OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 6 July 2000 *

1. This preliminary reference concerns the compatibility with Article 85 of the EC Treaty (now Article 81 EC) of exclusive purchasing agreements concluded in Finland by a supplier of petroleum fuels in respect of service stations. The central issue raised is whether the effects of certain agreements, which at the time of the dispute in the main proceedings could freely be terminated subject only to a short notice period, may be assessed separately from the other fixed-duration agreements of the supplier in question. No question has, however, been referred regarding whether such agreements, if caught by the prohibition in Article 81(1) EC, may benefit from the relevant Commission block exemption applicable at the material time. [1]

I — The legal and factual background

2. On 7 and 15 October 1986, Yötuuli Ky, formerly M. Jukkola Ky, concluded with Kesoil Oy, the predecessor of Neste Markkinointi Oy, a cooperation and marketing agreement in respect of the operation of a service station. The agreement provided that Yötuuli Ky became a member of the Kesoil Oy chain and was to sell on its premises exclusively oil and other special products marketed by the latter. The agreement was concluded for 10 years, after which it was to continue, unless terminated by either of the parties, for further periods of five years. Notice of termination was to be given six months before the end of the term of the contract so determined. However, it was also provided that, once the agreement had been in effect for at least 10 years, the purchaser was entitled, at any time, to terminate the agreement by giving one year's notice.

3. Yötuuli Ky informed Neste Markkinointi Oy, by a letter dated 23 June 1998, that it would end its purchases of fuel in accordance with the agreement with effect from 1 July 1998. [2] Neste Markkinointi Oy (hereinafter 'the claimant' or 'Neste') subsequently brought a claim before the Tampereen Käräjäoikeus (Tampere District Court) against Yötuuli Ky and

* Original language: English.

1 — See 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. This regulation was adopted by the Commission on the basis of the authority granted by the Council in Council Regulation 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, as amended; OJ, English Special Edition, Series I (1965-1966), p. 533.

2 — It would appear from the uncontradicted oral observations submitted by Neste that the original 1986 contract was renewed for a further period of five years on 7 October 1996, but that the new contract was subject to termination by either party on giving one year's notice.

its responsible partners (hereinafter collectively referred to as 'the defendants') for compensatory damages of FIM 530 000 for breach of contract in terminating the agreement without giving the required one year's notice.

4. In their defence, the defendants submitted that the exclusive purchasing obligation was contrary to Article 81(1) EC. They contended that fewer than 5% of owner-traders were free from such obligations in Finland, that access to the Finnish market was also restricted by the lack of independent retailers and that the existing high density of distribution outlets throughout the country further restricted access. Furthermore, in their view, Article 10 of Regulation No 1984/83 was not applicable to the agreement, because, once it continued automatically after the initial 10-year period, it was to be regarded as having been concluded for an 'indefinite duration' within the meaning of Article 12(1)(c) of that Regulation. The agreement was thus void pursuant to Article 81(2) EC.

5. The claimant contested this defence. It submitted that an exclusive purchasing obligation should only be prohibited if it is clear, as a result of the overall effect of the agreements in question, that national or foreign competitors cannot enter the relevant market, and if the effect of those and other similar agreements on the partitioning of the market is significant. While 573 of the total of 1 799 service stations operating in Finland on 31 December 1997 belonged to Neste's chain, and notwithstanding that it enjoyed a 33.5% share of the Finnish retail petrol market and a 44.2% share of that for diesel, by July 1998 only 27 of its retailer agreements contained the clause on duration at issue. The 27 service stations concerned were generally small and accounted for only 2.48% and 1.07%, respectively, of Finnish petrol and diesel sales. Consequently, it submitted that Yötuuli Oy's agreement could not have had any significant market-partitioning effect and that any limitations of access to the Finnish market did not result from the exclusive purchasing terms included in service station agreements. In the retail petroleum-fuels supply market competition takes place chiefly on the basis of price.

6. The Tampereen Käräjäoikeus (hereinafter 'the national court'), in its order for reference of 1 June 1999, considers that the 'degree of tying-in caused by the network [of exclusive purchasing agreements in the Finnish service station market] is considerable'. However, it points out that the question whether access to the market is actually prevented is disputed between the parties. Referring to the Court's *Brasserie de Haecht* and *Delimitis* case-law, it notes that an exclusive purchasing agreement will only infringe Article 81(1) EC if, having regard to its economic and legal context, it hinders access to the market or renders it

difficult to increase existing market share.[3] Regard must be had, in this respect, to whether the agreement is part of a network of similar agreements whose cumulative effect is to restrict competition. Secondly, 'the agreement must have a significant effect on the closing-off effect of the market caused by the network'. In its view, the 'extent of the influence of the individual agreement depends on the position of the parties to the agreement in the relevant market and the duration of the agreement'.

