditional trade can be subdivided into the 'specialized' trade and the 'catering' trade. The specialized trade comprises a large number of different types of sales outlet: petrol stations, kiosks, cake shops, theatres, cinemas, sports venues, etc. Within the catering sector a distinction can be made between the hotel, restaurant and café sector and catering proper (canteens, hospitals, homes, hostels, etc.).

(33) Most of the ice-cream sold through the traditional trade is catering ice-cream and impulse ice-cream and, to a lesser extent, multipacks. Hardly any take-home packs are offered for sale here. Impulse ice-cream is sold through the specialized trade and the catering trade, while catering ice-cream is sold exclusively through the catering trade. The quantities of impulse ice-cream marketed in this sector came to approximately 72 million litres in 1990 and 85 million litres in 1991 (approximately 55 % of all impulse ice-cream sales).

(34) The Commission estimates on the basis of the information in its possession that, of all the sales outlets in the traditional sector, approximately 225 000 carry impulse ice-cream.

(35) In 1991 SLG had, all told, some [>50 000] impulse ice-cream customers in the traditional trade. SLG's sales volume in this sector came to [...] million litres, of which [...] million litres were sold through appointed wholesale dealers. SLG's share of impulse ice-cream sales in the traditional trade therefore came to approximately [>25] % in 1991 ([...] million litres out of a total of 85 million litres). A large proportion of sales outlets in the traditional trading sector supplied by SLG was approached by that firm itself with a view to their selling ice-cream.

(36) It is clear from the above that SLG's position *vis-à-vis* L-I in the sphere of the traditional trade is stronger than in that of the grocery trade. In addition, Warncke and Milchhof/Eismann are also active throughout the country and a fairly large number of companies are active in the regions. Even Warncke and Milchhof/Eismann have, however, shares of well below 10 % in this sector.

5. The distribution network of Schöller Lebensmittel GmbH & Co. KG for ice-cream

(37) Ice-cream is distributed to the grocery trade through the central warehouses of the major foodstuffs distributors and through 'brokers'. The broker's function is to supply its customers with the full range of ice-cream available on the market. Brokers typically carry several brands. There are no exclusivity arrangements with brokers.

(38) The broker's function arose from the need of the trade to be able to obtain the full range from one source. It is cheaper to obtain all of one's supplies at once from a broker than to obtain them from several suppliers.

(39) In the traditional trade, appointed wholesale dealers, agents and special wholesalers act on behalf of SLG. Appointed wholesaler dealers may not take part either directly or indirectly in the distribution of other manufacturers' ice-cream products for the catering and traditional trades. The sales outlets of the traditional trade are also supplied direct by SLG's distribution organization.

6. The supply agreements

(a) *Provisions of relevance to the present proceeding*

(40) The notified standard-form contract contains an obligation on the part of SLG to supply customers with 'ice-cream products'. For his part, the customer

is required 'to sell in the sales outlet referred to ... only ice-cream or similar products obtained direct from Schöller'. SLG makes available to the customer on loan one or more freezer cabinets. Only products manufactured or distributed by Schöller may be stored in the cabinets.

(41) The customer receives the price list, valid at the time of conclusion of the agreement. The content of the price list changes each year. For example, on the price list valid as from 1 February 1991 there were nine new 'impulse ice-cream' and 'premium impulse ice-cream' lines.

(42) The standard-form contract contains a clause fixing its duration. It is renewed for a further period of one year if notice of its termination is not given in writing at least six months before its expiry date. The agreement can also be terminated at six months' notice before the end of two years from its entry into force if a later expiry date has been agreed upon.

(43) SLG reserves the right 'for profitability reasons' to terminate the agreement at one month's notice if the customer's turnover during the previous 12-month period is less than DM 950. Approximately 14 % of all customers fall into this turnover category. In practice, SLG terminates its contractual relationship as a rule only with customers whose annual purchases come to less than DM 150.

(b) *Distribution channels and product categories concerned*

(44) SLG uses the standard-form contract at the retail level in the traditional trade for all product categories marketed through this distribution channel (see recital 33). Agreements to this effect are concluded by SLG solely on the basis of this standard-form contract.

(45) Of its [...] impulse ice-cream customers in this sector, in 1991 [...] had concluded a supply agreement. These customers purchased from SLG [...] million litres of impulse ice-cream.

(c) *Duration*

(46) The fixed duration agreed by SLG in individual cases is arrived at using the formula applied by the customer service department: fixed duration = year of conclusion + a maximum of two years. On 10 January 1992 SLG informed the Commission that, in the case of 78 % of all current agreements, the remaining fixed duration was less than one year or the fixed duration had already expired. In an insignificant number of instances SLG concludes a variation on the supply agreement whereby the duration is five years without any possibility of extension.

(d) *Whether supply agreements are common in the trade*

(47) The manufacturers and wholesalers active in the traditional trade sector usually conclude exclusivity agreements which are broadly similar to SLG's supply agreements. L-I has stated that approximately [...] % of its customers in this sector are bound by contract to purchase ice-cream direct from it alone.

(e) *Financing agreements*

(48) In conjunction with its supply agreements, SLG concludes additional agreements with certain customers. Under these agreements SLG grants the customers concerned a loan or an advance rebate. Payment is conditional on the supply agreement running for a certain length of time. In the event of premature termination of the contractual relationship, the customer undertakes to repay the amount pro rata. As at 31 December 1991 SLG was party to [...] such agreements.

(f) *Wholesaler contracts*

(49) The wholesalers operating on behalf of SLG in the traditional trade sector (see recital 39) conclude in respect of the SLG range exclusivity contracts, the content of which is based on that of the supply agreements. Information from appointed wholesale dealers about the number of customers who have concluded an ice-cream supply contract with them and about their turnover is received by SLG only in individual cases when appointed wholesale dealers cease trading and wish to transfer their clientele to SLG. From the knowledge thus gained, SLG estimates that appointed wholesale dealers have a binding arrangement with on average about half of their sales outlets and achieve a quarter of their turnover on the basis of exclusivity agreements.

