JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

7 July 1994 *

In Case T-43/92,

Dunlop Slazenger International Ltd, a company incorporated under English law whose registered office is in Leatherhead (United Kingdom), represented by Nicholas Green, Member of the Bar of England and Wales, instructed by John Boyce and Richard Brent, Solicitors, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Berend-Jan Drijber, of the Legal Service, acting as Agent, assisted by Scott Crosby, Solicitor, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of Commission Decision 92/261/EEC of 18 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and Others) (OJ 1992 L 131, p. 32),

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

composed of: J. L. Cruz Vilaça, President, C. P. Briët, A. Kalogeropoulos, D. P. M. Barrington and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 December 1993,

gives the following

Judgment

The background to the application

1 This case concerns an application for the annulment of Commission Decision 92/261/EEC of 18 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and

Others) (OJ 1992 L 131, p. 32, hereinafter 'the Decision'), in which the Commission found that Dunlop Slazenger International Ltd (hereinafter 'DSI') had infringed Article 85(1) of the Treaty by applying in its business relations with its customers a general ban on exporting its products and by implementing, in concert with certain of its exclusive distributors, various measures in order to ensure enforcement of that general export ban and imposed a fine of ECU 5 million on DSI. The application also seeks annulment or alternatively reduction of that fine.

The complaint

2 DSI, a company incorporated under English law whose name until November 1984 was first 'International Sports Company Limited' and then 'Dunlop Slazenger Limited', was acquired in March 1985 by the BTR group as a result of BTR plc's takeover of DSI's holding company, Dunlop Holdings plc. DSI is responsible within that group for the manufacture and distribution of sports equipment worldwide.

3 On 18 March 1987 Newitt & Co. Ltd (hereinafter 'Newitt'), a company incorporated under English law, a wholesaler and retailer of sports equipment, submitted a complaint against DSI to the Commission alleging infringement of Articles 85(1) and 86 of the EEC Treaty.

4 In its complaint Newitt stated that it used to purchase from DSI in the United Kingdom a large range of sports equipment, mainly tennis and squash balls, which it then marketed in the United Kingdom or exported, mainly to the other Member States of the Community and in particular the Netherlands. Newitt complained

that DSI had by means of various measures, notably concerning prices, impeded exports to other Member States where DSI had exclusive distributors whom it sought thus to provide with absolute territorial protection. The alleged effect of those measures was to enable DSI to partition the Community market and to control prices. In addition, Newitt considered that, since DSI held a dominant position in the tennis and squash balls market, it was also infringing Article 86 of the Treaty.

The administrative procedure before the Commission

5 On 23 June 1987 the Commission sent that complaint to DSI which, by letter of 12 August 1987, requested its exclusive distributors not to reply to any questions from the Commission without first consulting DSI. On 20 October 1987 the Commission sent DSI a letter before action concerning the gravity of the alleged infringements and requesting it to put an end to them if it was in fact guilty of the anti-competitive conduct complained of.

6 On 3 and 4 November 1988 the Commission carried out an investigation at the premises of DSI's exclusive distributor in Benelux for the Dunlop brand, All Weather Sports BV (hereinafter 'AWS'), and at the premises of Pinguin Sports BV (hereinafter 'Pinguin'), DSI's exclusive distributor in the Netherlands for the Slazenger brand.

7 On 7 May 1990 the Commission decided to initiate infringement proceedings and on 29 May 1990 it sent a statement of objections to DSI, AWS and Pinguin.

8 DSI and AWS submitted their written observations on the statement of objections to the Commission on 16 and 31 July 1990 respectively and their oral observations at the hearing on 5 October 1990. Pinguin did not reply to the statement of objections.

9 In its replies and observations DSI admitted and regretted some of the measures of which the Commission had complained, while AWS admitted most of the facts set out in the statement of objections but denied that, apart from a few exceptions, they could constitute infringements of Article 85 of the Treaty.

10 On 12 December 1990, as part of measures taken to comply with competition law, DSI sent the Commission the text of the new instructions issued to its staff and on 22 January 1991 a copy of its new standard form contract with its distributors.

The Decision

11 On 18 March 1992 the Commission adopted the Decision, in which it found that DSI's exclusive distribution agreements contained an unwritten term by which DSI undertook to provide its exclusive distributors with absolute territorial protection, and that for that purpose DSI's sales agreements with its resellers and distributors contained a condition of sale, also unwritten, prohibiting them generally from exporting its products to the territories of each of its exclusive distributors in the Community.