7. The national court considers that the dispute before it requires it to decide whether 'the prohibition based on the overall effect of the network of agreements applies also to the agreement at issue'. This raises the issue whether the effects on competition of the agreements of a particular supplier must be viewed globally or whether they may be viewed separately. In its view, the agreement at issue, viewed together with other agreements that are terminable following on one year's notice period, would not appear to have significant effects on the partitioning of the market. It regards the judgments of the Court of First Instance in *Langnese-Iglo* and *Schöller*, interpreting *Delimitis*, to be insufficiently precise on the question whether an autonomous analysis of certain agreements is possible.[4] In its view, agreements that are concluded for a duration of several years restrict market access significantly more than those which may be ended upon short notice. It would not be arbitrary to treat such agreements separately for the purpose of applying Article 81(1) EC to a particular supplier's network of agreements. However, this approach could infringe the principle of legal certainty, which may require that the applicability of a prohibition based on the overall effect of networks of exclusive purchasing agreements be considered only following a global assessment of all the agreements of each supplier.

8. It has referred the following question to the Court:

'Is the prohibition referred to in Article 85(1) of the EC Treaty applicable to an exclusive purchasing agreement concluded by a supplier of goods, which could be terminated by the retailer at any time on one year's notice, if all the exclusive purchasing agreements concluded by that supplier have had a significant influence on the partitioning of the market, either on their own or together with the network of exclusive purchasing agreements concluded by all suppliers, but the agreements of similar duration to the exclusive purchasing agreement in question represent only a very small proportion of all the exclusive purchasing agreements of the same supplier, the majority of which are fixed-term agreements which have been concluded for a period of several years?'

3 — See Case 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407 (hereinafter '*Brasserie de Haecht*') and Case C-234/89 *Delimitis* [1991] ECR I-935.

4 — See Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533 and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611.

II — Observations

9. Written and oral observations have been submitted by Neste, the French Republic and the Commission.

10. Neste pointed out in its oral observations that no question concerning the possible application of the block exemption arises in this case. It submits that competition in the market for the retail supply of petroleum fuels in Finland is limited to inter-brand price competition. Relying principally on *Delimitis*, it asserts that the agreements of the type in question have no, or at most only minimal, effects on competition on that market. An unconditional right, on giving one year's notice, to terminate a contract is wholly reasonable because it allows both the reseller and the supplier a reasonable period of time in which to prepare for a smooth change of supplier at the station. It permits the former real freedom to switch suppliers, while providing the existing supplier with a chance to recoup its often considerable investments at the station on behalf of the reseller, or its costs in having provided the latter with equipment or low-cost loans.

11. France proposes that the Court reformulate the question referred so as to consider whether a contract containing a clause providing for tacit renewal is necessarily one which has been concluded for an 'indefinite duration' and, if so, what are the consequences on market access of such clauses. In its view, tacit renewal should not invariably, for the purpose of applying Regulation No 1984/83, be equated with an indefinite duration. At the oral hearing, its agent stressed that national courts must be free to assess the real effects on competition of contracts that contain tacit renewal clauses; such clauses, if the notice required is reasonable, may promote rather than restrict competition. To require in all cases a global approach to a supplier's network of contracts would restrict the autonomy of national courts and would ignore the potentially pro-competitive effects of tacitly renewable contracts where the possibility of switching suppliers always remains genuinely available. France contends that national courts should be entitled to take account of the diversity of potential situations. A tacitly renewable contract concluded for a short period of one or two years could facilitate a greater turnover of suppliers than fixed-duration contracts concluded for four or five years. However, where a contract falls to be regarded as having been concluded for an indefinite duration, France submits that the mere fact that the category of contracts of which it forms part may represent only a small proportion of the exclusive purchasing contracts operated by a particular supplier would not justify separate consideration of the effects on competition of that contract.