7. Central buying agreements

(50) Within the traditional trade there are central buying agreements for service stations.

(51) [...]

(52) [...]

(53) [...]

(54) [...]

8. Installation of freezer cabinets in retail outlets

(55) The large-scale distribution of ice-cream, which is a precondition for the industrial manufacture of this product, requires an unbroken chain of deep-freeze facilities up to the time of consumption. With regard to the traditional trade, SLG states that the assumption by the ice-cream manufacturer of the risk involved in investing in freezer cabinets opens up a large number of sales outlets which otherwise would not stock any ice-cream. The grocery trade, on the other hand, has the financial and technical resources needed to provide adequate storage facilities for frozen products (1).

(56) The terms of loan either form an integral part of the supply agreements, or, in the case of retailers who have not concluded a supply agreement, are taken note of when the equipment is signed for. This display area is made available exclusively for SLG products. Especially in the grocery trade, SLG does not tolerate the equipment being used for any purpose other than its intended use, which forms the basis of the annual round of talks.

(57) By 31 December 1991 SLG had installed [...] freezer cabinets, including [...] in the traditional trade and [...] in the grocery trade; [...] were made available to wholesalers, and [...] to brokers. The food-retailing majors have gone over to concluding freezer cabinet agreements only for impulse ice-cream.

(58) The size of the cabinets made available depends both on the volume of sales SLG expects the sales outlets to achieve and on the frequency of deliveries. Cabinets are filled as a rule once a week, but in some outlets even once a day or several times a day.

9. SLG's observations

(59) SLG argues that the supply agreements are conditioned by the objective needs of distribution. It is able as a result to plan in detail the continual supplying of a large number of sales outlets and to keep distribution costs as low as possible. If every sales outlet were free to purchase at will a varying proportion of their stock from third parties, the pattern of supplies would be seriously disturbed. The efficiency of the transport system could not be assured, and its profitability could be neither planned nor maintained. If the exclusivity were to be abolished, SLG fears that it might have to break off relations with those sales outlets whose sales of SLG products would be such that supplying them no longer made economic sense. The final consumer would receive a much reduced service in terms of the availability of ice-cream than he does now.

10. Ice-cream in the European Community

(60)

	United Kingdom	Germany	Italy	France	Spain	Belgium/ Luxem-bourg	Others (1)
Production of industrial ice-cream (1989, in millions of litres)	473,5	381,8	317,3	270,6	160,6	160,0	194,5
Number of manufacturers	14	13	11	25	14	9	29
Per capita consumption (1990, in litres)	7,4	7,3 (2)	12,6	6,2	5,0	8,0	(3)

(1) There are no data for Portugal.
(2) 8,0 litres in the old German *Länder*.
(3) Between 10,3 (Denmark) and 3,4 (Portugal).

(61) There are no reliable data for craft-trade ice-cream. Italy and Germany seem, however, to lead the field here.

(62) Only Unilever and Mars carry on business throughout the Community; companies in the Unilever group are the largest suppliers in the United Kingdom, Germany, Italy, Spain, the Netherlands, Belgium/Luxembourg, Denmark, Ireland and Portugal. In France the Unilever company is on a par with a Nestlé company, but behind the leading Miko/Ortiz group. The Miko/Ortiz,

(1) The tie arrangement whereby its retailers are obliged to use its deep-frozen storage and sales equipment was notified by SLG to the Commission on 8 July 1992.

Artic/Beatrice, Nestlé and Schöller groups sell ice-cream in more than one Member State.

(63) Contracts similar to the SLG supply agreements are commonly concluded in France, Italy and Denmark as well as in Germany. Manufacturers' tied freezer cabinets are commonly found at retail level throughout the Community.

(64) National content regulations for ice-cream are not harmonized in the Community. The differences that exist, especially those relating to the permitted types of fat (dairy/vegetable fat), may give rise to differences in the product and its cost.

(65) The SLG ranges offered for sale in the individual Member States differ in terms of their content and brand names. The average retail prices of certain Mars and Unilever lines sold in several Member States differ considerably.

(66) According to the information in the Commission's possession, a large part of this trade in ice-cream between Member States takes place between companies belonging to the same group.

II. LEGAL ASSESSMENT

A. ARTICLE 85 (1)

1. Restriction of competition

(67) In the supply agreements SLG is specified as the sole source of supply for the retailer. On the one hand, this clause is directed at the purchase of contract goods (exclusive purchasing obligation) and, on the other, it prohibits the purchase of competing products (prohibition on competition).

(a) *Exclusive purchasing obligation*

(68) The retailer undertakes to purchase contract goods only from SLG. Because of this contractual prohibition, offers of contract goods from other suppliers cannot be entertained by the retailer. Competition for the retailer between SLG and other suppliers of contract goods is precluded (restriction of inter-brand competition).

(69) Exclusive purchasing obligations also have an indirect effect on competition between suppliers of goods throughout the relevant market (inter-brand competition). They 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.

(b) *Prohibition on competition*

(70) The contractual requirement that only contract goods be stocked also implies a prohibition on selling goods which compete with contract goods (restriction of inter-brand competition).

(c) *Combined effect*

(71) The exclusive purchasing obligation and the prohibition on competition are complementary. The combination of both arrangements, as occurs in this case, strengthens the restrictive effects.