12 The Commission also found in the Decision that DSI, in concert with AWS and Pinguin, had, to the same end of eliminating parallel exports, taken a series of measures concerning tennis and squash balls, tennis rackets and golfing equipment. Those measures consisted first in refusing to supply the complainant company Newitt with its products either directly or indirectly via its subsidiary in the United States in October 1986, June 1987 and in 1988, secondly in pricing measures taken against Newitt and other dealers in the United Kingdom to make their

exports to the markets of the other Member States uncompetitive, thirdly in buying back its products which had been exported through parallel channels, fourthly in marking its products in order to identify the source of parallel imports with a view to eliminating them and finally in printing on some of its products, solely for the benefit of its exclusive distribution network, the initials of the Netherlands national tennis federation.

13 According to the Decision (recital 70), the infringements committed by DSI date back to 1977 and, except in the case of the measures relating to price, did not stop until 1990. The export ban had a particularly noticeable effect on trade between Member States because of its object and its general nature and given DSI's importance on the sporting goods markets, where in 1989 it held 39% of the market in 'First Grade' tennis balls and 63% on average of the market in squash balls and a strong position on the market in tennis rackets and golf equipment. The other measures taken by DSI, also in order to impede trade between Member States, had in many cases enabled imports to be eliminated or their effects on prices to be negated and culminated in the virtual elimination of all exports by Newitt to the other Member States and in all probability of parallel exports by other traders in the United Kingdom.

14 The Decision states that DSI's exclusive distribution agreements could not fall within the scope of Article 1 of Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1) because they imposed on the parties obligations restricting competition going beyond the restrictions authorized by Article 2 of the regulation, given in particular that the agreements were accompanied by a tacit provision for absolute territorial protection and moreover involved concerted practices falling within the scope of Article 3(d) of the regulation. Furthermore, those agreements had not been notified to the Commission and hence could not benefit from an individual exemption which in any event would have had to be refused.

15 Finally, as well as the gravity of the infringements and their long duration, the Decision refers to DSI's conduct following the statement of objections: on 12 August 1987 DSI sent a letter to its exclusive distributors requesting them not to reply to any questions from the Commission without first consulting DSI and it was slow to take measures to comply with competition law since it did not inform its exclusive distributors until January 1991 that they could accept orders for exports within the Community, and even then it made clear its intention to continue to apply a system of differentiated prices or discounts to its exclusive distributors (recital 69 of the Decision).

16 On all those grounds the operative part of the Decision adopted by the Commission states:

'*Article 1*

Dunlop Slazenger International Ltd has infringed Article 85(1) of the EEC Treaty by applying in its business relations with its customers a general ban on exporting its products, designed to protect its exclusive distribution network, and by implementing, in respect of some of its products (tennis-balls, squash-balls, tennis-rackets and golfing equipment), various measures — refusal to supply, dissuasive pricing measures, marking and follow-up of exported products, buy-back of exported products and the discriminatory use of official labels — in order to ensure enforcement of the export ban.

All Weather Sports International BV has infringed Article 85(1) by urging and participating in the implementation of such measures in the Netherlands in respect of Dunlop products.

Pinguin Sports BV has infringed Article 85(1) by urging the implementation of similar measures in the Netherlands in respect of Slazenger products.

Article 2

A fine of ECU 5 000 000 is hereby imposed on Dunlop Slazenger International Ltd and a fine of ECU 150 000 on All Weather Sports Benelux BV (which has taken over the assets of All Weather Sports BV) in respect of the infringements referred to in Article 1.'

Procedure

17 Those are the circumstances in which DSI has brought this action, lodged at the Registry of the Court of First Instance on 30 May 1992.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, as a measure of organization of procedure, requested the parties to answer several written questions. The Court also asked the Commission to produce certain documents. The parties presented their arguments and replied to the oral questions put by the Court at the hearing on 14 December 1993.

Forms of order sought

19 The applicant claims that the Court should:

(i) annul the Decision in so far as it relates to DSI;

(ii) cancel or reduce the fine imposed on DSI under the Decision;

(iii) order the Commission to pay the costs; and

(iv) order the Commission to reimburse DSI for any expenses incurred in providing security for payment of the fine.