12. The Commission submits that the fact that the effects on competition of an individual contract or group of contracts are relatively insignificant does not mean that such a contract or group of contracts is

not caught by Article 81(1) EC. In its view, the decisive question is whether such contracts have the same effect on competition as the other contracts of the same supplier. In its view, segregating the contracts of a particular supplier would be arbitrary, would run counter to the approach adopted by the Court in *Delimitis* [5] and, in addition, was expressly excluded by the Court of First Instance in *Langnese-Iglo* [6] and *Schöller*. [7] While the national court alone may assess the effects on the Finnish market of the contracts at issue, the Commission's agent contended at the hearing that tacitly renewable contracts were likely to last longer and, thus, pose a greater threat to competition than contracts concluded for fixed periods, since the predetermined expiry date of the latter focuses the reseller's mind on the possibility of switching suppliers.

III — Analysis

A — *The block exemption*

13. As is clear from the order for reference, the national court has asked only whether the agreement at issue infringes Article 81(1) EC. Nevertheless, it also emerges that the defendants have submitted that, if that prohibition applies, the agreement cannot benefit from the block exemption for certain service station agreements provided in Title III of Regulation No 1984/83, which was in force in June 1998 when the defendants gave notice of termination of the agreement. [8] No question has been referred regarding the applicability of the group exemption, as the national court appears to have assumed that it does not apply. However, the Commission and France have addressed written observations on the issue. Neste does not consider it.

14. Article 10 of Regulation No 1984/83 provides an exemption from Article 81 EC for 'agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier ... certain petroleum based motor-

5 — Loc. cit., footnote 3 above. The Commission refers particularly to paragraphs 24 and 25.

6 — Loc. cit., footnote 4 above. Reference is made to paragraphs 129, 206 and 207.

7 — Ibid. Reference is made to paragraphs 95, 160 and 161.

8 — This group exemption, which was initially due to expire on 31 December 1997, was extended until 31 December 1999 by Commission Regulation (EC) No 1582/97 of 30 July 1997 amending Regulations (EEC) No 1983/84 and No 1984/83 on the application of Article 81(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements respectively (OJ 1997 L 214, p. 27). It was, thus, in force in July 1998 when the present dispute arose. It has now been replaced by the exemption provided in Article 2 of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). Neste's agreements would not appear to benefit from the new exemption, whose application is limited, under Article 3 of Regulation No 2790/1999, to suppliers whose market share does not exceed 30%. However, under Article 12 of that Regulation, the earlier exemption effectively continues until 31 December 2001 in respect of agreements which benefited from the old exemption but which are no longer exempt under the new one.

vehicle fuels and other fuels specified in the agreement for resale in a service station designated in the agreement'. Article 12(1)(c) provides, however, that this exemption shall not apply where 'the agreement is concluded for an *indefinite duration* or for a period of more than 10 years' (emphasis added). The question that might be said to arise in this case is whether an agreement concluded for 10 years and thereafter automatically renewable in the absence of notice of termination for further periods of five years constitutes an agreement of 'indefinite duration' and is thereby excluded from qualifying for exemption under Article 10 of Regulation No 1984/83.

15. Although I was initially of the view that, in order to provide the fullest and most useful answer possible to the national court, it would be helpful to consider the possible applicability of Regulation No 1984/83, I have been persuaded otherwise by Neste's unqualified submission at the oral hearing to the effect that the block exemption is not at issue in this case. [9] In those circumstances, it would not be appropriate, in my view, for the Court, at least in the absence of a question from the national court, to consider whether a contract such as that at issue is to be regarded as being of 'indefinite duration' for the purpose of Regulation No 1984/83 [10] and thus excluded from the benefit of the block exemption. [11]

B — *Article 81(1) EC and exclusive purchasing agreements*

16. The national court's question presupposes that either the network of exclusive purchasing agreements entered into by Neste viewed on its own, or along with the parallel networks of similar agreements concluded by other petroleum-fuel suppliers in Finland, has significant market-foreclosing effects. The finding as to the existence of such effects has been made by the national court in the light of the Court's *Brasserie de Haecht* and *Delimitis* case-law. [12] It has not, however, yet made any definite finding about whether access is actually prevented or whether the contracts at issue make any significant contribution to the overall tying-in effects of Neste's

9 — It informed the Court that following Finland's accession to the European Union, it succeeded, in 1995, in renegotiating all its exclusive purchasing agreements with the exception of the 27 agreements at issue so that they would comply with the exemption block-requirements of Regulation No 1984/83. After the present dispute arose, it rescinded, in accordance with the one-year notice period, the remaining 26 contracts and replaced them with contracts that also comply with that group exemption.