2. Likelihood of affecting trade between Member States

(72) Both the exclusive purchasing obligation and the prohibition on competition have as their object and effect the restriction of the retailers concerned to obtaining supplies from SLG. Suppliers of contract goods and of goods competing therewith are precluded, irrespective of their geographical location and the origin of the goods, from competing for the retailers's orders. The supply agreements therefore also tend to insulate the German market from goods from other Member States, e.g. Mars ice-cream products produced in France.

3. Appreciability

(73) The supply agreements fulfil the conditions of Article 85 (1), however, only if they affect competition and trade between Member States to an appreciable extent. Before it can be determined whether this is so, the relevant market within which the supply agreements take effect must first be defined.

(74) The contract goods covered by the exclusive purchasing obligation are 'ice-cream products' of the SLG range. Since SLG concludes supply agreements only at the retail stage of the traditional trade, the product categories that are mainly affected are those of impulse ice-cream and catering ice-cream.

(75) The subject matter of the prohibition on competition is 'ice-cream or similar products'. The prohibition on competition is relevant, however, only in so far as the products concerned compete with contract goods.

(76) It therefore needs to be determined which goods compete with impulse ice-cream and catering ice-cream of the SLG range in which geographical area, and hence which are the subject of supply and demand.

(a) *Product market*

(77) The product market includes, in principle, all goods which are perceived by the consumer, on the grounds of their characteristics, price or intended purpose, as being similar. From the consumer's point of view, a distinction can be drawn using these criteria between the following three product categories:

(78) Ice-cream which is supplied as part of catering services forms, because of this feature, a separate product market [1]. This includes essentially [2] a proportion of industrial ice-cream for bulk-buying customers and a proportion of craft-trade ice-cream.

(79) Owing to the product-specific connection between deep-freeze facilities and consumption, the place of consumption of ice-cream is of decisive importance when it comes to determining similarity for competition law purposes. Ice-cream purchased by the consumer must either be consumed immediately at the place of purchase or be stored as soon as possible in a freezer in the consumer's own home. This stock is available, however, only to satisfy need at home. Owing to the lack of availability of the relevant categories of goods to satisfy need outside the home, and in particular to satisfy short-term need aroused spontaneously outside the home, multipacks and take-home packs form a separate product market. This also includes impulse ice-cream which is delivered by doorstep delivery services for storage at home in private freezer cabinets. In the case-law of the Court of Justice it is acknowledged that even identical products can belong to different product markets if they satisfy a specific demand [3].

(80) From the consumer's point of view, that part of industrial ice-cream for bulk-buying customers and of craft-trade ice-cream which is served out for consumption at or near the point of sale without the provision of any catering services, and industrial impulse ice-cream which is not sold through doorstep delivery services, are identical.

(81) The consumer's point of view is, however, not the sole criterion. Differentiation is necessary in the present case, owing to the different competive conditions at the various stages of distribution and in the sundry coexisting distribution channels through which the products in question reach the consumer, and for the following reasons.

(82) Supply agreements are concluded between SLG and resellers at the retail stage and are directed at competition between manufacturers and/or wholesalers for access to the retail trade. They concern, therefore, the supply of and demand for ice-cream at the stage of distribution, which consists of the grocery trade and the traditional trade.

(83) The grocery trade and the traditional trade are distribution channels for every kind of industrial ice-cream. Craft-trade ice-cream, however, is not offered for sale to these branches of the retail trade, nor is there any demand for it. On a market whose supply side consists of industrial ice-cream manufacturers and wholesalers and whose demand side consists of retailers, there is no trading in craft-trade ice-cream. Consequently, the discussion below as to whether any benefit arising from the application of Commission Regulation (EEC) No 1984/83 [4] should be eliminated from the supply agreements pursuant to Article 14 (b) of that Regulation must be confined to the competitive conditions prevailing at the distribution stage affected by the supply agreements. Craft-trade ice-cream which is served up for consumption at or near the point of sale does not, therefore, belong to the relevant product market in the present context.

(84) In relation to industrial impulse ice-cream and catering ice-cream in tubs intended for serving up as individual portions for consumption at or near the point of sale (scooping ice-cream), the retail trade performs various marketing functions [5] which are conditioned by the different product characteristics and which result in there being only a slight overlap between channels for these two categories of article.

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(1) Judgment in Case C-234/89, Henninger Bräu [1991] ECR, p. I-935, paragraph 17.

(2) SLG contends that products of the impulse ice-cream range can also be used for catering purposes. Because of the obviously limited extent of this type of use, SLG is given the benefit of the doubt and the quantities involved are not excluded from the product market.

(3) Joined Cases 6 and 7/73, Commercial Solvents [1974] ECR, p. 223, at 249: aminobutanol as starting material for the manufacture of an anti-tuberculosis drug and as an emulsifying agent for the dyestuffs industry; Case 85/76; Vitamins [1979] ECR, p. 461, at 514 *et seq.*: bionutrivite and technological uses of vitamins C and E; Case 322/81, Michelin [1983] ECR, p. 3461: new tyres for the original vehicle-equipment market and for the replacement market.

(4) OJ No L 173, 30. 6. 1983, p. 5.

(5) The need to take account of the structure of demand in delimiting the product market has been expressly acknowledged by the Court of Justice (Michelin, [1983] ECR, p. 3504 *et seq.*).

(85) Impulse ice-cream is purchased by the retail trade in the form in which it is resold to the consumer. It is particularly suited to consumer self-service. Catering ice-cream in tubs requires, on the other hand, a further processing operation, namely that of serving it up in individual portions. The added value created thereby is reflected in generally higher trading margins than in the case of impulse ice-cream. These differences mean that impulse ice-cream and catering ice-cream in tubs are offered for sale together to a significant extent only in the catering sector, and even there it is sold for different types of consumption (catering ice-cream in tubs in the context of catering service, impulse ice-cream sold in the street for consumption at or near the point of sale). The grocery trade and the traditional trade, which (together with doorstep delivery services) sell by far the greater part of industrial impulse ice-cream, are generally not geared to selling catering ice-cream.