20 The defendant contends that the Court should:

(i) dismiss as inadmissible the request for an order that the Commission reimburse DSI for the costs of any expenses incurred in providing security for payment of the fines;

(ii) dismiss the rest of the application as unfounded;

(iii) order DSI to pay the costs of the proceedings.

The claims seeking annulment of the Decision

The Decision's compliance with requirements as to form and notification

21 In respect of the Decision's compliance with requirements as to form and notification, the applicant advances three pleas disputing first that the Decision was properly authenticated and notified to it, secondly that the Decision was properly adopted on the ground of an alleged interference with the autonomy of the Commission and thirdly a breach of the principle of *audi alteram partem* in that the Commission did not refer in the Decision to certain documents on which it relies in its defence.

The first plea of irregularities affecting the authentication and notification of the Decision

Summary of the pleas in law and main arguments of the parties

22 The applicant submits, citing the judgment of the Court of First Instance in Joined Cases T-79, 84-86, 89, 91, 92, 94, 96, 98, 102 and 104/89 *BASF and Others* v *Commission* [1992] ECR II-315, that the Decision may not have been adopted in accordance with the Rules of Procedure of the Commission, and in particular Article 12. It claims that the copy of the Decision served on it was not authenticated by the President of the Commission and that, although the Decision was in principle intended to have been signed by the Commissioner for Competition, the copy which was served on DSI was not signed by him but certified by the Secretary-General of the Commission.

23 The Commission maintains that the Decision was adopted in accordance with its Rules of Procedure. The President and the executive secretary of the Commission authenticated the Decision in its two official language versions, English and Dutch, and the notification letter was signed by the Commissioner responsible for competition matters.

Assessment of the Court

24 First, in so far as the applicant's plea disputes that the Decision was properly adopted and authenticated and that the copy notified to it was the same as the original, the Court finds that the applicant does not plead any evidence or specific fact such as to displace the presumption of validity which applies to Community acts, either as to the adoption and authentication of the Decision or as to the conformity of the copy notified to the applicant with the original text of the Decision.

25 Secondly, in so far as the applicant disputes the formal validity of the actual copy of the Decision notified to it, the Court notes in the first place that the third paragraph of Article 16 of the provisional Rules of Procedure of the Commission, in force when the Decision was adopted, provides that its Secretary-General 'shall take the necessary steps to ensure official notification of acts of the Commission'. Moreover, the Secretary-General is, by virtue of Article 10 and the first paragraph of Article 12, responsible for keeping records of decisions of the Commission, by way of both minutes of the meetings of the Commission at which those decisions are adopted and the original decisions annexed to those minutes. Secondly, the copy of the Decision notified to the applicant contains the words 'certified copy' followed by the signature of the Secretary-General of the Commission and the name of the Commissioner responsible for competition matters. Finally, in order for a decision to be properly notified, it is sufficient that that decision reaches the

addressee and puts the latter in a position to take cognizance of it (judgments of the Court of Justice in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 10, and of the Court of First Instance in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219). Moreover, any irregularities in the procedure for notification do not invalidate the act notified itself (judgments of the Court of Justice in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 39 and 40, and Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 18) and in any event there is no provision which requires that the copy of the decision notified to the undertaking must be signed by the competent member of the Commission (judgment of the Court of Justice in Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 59).

26 Accordingly both limbs of the plea must be rejected.

The second plea that the procedure by which the Decision was adopted was irregular

Summary of the pleas in law and main arguments of the parties

27 The applicant states that two press reports on 17 and 18 March 1992 announced, on the day before and on the day of the adoption of the Decision, that DSI was to be fined for breach of the competition rules. It considers that those reports had an adverse effect on the way in which the Decision was adopted because they prejudged it, impeding the College of Commissioners, whose autonomy was threatened, from properly evaluating and debating the merits of the case.

28 The Commission states that it authorized no announcement to the press before the Decision was adopted and that investigations concerning this issue have not indicated that any official was responsible. The reports in question, being purely speculative, could not in any event have compromised the independence of the Commission acting as a collegiate body, since the only expression of the Commission's position is the Decision itself. The Commission therefore considers that that plea must be rejected in accordance with the case-law of the Court of Justice (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, at paragraphs 284 to 288).