10 — As regards the new block exemption provided by Article 2 of Regulation No 2790/1999, Article 5(a) provides that '[A] non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration'. It thus falls outside the scope of the maximum period of five years allowed under the new Regulation.

11 — The possibility that the agreement at issue might benefit from the application of the doctrine of provisional validity, confirmed recently by the Court in Case C-39/96 *KVBBB v Free Record Shop* [1997] ECR I-2303, on the basis that it was exempt from notification under both Article 4(2) of Protocol 21 to the EEA Agreement and Article 4(2) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-62, p. 87) and that it represents effectively a mere, or indeed a less restrictive, re-enactment of the original 1986 agreement has not been raised in the present case. I do not therefore intend to express any view on that complex issue.

12 — Loc. cit., footnote 3 above.

network of agreements. It wishes, rather, first to know whether it is permissible, when applying Article 81 EC, to consider separately some of a supplier's agreements. It will assist in answering this question if I recall the principal elements of the case-law.

(i) The relevant case-law

17. In *Brasserie de Haecht* the factual context was the simultaneous existence of a large number of exclusive purchasing agreements imposed by a small number of Belgian breweries. The Court was asked whether it was the economic context of the whole market or the effects of the particular agreements in issue, considered in isolation, that had to be considered for the purposes of Article 81 EC. It ruled that the effects on competition of an exclusive purchasing agreement had to be assessed 'in the context in which they occur, that is to say in the legal and economic context' of the agreement. [13] This is because 'it would be pointless to consider an agreement ... by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation'. [14] For the purpose of determining whether an agreement actually falls within Article 81(1) EC, it then held that '[T]he existence of similar contracts *may be taken into consideration* ... to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade' (emphasis added). [15]

18. The Court has, therefore, not adopted a strict *per se* approach to the applicability of Article 81 EC to exclusive purchasing agreements. It has never formally held that such agreements have as their 'object' the restriction of competition, but, rather, has focused on whether, viewed in the totality of their economic and legal context, their effect is to restrict competition. The same approach is to be found in the seminal 1966 judgment in *Société Technique Minière* v *Maschinenbau Ulm* [16] where the Court, conscious of the potential pro-competitive benefits, in terms of facilitating market penetration, of vertical restraints in supply contracts, held that, for 'a clause granting an exclusive right of sale' in a defined territorial area (in that case an entire Member State) 'to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of

13 — [1967] ECR 407, p. 415.
14 — Ibid.
15 — Ibid.
16 — Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235.

parallel re-exportation and importation'. [17] The Court has thus stressed right from the earliest days of Community competition law the importance of a dynamic and contextual analysis. This approach was categorically confirmed and developed by it more recently in *Delimitis*, which concerned the German beer market.

19. In *Delimitis*, the Court first provided a far from unfavourable overall assessment, so far as their object is concerned, of the nature of exclusive purchasing agreements: [18]

'Under the terms of beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, such as the grant of loans on favourable terms, the letting of premises for the operation of a public house and the provision of technical installations, furniture and other equipment necessary for its operation. In consideration for those benefits, the reseller normally undertakes, for a predetermined period, to obtain supplies of the products covered by the contract only from the supplier. That exclusive purchasing obligation is generally backed by a prohibition on selling competing products in the public house let by the supplier.

Such contracts entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, lead to co-operation with the reseller, allowing the supplier to plan his sales over the duration of the agreement and to organise production and distribution effectively.

Beer supply agreements also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service.

If such agreements do not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition.'

The same rationale applies, to my mind, to the exclusive supply and purchasing obligations imposed in service station agree-

17 — Ibid., at p. 250.
18 — Paragraphs 10 to 13.

ments. Such agreements should not be viewed as falling within Article 81(1) EC unless, in the economic context in which they occur, they contain clauses whose effects on competition are 'sufficiently deleterious'. [19]

20. Since an individual agreement such as a service station agreement between a supplier of fuels and an operator of a local petrol station would be unlikely ever to engender the restrictive effects necessary to be considered as capable of falling within the scope of Article 81(1) EC, the Court has consistently followed the advice of Advocate General Roemer in *Brasserie de Haecht* and considered the effects of such agreements in their overall market context. [20] However, to determine whether national courts may segregate a particular supplier's network of the exclusive purchasing agreements for the purpose of determining whether, viewed separately, the effects of certain agreements on competition are so negligible as to render Article 81 EC inapplicable, it is necessary to examine carefully the dynamic contextual approach formulated by the Court in *Delimitis*, with regard to the effect of such agreements.