(86) Impulse ice-cream and catering ice-cream in tubs are different products from the point of view of product technology too. Impulse ice-cream is an end-product which, being a mixture of ice and other ingredients, generally relies heavily on technology and know-how. Ice-cream in tubs is a primary product which acquires its characteristics only by being served up.

(87) The categories of article concerned belong, therefore, to different product markets. The product market that is relevant to the present proceeding comprises industrial impulse ice-cream sold through all distribution channels with the exception of doorstep delivery services [1].

(88) The legal assessment of the supply agreements would be no different even if the delimitation of the product market were to focus exclusively on the consumer's point of view (recital 80). The producers of craft-trade ice-cream cannot be considered potential purchasers of industrial impulse ice-cream. The supply agreements do not operate in this distribution channel. On the other hand, the agreements also concern catering ice-cream, which is distributed exclusively through the traditional trade. The competition-related effects of the supply agreements on this latter category of article are therefore comparable in this sector to those on industrial impulse ice-cream.

(89) SLG disputes this delimitation of the product market. It maintains that the delimitation must be determined exclusively by reference to the consumer. Such a delimitation would result in all ice-cream having to be included in the product market, as the enjoyment of a portion of ice-cream satisfies in every case one and the same need for a 'sweet, cool refreshment' at comparable prices.

(90) This type of market delimitation takes insufficient account of the fact that the availability of ice-cream is dependent on location or of the spontaneous but short-lived need. Even ice-cream which the consumer stores at home in his freezer cabinet is not substitutable for an identical product outside the home because it is not available outside the home.

(91) SLG argues in support of its case that impulse ice-cream is marketed through all distribution channels, as a rule together with other product lines.

(92) This fact is not disputed. Impulse ice-cream is in fact distributed through the various distribution channels together with other product lines: in the catering trade, together with catering ice-cream; in the grocery trade and through doorstep delivery services, together with ice-cream in take-home packs and multipacks; and in the traditional trade, although here other product lines are carried to a much lesser extent. What is more, in the case of consumer goods, the supply of products which belong to different product markets is the rule rather than the exception.

(93) Lastly, SLG objects to the exclusion of multipacks from the product market. It points out that this product line is also sold in the traditional trade and hence that it is available to satisfy need outside the home.

(94) It is indisputable, however, that the vast majority of multipacks are sold to consumers by the grocery trade and by doorstep delivery services for home storage. In the case of all product lines there is a certain amount of overlapping at the edges which in the present context works partly to the advantage [2] and partly to the disadvantage of the firms concerned. These findings are therefore immaterial as far as the legal assessment is concerned.

(b) *Geographical market*

(95) Although the production of industrial ice-cream has displayed a clear trend towards internationalization, distribution is everywhere organized on a national basis. National peculiarities are reflected in different

[1] The Commission can see no reason for the time being for examining of its own motion the effects of the supply agreements on the market for industrial catering ice-cream.

[2] See footnote [2] on page 9 of this Official Journal.

market structures, assortments and prices. Consumers prefer different brands in each country. The supply agreements at issue here and analogous distribution contracts are concluded at domestic level. The requirements governing the manufacture of ice-cream are not harmonized. The relevant market here is thus the German market [1].

(c) *SLG's position on the relevant market*

(96) In 1991 the relevant market had a volume of about 140 million litres (total sales of single-item ice-cream, less 10 % doorstep deliveries). SLG's sales on this market amounted to [...] million litres ([...] million litres overall, less [...] million litres through doorstep deliveries). In 1991, then, its market share was about [> 20] %.

(97) Of the undertakings doing business on the relevant market only L-I and Mars belong to groups of greater commercial importance than SLG. At the end of 1990 SLG entered into an arrangement for cooperation on the relevant market with Jacobs Suchard, which belongs to Philip Morris, one of the world's leading food and tobacco groups. The other undertakings trading here are all a great deal smaller.

(98) In the grocery trade and 'traditional trade' SLG and L-I have a leading position. In the grocery trade, indeed, this is true not only of the relevant product market but for all ice-cream products. SLG also operates in the related frozen foods and pastries markets.

(99) The products sold by SLG on the relevant market are mainly branded goods with high recognition rates. This strengthens SLG's position, particularly in its dealings with traders, and helps to offset any power which might be brought to bear by the demand side.

(100) At all levels of distribution there are contracts protecting SLG's market position in different ways: in the traditional trade there are agreements with wholesalers (recital 39) and central buying agreements (recital 50), and throughout the relevant market there are restrictions on the use of SLG's freezer cabinets, which are used to store most of the goods sold (recital 55).

(d) *The scale of coverage of SLG's exclusivity agreements on the relevant market*

(101) On the relevant market in 1991, SLG sold [...] million litres under supply agreements (recital 45) and [...] million litres through tied wholesalers (recitals 35 and 39). This was about [> 10] % of the total volume sold on the relevant market.

(102) Of the approximately 225 000 traditional sales outlets and 92 000 grocery outlets on the relevant market, SLG has tied aboud [...] to its own products by means of supply agreements (recital 45); this likewise amounts to about [> 10] %.

(e) *The effects of the supply agreements*

(103) What has to be examined here is the network of similar agreements concluded by the undertaking under consideration. If this network has no appreciable effect by itself, then the effects of similar networks of agreements concluded by other undertakings doing business on the relevant market will have to be examined too.

(104) In its Notice on Agreements of Minor Importance the Commission set out quantitative criteria giving a concrete meaning to the term 'appreciable' [2]. The Commission there stated that agreements have no appreciable effect, and are not caught by the prohibition in Article 85 (1), if the goods which are the subject of the agreement do not represent more than 5 % of the relevant market, or if the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million.