Assessment of the Court

29 The Court considers that, even on the assumption that the Commission was responsible for improperly divulging the information contained in the reports to which the applicant refers — which is however neither admitted by the Commission nor proved by the applicant — that fact would in any event have no effect on the legality of the Decision. Accordingly, given that the applicant has adduced no evidence to show that the Decision would not in fact have been adopted or would have been different had the disputed statements not been made (*United Brands* v *Commission*, cited above, paragraph 286) or that the Commission, in adopting the Decision, based itself 'on considerations other than those set out therein' (judgment of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 136), this plea must also be rejected.

The third plea that the Decision was adopted following an irregular administrative procedure

Summary of the pleas in law and main arguments of the parties

30 The applicant submits in its reply that the Commission's defence includes a number of annexes (Annexes 9, 13 to 17 and 20 to 27) — the majority in Dutch —

which, although mentioned in the statement of objections, were not expressly referred to in the Decision. The applicant maintains that this is in breach of the principle of *audi alteram partem* in that, having failed to mention those documents in the Decision, Commission is not entitled to rely on them in its defence, particularly given that the Decision's silence as to the documents led the applicant to assume that the explanations which it had given concerning those documents during the administrative procedure had been sufficient and had been taken into account when the Decision was adopted.

31 The Commission points out that, in so far as those annexes concern questions of fact, they were all cited in the statement of objections and submitted to the applicant which, as is clear from its observations in reply to the statement of objections, did not complain that certain documents were in Dutch or provide any explanation or rebuttal concerning the evidence against it contained therein. The Commission therefore considers that, in the absence of explanations by the applicant, it was entitled to infer from that silence that the construction of the facts given in the statement of objections was correct.

32 As to legal principles, the Commission maintains that it fully respected Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) and the case-law of the Court of Justice, given that in the Decision it dealt only with the objections and facts in respect of which DSI had been afforded the opportunity of making known its views on the basis of the documents in question which, all cited in the statement of objections and repeatedly referred to, both individually and collectively, in the Decision, should have enabled the applicant to ascertain whether the Decision was justified. The Commission moreover considers that it was under no obligation to cite each document individually in the Decision (judgments of the Court of Justice in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, and Case 7/82 *GVL* v *Commission* [1983] ECR 483). Finally, the Commission notes that the documents in question refute the arguments set out in the application without raising

new issues and, since they are essential to the review by the Court of the lawfulness of the Decision, must be put before the Court by virtue of Article 43(4) of the Rules of Procedure.

Assessment of the Court

33 In so far as the applicant's plea raises a question concerning observation of the principle of *audi alteram partem* and the relevant rights of the defence, as provided for in Article 19(1) 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 1959-1962, p. 87) and Articles 3 and 7(1) of Regulation No 99/63, it is common ground that the documents concerned, annexed to the defence, were mentioned in the statement of objections of 29 May 1990 and sent to the applicant. The applicant accordingly had the opportunity to refute the evidence against it which they contained and to present its point of view. It follows that the applicant is not justified in alleging a breach of the principle of *audi alteram partem* and the rights of the defence since the Commission did not refer in the Decision to evidence against it except evidence as to which it had been afforded the opportunity of making known its views as required by Article 4 of Regulation No 99/63 (judgments of the Court of First Instance in Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 39, Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499 and Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995).

34 In so far as the applicant in that plea claims that the Commission was obliged to refer separately in the Decision to all the documents on which it relied when adopting the Decision, the Court notes that, in accordance with the case-law on this issue, although the Decision must specify the evidence on which the Commission's case hangs, it is not necessary for it to enumerate exhaustively all the evidence available but it may refer to it in general terms (*Petrofina* v *Commission*, cited above, paragraph 39).

35 It follows that that plea must be rejected.

The substantive legality of the Decision

36 It is clear from Article 1 of the Decision that the applicant is alleged (I) in its contracts to have imposed on the other parties a general prohibition on exporting the goods covered and (II) to have used various measures in order to ensure that that prohibition was actually implemented. The applicant's pleas seeking annulment of Article 1 of the Decision and, consequently, annulment of Article 2 must be considered in the light of these two accusations.

I — *The general export ban*

37 The applicant disputes that it imposed a general export ban (A). Furthermore, it disputes the alleged extent and scope of any such ban (B) and the period during which it was allegedly imposed (C).