21. In *Delimitis* the Court was concerned with whether the existence of several exclusive purchasing agreements 'impedes access to the market'. [21] To determine whether access was impeded, it held that it was first necessary to look at 'the extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale ...'; i.e. at the cumulative effects on competition of the various parallel networks of agreements. However, even if the 'bundle of similar contracts' has 'a considerable effect on the opportunities for gaining market access', the market may not necessarily be foreclosed. [22] On the contrary, before this limb of the test may be deemed to be satisfied, the 'opportunities for access' and the 'competitive forces' operating on the market must also be considered. [23]

22. It is only if an examination of those factors reveals that 'it is difficult to gain access to the relevant market' that the various individual agreements in question potentially restrict competition. [24] However, it is necessary to determine whether the particular supplier's contracts contribute to an appreciable extent to 'the cumulative effect produced ... by the totality of the similar contracts found on the market'. [25] This assessment requires that not only the market share held by that

19 — *Société Technique Minière* v *Maschinenbau Ulm*, loc. cit., footnote 16 above.

20 — Referring to beer-supply agreements, he observed that they '... do not seem, when viewed in isolation, to be prejudicial to the Common Market in any way', that 'this assessment is hardly altered if the entire distribution network of one brewery is examined as a whole, since where many such distribution networks exist ... it would be difficult for a single one of them to have an *appreciable* effect on trade between countries', but that such an effect could 'occur as the result of the combined operation of *all* the internal beer distribution agreements in a Member State'; see [1967] ECR 407, at pp. 420 and 421 (emphasis in original).

21 — Paragraph 19.

22 — Paragraph 20.

23 — See paragraphs 20 to 22.

24 — Paragraph 24.

25 — Paragraph 24.

supplier but also the duration of its contracts be considered. As duration is central in the present case, it is worth fully quoting the relevant passage of the judgment: [26]

'If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals.'

(ii) Application in the present case

23. The national court has not yet decided whether access to the Finnish market for the supply of petroleum fuels is impeded for the purpose of the first limb of the *Delimitis* test. Notwithstanding the very strong market position enjoyed by Neste (577 service stations of a total of 1 799 on 31 December 1997), if new and equally efficient competitors could still without difficulty enter the market, or if existing competitors could readily increase their market share, competition could not be regarded as adversely affected by the existence of the present parallel networks of exclusive distribution agreements. Neste has emphasised in both its written and oral observations that there are no restrictions affecting the importation of petroleum fuels into Finland, while the price, which is the most significant factor in competition on the retail market, is essentially fixed on the world market and is more precisely calculated for Nordic countries by reference to the prices charged at the ports of Antwerp, Rotterdam and Amsterdam. It has also pointed to new suppliers who have successfully entered the Finnish retail petroleum-fuels supply market in recent years, including the JET chain, which now has a 10% market share with just 25 service stations, which is less than 2% numerically of the total. Moreover, it appears that the average duration of service station agreements in Finland, including those of the claimant, is now three to five years.

24. It must be recalled, however, that the defendants have claimed before the national court that the Finnish retail petroleum-fuels supply market is already saturated. The mere fact that some new competitors have recently succeeded in gaining a foothold on that market, and that Neste's market share has lately been slipping, does not preclude a finding, which it is for the national court alone to make by applying the *Delimitis* criteria, that access to the market 'is difficult'. To my mind, there must be more than a 'real possibility' of

26 — Paragraph 26.

access, which must not, at least not exclusively, be based on acquiring or taking over existing suppliers.[27] If the national court ultimately forms the view that competition is not restricted by the various networks of exclusive purchasing agreements, then the defence raised by the defendants to Neste's claim must fail, since the agreement at issue could not, on its own, restrict competition for the purposes of Article 81(1) EC.

25. If the national court, however, concludes that access to the Finnish retail petroleum-fuels supply market is impeded by the various networks of exclusive distribution agreements, it is noteworthy that it is explicitly stated in the order for reference — a finding which would seem reasonable given Neste's strong market position and its very large share of the total number of tied service stations — that the contribution of the claimant's network of agreements to the overall foreclosure of that market is significant. The novel aspect of this case is that the national court would appear to be satisfied that, apart from the 27 agreements in question, all of the claimant's agreements, which were in existence on 1 July 1998 when the defendants allegedly breached their contract, were covered by the block exemption contained in Article 10 of Regulation No 1984/83. Consequently, the question arises whether it is permissible to view separately the effects on competition, on that date, of those 27 agreements, in so far as they were terminable on giving one year's notice.