(105) The supply agreements apply to about [> 10] % of sales outlets and of sales volume on the relevant market. SLG's sales far exceed both the ceilings defining an agreement of minor importance. These facts alone are sufficient to establish that the supply agreements do appreciably restrict the scope for domestic and foreign competitors to establish themselves on the relevant market, or to increase their market share. In this case, then, it is unnecessary to examine the effects of the networks of similar agreements concluded by other undertakings on the relevant market.

[1] See Henninger, paragraph 18.

[2] OJ No C 231, 19. 9. 1986, p. 2.

(106) SLG refers to the principles stated by the Court of Justice in Haecht I [1] and clarified in Henninger [2]. But the findings in those cases are not pertinent here. It is only where the network of similar agreements concluded by the undertaking under consideration does not by itself have any appreciable effect that the rules developed by the Court require an examination of the cumulative effect of parallel networks. In a case of that kind the thresholds are lower — on the basis of the Court of Justice's judgment in Henninger [3] the Commission has defined lower thresholds for beer supply agreements [4] — but there are also more stringent tests of appreciability. In accordance with the same Court judgments, however, the cumulative effect of parallel networks of agreements will be considered further on, when assessing structures on the relevant market as a whole.

(107) Thus the supply agreements do appreciably restrict inter-brand competition on the relevant market, and are liable appreciably to affect trade between Member States. This assessment is valid for the supply agreements taken together. Article 85 (1) does not admit of a division of individual agreements or networks of agreements such as will remove a section from the scope of the ban on restrictive practices on the ground that it is 'inappreciable'. The same point may be inferred from Article 85 (2); its legal consequence is the nullity of restrictive agreements, and for reasons of legal certainty that consequence militates against such a division, particularly where a network of agreements is involved.

B. ARTICLE 85 (3)

1. **Block exemption**

(108) It must now be considered whether the supply agreements have been exempted from the prohibition pursuant to Article 85 (1) by Article 1 of Regulation (EEC) No 1984/83. If that is to be so the goods covered by the supply agreements must be 'certain goods specified in the agreement' within the meaning of the Article, and the agreement must not have been concluded for an indefinite duration (Article 3 (d) of the Regulation).

(a) *'Certain goods specified'*

(109) The goods which are the subject of the exclusive purchasing obligation are 'ice-cream' of the current SLG range (recital 40).

(110) A product range may constitute 'goods' within the meaning of Article 1 of the Regulation (paragraph 38 of the Commission notice concerning Regulations (EEC) No 1983/83 and (EEC) No 1984/83 [5]). Ranges of goods satisfy the test of certainty if they are 'specified by brand or denomination' (paragraph 36 of the notice). The purpose of the certainty requirement is to allow an unequivocal assessment to be made under competition law, and to protect the dealer by preventing the supplier from unilaterally extending the class of goods covered by the agreement.

(111) The range covered by the agreement is clarified in the price list provided when the supply agreement is concluded. Impulse ice-cream lines bearing the Schöller and Mövenpick brands are made the subject of the agreement here. The exclusive purchasing obligation applies to the current range, whose content changes from year to year. But the annual changes in the content of the price list affect only a few articles, so that the range continues to be a clear-cut one [6]. In this respect the supply agreements satisfy Article 1 of the Regulation.

(b) *Duration*

(112) The supply agreements are concluded for a set duration of not more than two years, to be renewed automatically thereafter (recital (46). They are 'concluded for an indefinite duration' within the meaning of Article 3 (b) of Regulation (EEC) No 1984/83 (see paragraph 39 of the notice), because their termination is made conditional on an uncertain future event. Article 1 of the Regulation consequently does not apply.

(113) It cannot be objected that the supply agreements are concluded for a fixed period in the first place and thereafter for further periods determined by the period of notice required, so that the duration of the agreement is ultimately a definite one. If this were so then an agreement would be 'concluded for an indefinite duration' for these purposes only of it set

(1) Case 23/67, [1967] ECR, p. 407.
(2) *Loc. cit.*
(3) *Loc. cit.*
(4) OJ No C 121, 13. 5. 1992, p. 2.
(5) OJ No C 101, 13. 4. 1984, p. 2.
(6) For judicial consideration of the certainty requirement with reference to a beer supply agreement, see Henninger, paragraph 36.

no date for termination and made no provision for termination at the request of one of the parties. For an assessment of the agreements in terms of competition law the decisive consideration is that the duration depends on the initiative of one of the parties and consequently is not fixed.

2. Individual exemption

(114) The supply agreements were notified to the Commision. It remains to be considered whether they satisfy the tests of Article 85 (3).

(a) *Improving the distribution of goods*

(115) The fifth recital of Regulation (EEC) No 1984/83 states that exclusive purchasing obligations 'lead in general to an improvement in distribution'. They 'enable the supplier to plan the sales of his good 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 ... this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs.' The eighth recital to the Regulation argues that an anti-competition clause is generally necessary in order to achieve the desired improvement in distribution because it compels the reseller to concentrate his sales efforts on the contract goods.

(116) SLG contends that the supply agreements do secure the benefits just described for SLG itself and the other parties to the agreements (recital 59). There is no obvious reason to doubt this as far as SLG is concerned. Whether it is always true of the other party to the agreement, who has to give up his commercial freedom, is an open question.

(117) The fact that agreement may be advantageous to the parties to them is not sufficient to constitute an 'improvement' for the purposes of Article 85 (3). They must rather produce appreciable objective advantages in the public interest of such a character as to compensate for the disadvantages which they cause in the field of competition [1].