A — The existence of a general prohibition on exporting goods covered by the contracts imposed by the applicant on parties to contracts with it

38 The applicant disputes the existence of a general export ban imposed by it both in its exclusive distribution contracts (a) and in its sales contracts (b).

(a) The existence of a general export ban in the context of the applicant's exclusive distribution system

Summary of the pleas in law and main arguments of the parties

39 The applicant submits that, in so far as the Decision finds that it had imposed in its exclusive distribution agreements a general prohibition on exporting its goods to countries where it had exclusive distributors in order to provide them with absolute territorial protection, insufficient reasons and evidence are given.

40 The applicant complains first that the Commission limited its investigation to two of its exclusive distributors in Benelux, AWS and Pinguin. Since it did not investigate traders and territories other than those mentioned in the Decision, the Commission had no justification for concluding that there was a general export ban.

41 Secondly, the applicant notes that the documents on which the Commission bases its conclusion that there was a general export ban are letters dated 14 December 1977, 5 August 1985, 16 June 1986 and 15 October 1986 which the applicant had sent to Newitt and not to its exclusive distributors, who moreover did not accept that there was such a ban. It states that, although in accordance with the case-law of the Court of Justice the statements in those letters could, as unilateral declarations by it in its capacity as manufacturer, be regarded as forming part of an agreement or concerted practice with its exclusive distributors (Case 107/82 *AEG* v *Commission* [1983] ECR 3151 and Joined Cases 25 and 26/84 *Ford* v *Commission* [1985] ECR 2725), the Commission has not shown that those statements were made in the context of a uniform and consistent policy applicable to other

purchasers of its products and characterizing all its contractual relationships with its exclusive distributors. Its conduct cannot therefore be regarded as 'systematic', as the case-law requires in this area (*AEG* v *Commission*, cited above, paragraph 39).

42 Thirdly, the applicant emphasizes that the complaints made by its exclusive distributors, which, according to the Decision, furnish proof that there was a general export ban protecting them from parallel imports, are evidence simply of the fact that those distributors believed, when their interests were affected by sales made in the special context of its historic trading relationship with Newitt, that DSI had acted in breach of the legitimate exclusivity terms in their distribution agreements.

43 The Commission refers first to the letter of 12 August 1987 by which the applicant asked AWS and Pinguin not to reply without first consulting it to any questions by the Commission in connection with the infringement proceedings. It considers that, having silenced its exclusive distributors, the applicant could no longer rely on the fact that they had not admitted that there was a general export ban in their exclusive distribution agreements.

44 The Commission pleads secondly, as evidence that there was a general export ban under the applicant's exclusive distribution agreements, a series of letters sent to Newitt by the applicant.

45 The first of these letters, dated 14 December 1977, sent by the applicant under its then name of 'Dunlop Sports Company', contains in particular the following sentence: 'May I emphasize that this offer is made on the understanding that the goods offered by you will be through your normal retail premises and not for

export in bulk to overseas agencies without our prior permission or to other outlets within the UK for resale by companies with whom Dunlop Sports Company do not have a trading account.'

46 The second letter, dated 5 August 1985, states: 'I would confirm our export policy as quite simply not allowing shipments to any world market where we have local legal distributor agreements where to supply via a third party would be both a breach of contract and poor commercial practice. In essence all European markets are covered by such agreements ...'.

47 The third letter, dated 16 June 1986, contains the following passage:

'1) You have agreed to eliminate all direct exporting of Dunlop Slazenger Racket and Specialist Sport products, except those agreed by specific agreement with myself.

2) In the event that you receive any export enquiries for our products, you will pass these leads to us for individual consideration. We may, in certain circumstances, agree to take the business directly — building in an agreed commission for your Company.'

48 The fourth letter from the applicant to Newitt, dated 15 October 1986, states: 'I thought we had an understanding that any enquiries for export business would be passed directly to me following the arrangements I set out in my letter of 16 June.

Our previous discussions also indicated that we were unlikely to take any direct business in Europe. We anticipated however there may be opportunities in markets such as Africa where we would consider supplying directly with an agreed commission built in for yourselves.'