26. A persuasive and cogent argument based on legal certainty can be made in favour of requiring a global analysis for the purpose of determining whether a supplier's network of agreements is caught by Article 81(1) EC. The extensive economic analysis that the *Delimitis* approach already requires of national courts charged with the application of Article 81 EC is, by its very nature, complex and will, for all courts apart from those more specialised in competition law, almost invariably present difficulties. This was recognised by the Court itself in *Delimitis*, where it drew attention to the Commission's duty to cooperate with national courts which, 'within the limits of the applicable national procedural rules', seek advice or information from the Commission 'where the concrete application of Article 85(1) or of Article 86 raises particular difficulties [and] in order to obtain the economic and legal information which that institution can supply to [them]'.[28] Moreover, since one of the important and *sui generis* objectives of Community — as distinct from

27 — See *Delimitis*, paragraph 32, where the Court considered that a clause allowing a beer reseller to purchase beer from other Member States could not affect the assessment under Article 81(1) EC of an exclusive purchasing agreement unless the clause gave 'a national or foreign supplier of beer from other Member States a *real possibility* of supplying the sales outlet in question' (emphasis added). In my opinion, it follows that there must be a substantive, as opposed to a minimal, opportunity for new competitors to enter the relevant market in order to avoid the conclusion that market access is 'difficult'; see also in this respect the judgments in *Langnese-Iglo*, paragraph 106 and in *Schöller*, paragraph 82 where the Court of First Instance refers to whether there are 'real and specific possibilities for new competitors to penetrate the market despite the existence of a network of exclusive purchasing agreements'.

28 — Paragraph 53.

national — competition policy is to promote the integration of Member State markets, and since most exclusive purchasing agreements, viewed in isolation, would never affect inter-State trade, it is clearly both appropriate and essential that a global and contextual assessment be made of each network of such agreements.

27. I consider that the judgments of the Court of First Instance in *Langnese-Iglo* and *Schöller* provide support for this view. [29] One of the applicants' contentions in both cases was that their exclusive purchasing agreements with their ordinary (small) resale outlets could be distinguished from sales of ice-cream at service stations. This view was earlier accepted by the President of the Court of First Instance in the interim application brought in 1992 [30] for the suspension of a Commission decision that had been adopted in that case. [31] In adopting 'a temporary solution' for the purpose of disposing of the interim application, the President of the Court of First Instance suspended the operation of the impugned decision with the exception of retail outlets in service stations. [32] He thus sought to balance the competing economic interests of the applicants and the regulatory interests of the Commission by permitting their competitor, Mars, 'the possibility of negotiating' with the service station outlets 'the conditions for the distribution of its four ice-cream products'. [33] However, in the substantive actions challenging the definitive decision adopted in 1993 by the Commission, the Court of First Instance refused to consider any individual agreements separately. [34] Referring to *Delimitis*, it held 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'. It also agreed with the Commission's observation that 'it might be arbitrary in the present case to divide the contested agreements into different hypothetical categories'. [35]

28. Nevertheless, when considering the applicants' plea that the Commission had no power under Article 3 of Regulation No 17 of the Council of 6 February 1962 to prohibit them from concluding in the future any exclusive purchasing agreements similar to those declared to be contrary to Article 81(1) EC, the Court of First Instance held that, 'where an examination of *all similar agreements* entered into on the relevant market and the other factors

29 — Loc. cit., footnote 4 above.

30 — See Cases T-24/92 R and T-28/92 R *Langnese-Iglo* v *Commission* [1992] ECR II-1839.

31 — Commission Decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.072 — Mars/Langnese and Schöller — Interim Measures). This was an interim decision in which the Commission had prohibited the applicants from enforcing their contractual rights under their exclusive purchasing agreements.

32 — See paragraphs 30 and 31 of the Order.

33 — Paragraph 32.

34 — 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 (IV/31.533 and IV/34.072) and 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. 1 and p. 19 respectively.

35 — *Langnese-Iglo*, paragraph 129, *Schöller*, paragraph 95, both cases cited in footnote 4 above.