(118) A conceivable gain for the general public might be an intensification of inter-brand competition (sixth recital of Regulation (EEC) No 1984/83). It is true that the supply agreements should considerably strengthen SLG's position with respect to current and potential competitors. But a strengthening of an undertaking which is as important on the market as SLG leads not to more but to less competition, because the network of such agreements constitutes a major barrier to entry to the market (recital 127).

(119) General territorial coverage and regular supply might also be considered possible economic gains from the supply agreements. SLG raises that point. SLG fears that on grounds of cost it would have to stop supplying sales outlets with low turnovers if those turnovers were to be divided between several suppliers.

(120) This apprehension concerns only a small number of outlets (recital 43). In any event, suppliers also compete in terms of the cost of their distribution systems. Any decision on SLG's part to stop supplying a sales outlet on grounds of cost would therefore be a consequence of competition, with SLG's share of turnover going to reward the successful competitor. Small local ice-cream manufacturers should be able to supply sales outlets in their immediate neighbourhood at lower cost than manufacturers with country-wide distribution networks. But even in the unlikely event that no competitor were forthcoming to take over SLG's share, the distribution fuction could be assumed by independent dealers who would obtain supplies from a variety of sources and supply all the sales outlet's requirements. The fact that there are no independent dealers of this kind at present is partly due to the exclusive purchasing obligations customary in the trade, which are to be largely prohibited in these proceedings. The opening of the market will also benefit SLG, which will in future be able to supply all or part of the requirements of the sales outlets currently tied to L-I, and by thus increasing the density of its distribution network to offset the increase in costs caused by a reduction in its turnover at individual outlets.

(121) There are no other major commercial considerations which would militate in favour of the supply agreements. The agreements consequently do not contribute to improving the distribution of goods within the meaning of Article 85 (3).

[1] Judgment of the Court of Justice in Joined Cases 56 and 58/64 Consten and Grundig [1966] ECR, p. 299 at 348; this is the established rule in the judgments of the Court and the Commission's administrative practice.

(b) *Allowing consumers a fair share of the resulting benefit*

(122) Nor is there any reason to anticipate that consumers will derive a fair share of the gains resulting from the restrictive agreements. Consumers might secure a fair share of the benefit only if the pressure of effective competition were to compel the parties to pass on the gains resulting from the restrictive agreements. But because exclusive agreements are customary in the trade, and produce similar and easily-monitored distribution arrangements, that is not the case here.

(123) The exclusive agreements also restrict the choice available to consumers. In a tied sales outlet the customer will find only one manufacturer's range of ice-cream products. Even if there is another tied sales outlet selling another manufacturer's range in the neighbourhood of the first, the alternative this represents is not equivalent to a choice available from an individual outlet. Firstly, it is in no way the rule. Secondly, a consumer who wishes to buy articles from different ranges will find it irksome to have to visit separate outlets in order to do so. He will no take trouble of that kind to satisfy a short-term impulse.

(c) *Eliminating competition in respect of a substantial part of the products in question*

(124) The Court of Justice has held that competition is eliminated in such a way as to prevent exemption pursuant to Article 85 (3) where there is no effective competition on the relevant market [1]. It must therefore be considered whether there are barriers to entry insulating the relevant market against competition from outside, and what competitive relationships there are inside the market.

— Barriers to access

(125) The relevant market consists of the traditional trade, accounting for about 61 % of total volume, and the grocery trade, accounting for about 39 %. The competitive structures of the two channels are substantially different.

(126) In the grocery trade L-I and SLG hold a leading position, together accounting for more than two-thirds of sales volume, and demand is concentrated; it is consequently difficult for other competitors to establish themselves in the grocery trade or to increase their market share. This is particularly true of manufacturers who do not choose to meet the demand from the trade for own-brand impulse ice-cream. It can also be seen from SLG's submission that the costs associated with distribution through the grocery trade can be justified only by large sales volumes. SLG states that to build such a distribution system afresh would be beyond the capacity even of undertakings comparable in size to itself (written reply of 20 August 1992, top of page 34). Strong concentration on the supply side also constitutes a barrier to entry, because it increases both the likelihood that established undertakings will take action against newcomers in order to defend their inherited market positions, and the effectiveness of any such action they do take [2].

(127) In the traditional trade L-I and SLG market well over two-thirds of sales volume. Access to this channel is also to a great extent prevented by the existing exclusive agreements. The importance of the agreements as barriers to entry depends on the number of sales outlets tied to domestic manufacturers as compared with the number of outlets not so tied, on the volumes covered by these agreements as compared with the volumes sold through free sales outlets, and on the duration of the agreements [3]. It is here that the cumulative effect of all exclusive agreements together has to be considered.

(128) In the traditional trade SLG has tied the major proportion, or [...] %, of its sales outlets (recital 45). It is known that L-I has concluded exclusive supply agreements with about [...] % of its sales outlets in the traditional trade. Given the high shares held by the two undertakings in total sales by the traditional trade, and the fact that agreements of this kind are customary there, it can be assumed that the proportion of total outlets covered by tie obligations is somewhere in the same range.

(129) The proportion of SLG's sales volume in the traditional trade which is covered by tie agreements is not very different from the proportion of sales outlets they account for. Of the [...] % million litres of impulse ice-cream which SLG sold through this channel in 1991 (recital 35) [...] million litres, or [...] %, were covered by supply agreements (recital 45). Indeed, if we add to this the [...]

(1) Case 6/72, Continental Can [1973] ECR, p. 215, paragraph 25.

(2) Commission Decision 92/553/EEC in Nestlé/Perrier (OJ No L 356, 5. 12. 1992, p. 1), recital 98.

(3) Henninger, paragraph 19.

million litres which SLG supplies to the traditional trade through tied wholesalers, the figure is actually bigger than that for sales outlets. There are indications, however, that the figures for the traditional trade as a whole differ from the figures for SLG (1).