49 Finally, a letter of 3 September 1977 from BTR, the parent company of DSI, to Newitt's solicitors, states: 'b) except where (c) below applies Newitt is and will be entitled to purchase such of DSI's goods as it requires for re-sale at discounts to be negotiated from DSI's home trade price list; the level of those discounts will be those appropriate to Newitt's position in the UK wholesale market; c) where Newitt can procure specific export orders to named customers it will be entitled to buy DSI products at discounts from DSI's export price list the level of such discounts to take account *inter alia* of the responsibilities borne in the relevant territory by DSI's distributors there (if any).'

50 The Commission considers that the letters in question, taken together, do in fact prove that DSI adopted a systematic course of conduct and prohibited its customers from exporting its products without its agreement, the purpose being to ensure absolute territorial protection for its distributors, and that they show that that prohibition applied generally to all the territories where the applicant had a distributor.

51 Finally, in the Commission's view, the complaints by the applicant's exclusive distributors prompted by the limited exports effected by Newitt under the applicant's control must be interpreted in the light of the abovementioned letter of 14 December 1977 and confirm the existence of a consensus between the applicant and its distributors as to absolute protection of their territorial exclusivity, in so far as the latter considered that the applicant was in breach of an unwritten term of their agreements providing for protection against parallel imports. Those agreements, which do not fall within the scope of Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10) and Regulation No 1983/83, cited above, were moreover not notified and hence could not benefit from the exemption laid down in Article 85(3) of the Treaty.

Assessment of the Court

52 It is settled case-law that, when a producer chooses to organize the distribution of its products by a network of authorized distributors who are guaranteed exclusive or selective distribution, such a distribution system will be permitted under Community competition law only on condition that *inter alia* no prohibition on the resale of the products in question within the distribution network is imposed in fact or in law on the authorized distributors. Such stipulations, the effect of which is to partition national markets and in so doing to thwart the objective of achieving a common market, are inherently contrary to Article 85(1) of the Treaty.

53 The Court considers that the abovementioned correspondence, relied on by the Commission, clearly demonstrates the existence of a general prohibition on the re-export of the goods in question, imposed by the applicant on its exclusive distributors. The very words used by the applicant in its abovementioned letter of 5 August 1985 show that its commercial policy consisted in not allowing re-exports to any national market in the world where it had a distributor. The

terms of that letter also show that that commercial policy mainly concerned the Member States of the Community. Similarly, the abovementioned letter of 15 October 1986, referring to previous discussions, indicates that the applicant was 'unlikely' to take any direct business in Europe. Finally, the abovementioned letter of 3 September 1987 reminds Newitt that it was entitled to purchase the applicant's goods subject to export discounts only where it could show specific orders in support of its request for price discounts, enabling the relevant customers to be identified.

54 In this case, the Court considers that that general prohibition on re-exporting the applicant's goods cannot be attributed to unilateral action by the applicant which as such would not be caught by Article 85(1) of the Treaty, which solely concerns agreements, decisions by associations of undertakings and concerted practices. A contractual provision which is contrary to Article 85(1) of the Treaty does not have to be recorded in writing (see the judgment of the Court of Justice in Case 28/77 *Tepea* v *Commission* [1978] ECR 1391), but may form a tacit part of the contractual relations between an undertaking and its commercial partners (*AEG* v *Commission*, cited above, paragraph 38).

55 Furthermore, the Court finds that the applicant, while emphasizing that the agreements with its exclusive distributors did not contain a clause prohibiting exports, designed to give them absolute territorial protection, admits that its exclusive distributors complained to it 'when affected by sales under its special relationship with Newitt', and that those complaints evidenced 'that they believed that the applicant was in breach of the legitimate exclusivity provisions under their exclusive distribution agreements' (reply, paragraph 2.3, and the applicant's reply to a written question put by the Court). The Court holds that the fact that the applicant's exclusive distributors interpreted their contracts with it in that way, considered in conjunction with the general export ban referred to by the applicant in its

abovementioned correspondence with Newitt, means either that there was already a tacit provision in its contracts with its distributors guaranteeing them absolute territorial protection or that they accepted the applicant's policy as manufacturer not to allow its products to be exported to any world market where it had a distributor (letter from the applicant of 5 August 1985, quoted above).

56 Accordingly the prohibition on re-exporting the products covered by the agreements, as apparent from the correspondence with Newitt quoted above, is not unilateral conduct of the applicant such as to fall outside the prohibition in Article 85(1) of the Treaty, but is a contractual prohibition forming part of its contractual relations with its exclusive distributors (see *AEG* v *Commission* and *Ford* v *Commission*, cited above).