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)' (emphasis added). [36] It then observed that 'Article 85(1) does not, as a general rule, preclude the conclusion of exclusive purchasing agreements, provided they do not contribute significantly to any partitioning of the market'. [37] The Court of First Instance was thus of the view that the compatibility of such agreements should, in general, be assessed in their global context.

29. The case-law therefore requires national courts to consider all the 'similar' agreements operated by a particular supplier. Normally the various agreements comprised in a network of exclusive purchasing agreements operated by a particular supplier would be 'similar', if not almost identical. However, in my opinion, it does not follow that particular agreements containing specific clauses having clearly different *economic effects* should, for the purpose of applying the *Delimitis* test, necessarily be regarded as 'similar'. I agree with Neste that this view is not inconsistent with *Langnese-Iglo* and *Schöller*, because in those cases it was the type alone of certain reselling outlets (which were in fact service stations) that was advanced as justifying a separate treatment of their agreements from that applicable to agreements with other ice-cream resellers. For a distinction to be relevant, it must be significant and based on the substantive terms of the agreements at issue and their materially different economic effects.

30. The clearest support for this view can be derived from *Delimitis* itself. By recognising that a clause allowing a tied publican to purchase beer from other Member States could affect the assessment under Article 81(1) EC of an exclusive purchasing agreement, provided it genuinely permitted that publican to be supplied by other suppliers, the Court obviously accepted that the effects on competition of every agreement entered into by a supplier were not necessarily the same. It held that (emphasis added): [38]

'If the interpretation of the wording of the access clause or an examination of the specific effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition on competition is merely hypothetical or without economic significance, *the agreement in question* must be

36 — *Langnese-Iglo*, paragraph 206, *Schöller*, paragraph 160. The Commission pointed out in its written observations that, in the Finnish version of the judgments, there is no reference to 'of a supplier' but merely to exclusive purchasing agreements whose contribution to a cumulative effect is insignificant. However, in the authentic German version, the reference to supplier, '... die Alleinbezugsvertraege *eines Lieferanten*' (emphasis added), is included.

37 — *Langnese-Iglo*, paragraph 207, *Schöller*, paragraph 161.

38 — Paragraphs 31 and 32.

treated in the same way as a classic beer supply agreement. Accordingly, it must be assessed under Article 85(1) of the Treaty *in the same way as beer supply agreements in general.*

The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. *An agreement containing such a clause is not in principle capable of affecting trade between Member States* within the meaning of Article 85(1), with the result that it escapes the prohibition laid down in that provision.'

31. Neste therefore correctly stresses the importance of 'duration' clauses in service station exclusive purchasing agreements. Clauses governing the duration of agreements comprised in a network of exclusive purchasing agreements are clearly material to their market effects and shorter periods are, by their nature, less restrictive. It is a question of degree. In *Delimitis*, the Court observed that the contribution of a brewery's individual contracts to market foreclosure depends on their duration: 'If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1)'.[39] The converse also follows, in my opinion; namely that, if the duration of certain individual contracts, terminable at short notice, is so much less than that of a network of agreements, their effect on sealing-off the relevant market may be so slight that they fall outside the scope of Article 81(1) EC. The effects of contracts so differentiated must therefore be capable of individual assessment by national courts. I see no reason why a limited number of agreements concluded by a supplier of petroleum fuels which, overall, has many outlets, and by which the relevant outlets are not tied for any longer than may be regarded as wholly reasonable in the market at issue, both from the point of view of permitting those outlets to switch suppliers and that of affording the existing supplier a realistic opportunity of preparing for a changeover, should not be assessed separately.

32. I do not accept the Commission's argument that subdividing a network of exclusive purchasing agreements would always be arbitrary. On the contrary, it seems to me that the national court has correctly analysed the distinction to be made, saying that 'it may be supposed in principle that agreements of several years' duration restrict access to the market significantly more than agreements which may end at any time with a short notice period', and that '... it would not be arbitrary to apply a prohibition based on the overall effect of the network of agree-

39 — Paragraph 26.

ments to agreements belonging only to the former and not to the latter group, if the former form the majority and the latter only a small part of the agreements concluded by one supplier of goods which significantly influence the overall effect'. The Commission has, itself, recognised that the principal problem posed by exclusive purchasing agreements in the retail-fuels sector, where intra-brand competition at sales outlets is not feasible, is that of market foreclosure, which, it accepts, can best 'be remedied by limiting the effective duration of contracts'. [40] At the oral hearing, in response to questions from the bench, the Commission, although reiterating its concern about the effects of tacitly renewable agreements, accepted that a clause importing a short notice period into a service station agreement could make a difference to a national court's assessment of whether the agreement of which that clause forms part makes any contribution to the overall effects on market access of the supplier in question's network of agreements. [41]