(130) The insulating effect of the exclusive agreements could, however, be reduced if they were concluded for short durations. The market structures described above continue to apply at any given time. But there may be competition for the conclusion of exclusive agreements. Competition of this kind can in no way replace free access to the retail trade. Exclusive agreements bring special commercial advantges to the dealer in return for the limitation of his commercial freedom (2), and it can be seen that in practice the majority of dealers on the relevant market prefer these advantages to the exercise of commercial freedom if the range to be sold involves no commercial risk.

(131) In the competition to conclude exclusive agreements, undertakings whose marketing strategy does not provide for such agreements are placed at a disadvantage. They are compelled to take measures of this kind against their own commecial judgment. The same applies to undertakings seeking to enter the market. Dealers generally have higher expectations for the sales of established products than for the sales of products which have still to prove themselves on the market. Particularly where the exclusive obligation applies to entire ranges, resellers will have little inclination to experiment, and suppliers who might wish to offer partial ranges are prevented from competing for the conclusion of exclusive agreements.

(132) On a market in which exclusive agreements are customary, therefore, short lifetimes for such agreements will reduce their insulating effect only with respect to undertakings whose market position, organization and product range prepare them to compete for the conclusion of similar agreements. In any event agreements with a fixed duration of up to two years and an indefinite duration thereafter cannot be regarded as agreements with short lifetimes. They are at the upper end of what might be acceptable if competition were effective in other respects (Article 3 (d) of Regulation (EEC) No 1984/83).

(133) A further barrier to entry is the fragmentation of demand in the traditional trade. To run a distribution operation at reasonable cost a considerable number of customers must be secured in a geographically concentrated area which can be supplied from regional warehouses and centres. Because there are no independent middlemen — given the exclusive obligations customary in the trade, there cannot be — a supplier who wishes to establish himself in this branch of the relevant market, or to expand the area covered by an existing operation, within a reasonable time, must collaborate with or take over an existing manufacturer. If a competitor wishes to achieve an appreciable share of the market as a whole within the foreseeable future, only L-I and SLG are available for the purpose. Their market positions are so strong that it is not possible to compete effectively with them by cooperation with any other undertaking. This is true even of enterprises as strong as Jacobs Suchard and Mars. Cooperation of this kind would in any event serve to perpetuate the existing market structures.

(134) An exhaustive account of all the barriers to entry to the relevant market will not be attempted here (other examples would be the technology and know-how needed for the production of impulse ice-cream and the consumer preferences which have built up after many years of experience and advertising); but special mention should be made of the insulating effect on the relevant market as a whole of the restrictions on the use of the freezer cabinets which are everywhere supplied to retailers by the established manufacturers (recital 55).

(135) Clearly, retailers are allowed the use of these freezer cabinets, which are needed for the sale of impulse ice-cream, without having to bear the cost, or at any rate the entire cost, so that by giving up their commercial freedom they avoid having to make the corresponding investments themselves. Even competitors who are ready and willing to follow this customary trade practice are restricted in the competition they can offer. They must persuade dealers either to replace their freezer cabinet or to install further cabinets.

(136) A trader who replaces his freezer cabinet must give up selling the products of his current supplier. He will not do so if the current supplier, like SLG, is strong on the market, and the competitor is less well

(1) L-I estimates that in 1990 about [. . .] million litres were sold under exclusive agreements. On total sales of 131,8 million litres of impulse ice-cream and 69,9 million litres of ice-cream for bulk-buying customers, this would mean that the tied proportion of total sales volume in the traditional trade is about [> 55] %.

(2) Henninger, pargraph 12.

known or offers only a partial range which does not provide a full alternative to the earlier one.

(137) The possibility of installing further cabinets is limited: there may be no space available, or what space there is may be used for commercial purposes other than the sale of ice-cream. In the traditional trade there will be many sales outlets with no space for further cabinets. It might be thought that in other shops space could surely be found somewhere for a freezer cabinet, even if only a small one, as a general rule; but in fact this view seriously misjudges the constraints under which grocery retailing in particular operates. Firstly, impulse ice-cream cannot be put on offer just 'somewhere'; it is intended for immediate consumption, and must be displayed very close to the check-out desk [1]. And every section of the total surface of a retail store generally has a specific function. The existing freezer cabinets are already geared to the outlet's total requirements. Nor can it generally be expected that sales of ice-cream will increase substantially if further cabinets are installed. The effort and space devoted to a new cabinet is lost to other commercial purposes, without securing additional turnover.

(138) The only circumstance suggesting some degree of openess in the relevant market is its continuing expansion. In so far as this increases turnover at tied sales outlets, it does not help to facilitate market access. The situation is different where new sales outlets open. But the fact that exclusive agreements are customary in the trade means that competition for the new outlets, like competition for existing outlets which become free, is directed only at the conclusion of new exclusive agreements. The opening-up of the new *Länder* is a practical example of this kind of development. In such circumstances the expansion of the relevant market produces insufficient scope for access from outside or growth inside the market, particularly as far as new competitors and suppliers of incomplete ranges are concerned.

(139) Examination of the exclusive agreements taken together, and of the other economic and legal considerations which have just been discussed, shows that access to the retail level of the relevant market, and thus market entry itself, are rendered very difficult. The supply agreements contribute in no small measure to the insulation of this market. This assessment is confirmed by the observation that it is clearly a long time since any new supplier succeeded in changing the structure of the relevant market to his advantage.

(140) The conclusion would be the same if craft-trade ice-cream and industrial ice-cream for bulk-buying customers were to be included in the product market (recital 77).

— As far as can be seen, there is no major restriction in the way of persons wishing to enter the market as craft-trade ice-cream producers, but this is quite insignificant in terms of the structure of the market. Manufacturers of industrial impulse ice-cream cannot use producers of craft-trade ice-cream as a vehicle for markt entry.