57 The plea that the Commission did not adduce sufficient evidence to establish the existence of a general export ban in the context of the applicant's exclusive distribution system, prohibited by Article 85(1) of the Treaty, and did not give sufficient reasons for its Decision on that point must therefore be rejected.

(b) The existence of a general export ban under the applicant's sales agreements

Summary of the pleas in law and main arguments of the parties

58 The applicant submits that the three letters to Newitt of 14 December 1977, 5 August 1985 and 16 June 1986 do not prove the existence of an agreement whether with Newitt or with another customer. Those letters can at most be regarded as an attempt to impose an export ban on one of its customers, Newitt, a ban which Newitt moreover did not accept. The Commission's assertion as to the

existence of a tacit condition in the applicant's sales agreements is therefore speculative and inadequately reasoned, since it has not established that other customers had accepted or acknowledged the existence of such a tacit condition in their agreements.

59 The Commission submits that, if the existence of an export ban in the applicant's exclusive distribution system is accepted, the existence of a condition in its sales agreements prohibiting any export must also be accepted. It relies on the applicant's letter of 5 August 1985 indicating to Newitt that its export policy precluded sales being made by a third party to the territory of one of its distributors, since this would amount to 'a breach of contract'. Furthermore, as indicated by the record dated 28 May 1986 of a meeting between DSI and AWS on 15 and 16 May 1986, the applicant asked AWS not to export squash balls to the United Kingdom in order to preserve the difference between the prices in the United Kingdom and those in the Netherlands, which constitutes further proof of a policy of absolute territorial protection applied by the applicant.

Assessment of the Court

60 The Court considers that the general nature of the prohibition imposed by the applicant on its resellers on exporting its products to national markets covered by an exclusive distribution agreement is shown by the documentary evidence considered above (see paragraph 53), in particular the abovementioned letter of 5 August 1985 in which the applicant indicates to Newitt that such sales would be considered to be a 'breach of contract'. Moreover, assuming that it were established that Newitt did not explicitly consent to the ban which the applicant imposed on it, that fact would not in itself affect the existence of the ban in question. For an agreement between a supplier and a reseller to fall within the prohibition in Article 85(1) of the Treaty, it is sufficient that the reseller accepts, at least tacitly, the anti-competitive prohibition which the supplier imposes on him (judgment of the Court of Justice in Case C-277/87 *Sandoz Prodotti Farmaceutici* v

Commission [1990] ECR I-45). In this case, the existence of a tacit anti-competitive agreement between the applicant and its reseller is sufficiently apparent from the very terms of the correspondence mentioned above, according to which the distributor's failure to comply with the practice at issue must be regarded as a breach of his contractual obligations.

61 Moreover, in any event it is clear from the documents before the Court that Newitt continued its commercial relations with the applicant, renewing its orders on identical terms, without expressing any wish to object to the export ban imposed on it, at least until it lodged its 'complaint' on 18 March 1987. Nor is the tacit existence of the stipulation in question affected by the fact that the reseller was, by making sporadic exports, in breach of the obligation imposed on it. According to settled case-law it is irrelevant to the prohibition in Article 85(1) of the Treaty whether the anti-competitive stipulation in question was actually implemented by the parties. For the same reason, the fact that the applicant did not object to the exports made by Newitt to the sales territories of its exclusive distributors, assuming that it were established, would also be irrelevant (see the judgments of the Court of Justice in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883 and *Sandoz Prodotti Farmaceutici* v *Commission*, cited above).

62 The plea that the Commission did not adduce sufficient evidence and did not give sufficient reasons for its Decision on this point must accordingly be rejected.

B — The scope of the export ban

63 The applicant disputes the scope of the export ban imposed on its customers, from the point of view of both (a) the geographical extent of that ban and (b) the type of products affected.

(a) The geographical area covered by the ban

Summary of the pleas in law and main arguments of the parties

64 The applicant does not accept that the alleged ban concerned 'the whole of Europe' (recital 49 of the Decision). In its letter to Newitt of 15 October 1986, it did not set out an export ban by way of a general statement of its commercial policy, but simply repeated its special position in relation to Newitt which it had already indicated to Newitt in its letter of 16 June 1986 stating that it was 'unlikely to take any direct business in Europe'; this was not to deflect sales of goods from the European mainland to Africa, but to maximize its profits through sales in Africa.