33. I accept that a national court in an action for breach of contract, when faced with a 'Community-law' defence based on the alleged incompatibility of an exclusive purchasing agreement with Article 81(1) EC, need in most cases only look at the overall contribution of a particular supplier's network of agreements to hindering access to the market. However, where it is clear that a small number of that supplier's agreements is easily distinguishable from the general body of agreements constituting its network, the national court concerned should not be precluded from considering the effects of that limited number of agreements separately. [42] Concerns related to legal certainty should not impose an analytical strait-jacket on national courts when considering the effects of a network of exclusive purchasing agreements.

34. The mere fact that certain agreements may, because of their distinctiveness, occasionally merit separate assessment does not relieve the national court of its obligation to consider, by reference to their effects, whether they are capable of restricting competition and, thus, falling within the scope of Article 81(1) EC. A relatively short notice period in certain retail markets, like those for ice-cream and beer where there is far greater product differentiation than in the retail petroleum-fuels supply market, could still contribute to a

40 — See the Commission's new 'Guidelines on Vertical Restraints' (paragraph 151), which were issued in December 1999 along with the adoption of the new block exemption regulation (Regulation No 2790/1999, loc. cit., footnote 8 above) and which took effect on 1 June 2000. They have to date only been published on the Internet (see, in this respect, http://europa.eu.int/comm/dg04/antitrust/legislation/verticalrestraints/guidelinesen.pdf). In paragraph 143 of the earlier draft version of the Guidelines, published along with the draft new block exemption regulation (see OJ 1999 C 270, p.12), it cited explicitly the example of 'petrol retailing'.

41 — The fact that Regulation No 2790/1999 specifically provides (Article 8) that the Commission may withdraw, by regulation, the benefit of the group exemption provided for in Article 2 of that Regulation, in the case of 'parallel networks of similar vertical restraints' which 'cover more than 50% of a relevant market', does not support the Commission's opposition to the separate treatment in certain circumstances of individual agreements, since the power granted by Article 8 is, like the approach to Article 81(1) required by *Delimitis*, predicated on the similarity of the agreements at issue.

42 — Neste informed the Court at the hearing that the defendants, along with the other 26 resellers, made a business decision in 1995, when Neste wished to amend all of its agreements so as to bring them into conformity with Regulation No 1984/83, to retain the agreements originally concluded in 1986.

not insignificant degree to an overall tying-in effect flowing from a major supplier's network of agreements. However, if, at the time a dispute arises, the agreements in question give resellers a virtually unrestricted opportunity, without being subject to penalties on existing loans or any other disguised termination disincentives, to switch suppliers, it is difficult to conceive of any adverse effect on competition on the relevant market flowing from them. This would *a fortiori* be the case if the national court were to accept Neste's assertion in the present case that there are no significant barriers to entry to the Finnish retail petroleum-fuels supply market.

35. In summary, I am satisfied, at least in respect of exclusive purchasing agreements in the service station sector, where it is common ground that competition is essentially limited to inter-brand price competition and where it is also clear, unlike, for example, in the beer and ice-cream markets, that there is little or only insignificant brand loyalty among consumers, that an agreement concluded by a supplier which may be terminated by the reseller at any time simply by giving one year's notice is not similar to other fixed-term agreements which tie the reseller to the supplier for significantly longer periods of time. Such agreements, where they constitute a small minority of that supplier's network of agreements and where they genuinely permit the reseller readily to switch suppliers, should be assessed separately by national courts.

IV — Conclusion

36. Consequently, I would recommend that the Court answer the question referred by the Tampereen Käräjäoikeus as follows:

Article 85(1) of the EC Treaty (now Article 81(1) EC) does not apply to an exclusive purchasing agreement concluded by a particular supplier which,

because it is terminable on giving a short period of notice, is economically distinguishable, as regards its effects on competition, from the majority of the other exclusive purchasing agreements of the same supplier, provided the agreement in question has insignificant effects on access to the market. This is so even if all the exclusive purchasing agreements concluded by that supplier, considered as a whole or together with the parallel networks of similar agreements concluded by the other suppliers active on the market, have a significant influence on foreclosure of the market.