— In the case of industrial ice-cream for bulk-buying customers, the distribution arrangement customary in the trade is the exclusive agreement, as with impulse ice-cream (recital 44). It has to be borne in mind here that for lines of this kind the traditional trade is the only distribution channel available. In this area, then, the effects of the supply agreements on competition are comparable for all lines.

— Lastly, it would be unreasonable to reply to a manufacturer of industrial impulse ice-cream that market entry in that line was impossible but that there would be less difficulty in marketing other lines.

— Competition inside the relevant market

(141) The barriers to entry to the relevant market just described also prevent any substantial shift in market shares inside the market.

(142) SLG takes the view, however, that there is effective competition at least between itself an L-I.

(143) This is certainly not true of the grocery trade, given L-I's position there (recital 31). Not only has L-I a high share of the volume of sales through this distribution channel, it is commercially strong, it has a major position on the related frozen food market, and it belongs to the Unilever group, which is one of the principal suppliers to the grocery trade on the same geographical market.

[1] The Commission emphasized the importance of display locations inside retail premises for competition between the goods on offer in its Decision 78/172/EEC in Case IV/29.418 Spices (OJ No L 53, 24. 2. 1978. p. 20).

(144) As far as the traditional trade is concerned, the competition which exists between SLG and L-I is to a great extent competition for the conclusion of exclusive agreements, which then exclude competition of any other kind for the duration of the agreement.

(145) In general it can be presumed that where there is a duopolistic market structure such as that obeserved on the relevant market here, competition between the duopolists tends to be limited. Any aggressive conduct on the part of either undertaking will very likely produce a corresponding reaction on the part of the other, whose market potential is comparable. The conviction will therefore arise that the maximization of the profits of both will be best served if they refrain from competing with one another.

(146) Thus competition is eliminated in such a way as to prevent exemption pursuant to Article 85 (3), because there is no effective competition on the relevant market. The supply agreements have effects which fail to satisfy the tests of Article 85 (3). In particular, access by other suppliers to the retail stage of distribution is made difficult to a significant extent.

(147) It remains to be considered whether the supply agreements can be divided in such a way that the negative effects just discussed can be attributed to a part of them only, while Article 85 (3) can apply to the rest. It need not be decided here whether in other economic and legal contexts such a division might be necessary. Given SLG's strong market position, which is protected not only by the supply agreements but by various barriers to entry and other agreements too (central buying agreements — recital 50 — and in particular the restrictions on the use of freezer cabinets — recital 55), the agreements as a whole fail to satisfy the tests of Article 85 (3). The exclusive agreements concluded with wholesalers who account for [...] million litres out of SLG's sales of impulse ice-cream through the traditional trade (recital 49) are not the subject of the operative part of the present decision, which relates only to the exclusive agreements which SLG concludes with retail traders.

C. PROTECTION OF LEGITIMATE EXPECTATIONS

(148) SLG takes the view that the Commission is bound by the assessment set out in its competent department's administrative letter of 20 September 1985. SLG concedes that that letter reserved the Commission's right to return to the matter if there were any substantial change in the legal or factual circumstances, but argues that that condition is not met: the main market data have remained unchanged since notification in 1985.

(149) It must be pointed out, first of all, that it was made very clear in that letter that the assessment was based largely on the account given in the notification. The account of the facts there was incomplete: there was no mention of the agreement in the ice-cream section of the Confectionery Assosciation calling for the mutual recognition of exclusive agreements (Commission letter of 29 November 1991 in Case IV/31.533), nor of the scale and extent of the restrictions on the use of the freezer cabinets provided by SLG and other manufacturers in the grocery trade, nor to other circumstances which would have enabled the competent department of the Commission to discern other barriers to entry. The same applies to SLG's account of the definition of the relevant market.

(150) Despite SLG's contention, the factual circumstances have changed in the meantime. The very entry of Mars and Jacobs Suchard are facts which would justify a review of the earlier assessment. A review is likewise necessary because it is only in this new context that it has become clear how closed the market is.

(151) The Commission is therefore not prevented from making an assessment of the supply agreements which differs from that in the administrative letter of 20 September 1985.

D. ARTICLE 3 OF REGULATION No 17

(152) In response to the application by Mars, therefore, the Commission must find pursuant to Article 3 (1) of Regulation No 17 that the supply agreements constitute an infringement of Article 85.

(153) The supply agreements are still in force. SLG must therefore be required to refrain from invoking its contractual rights in respect of the exclusivity of sales outlets, and to inform the other parties to the contracts accordingly. In view of the particular circumstances of the case, however, SLG should be given an opportunity to apply to the Court of First Instance of the European Communities for a judicial review of this Decision. This measure should consequently take effect only three months after notification of the Decision.

(154) The order not to invoke the supply agreements would serve no purpose if SLG were permitted immediately to replace the current agreements by new ones. SLG must therefore be prohibited from

concluding fresh agreements of this kind for a period sufficient to allow a substantial change in market structures. The Commission is of the opinion that, given the rigid structures of the relevant market as well as the barriers to entry to that market which are outlined above, a period of five years is appropriate. If the market structures change substantially before the expiry of that period SLG is free to apply for an early lifting of the prohibition,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

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

Article 4

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

Article 5

This Decision is addressed to:

Schöller Lebensmittel GmbH & Co. KG
Bucherstraße 137
D-W-8500 Nürnberg.

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

Vice-President

[1] Kleineis, as defined in the commentary on product classification describing the situation at 21 May 1990, drawn up by the ice-cream section of the Association of the German Confectionery Industry (Bundesverband der Deutschen Süsswarenindustrie e. V.).