65 The Commission emphasizes, first, that the finding that the export ban concerned the whole of Europe is based in part on the applicant's letter of 5 August 1985 prohibiting Newitt from exporting to markets covered by its exclusive distributors and stating: 'In essence all European markets are covered by distributor agreements'. Moreover, the applicant confirmed in its application that at the material time it had exclusive distributors in eight Member States, namely Belgium, Denmark, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain, and that for the four remaining Member States sales were conducted by DSI itself, which made no difference.

66 Secondly, the Commission points out that, even if the applicant's letter of 15 October 1986 primarily reflected its position vis-à-vis Newitt, that position was itself a reflection of its general policy on the export of its goods. It emphasizes that the applicant referred in that letter to its preference for sales from the United

Kingdom to Africa, which indicates a policy of deflecting sales from the European mainland to Africa, with the sole aim of protecting the continental European market. In the Commission's view, the applicant's anti-competitive conduct moreover extended beyond the Community and European market to the whole world since from January 1988 it prohibited its US subsidiary from supplying Newitt.

Assessment of the Court

67 The Court finds that in its abovementioned letter of 5 August 1985 the applicant states that its export policy consists in 'quite simply not allowing shipments to any world market where we have local legal distributor agreements' and 'all European markets are covered by such agreements', and that the latter statement must be understood according to the application — not disputed on this point — as comprising eight Member States, namely Belgium, Denmark, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain. Moreover, the applicant has accepted that in so far as concerned the four other Member States it distributed its products itself. Accordingly, it has been shown that the geographical scope of the export ban, imposed by the applicant on its distributors, in fact affected the national markets of all the Member States, and that finding is corroborated by the applicant's abovementioned letter of 15 October 1986 in which, while prohibiting exports of its goods to Europe, it stressed the opportunities for exporting to the African markets, thus demonstrating its intention to prevent parallel exports to European markets by deflecting them to markets outside the Community.

68 The plea disputing that there was sufficient evidence or reasons in the Decision concerning the geographical extent of the export ban must accordingly be rejected.

(b) The type of products covered by the export ban

Summary of the pleas in law and main arguments of the parties

69 The applicant claims that the Commission does not adduce evidence that all its products were affected by the alleged export ban. It points out first that Newitt's complaint concerned only tennis and squash balls, secondly that only tennis balls, a 'fast moving' product, are of real interest to parallel importers, and finally that the Decision itself concerned only tennis and squash balls, tennis rackets and golfing equipment. The applicant considers that the only evidence adduced by the Commission on this issue is contained in the letter to Newitt of 16 June 1986.

70 The Commission submits that it was entitled to base its finding that the export ban applied to all the applicant's products on the contents of the letter of 16 June 1986, since such a ban was the very subject of that letter, which was cited in paragraph 24 of the statement of objections and whose purport was not disputed by the applicant either in its written observations or at the hearing.

Assessment of the Court

71 The Court considers that the abovementioned letter of 16 June 1986 clearly indicates that the applicant intended to prohibit 'all direct exporting of Dunlop Slazenger ... products, except those agreed by specific agreement' with itself. Accordingly, the Commission was entitled to consider that the general export ban applied in principle to all the applicant's products.

72 That finding cannot be invalidated either by the fact that Newitt's complaint solely concerned certain products or by the fact that only 'fast moving' products, namely tennis and squash balls, could be of interest in the context of a parallel import strategy.

73 Accordingly the Court considers that the applicant's arguments disputing that the export ban imposed on its distributors affected all its products must in any event by rejected.

C — The duration of the infringement

Summary of the pleas in law and the main arguments of the parties

74 The applicant submits that the Commission has not adduced precise and coherent evidence that a general export ban, already in existence in 1977, was maintained for the whole period between 1977 and 1985. While acknowledging that in its letter of 14 December 1977 it specified to Newitt that the trading terms agreed with Newitt for 1978 included an export ban, possibly contrary to Article 85 of the Treaty, the applicant considers that it has not however been established that that prohibition continued from that date until 1985. It points out that in connection with Newitt's exports the Commission accepted in the Decision that 'in practice, however, such exports were tolerated' and that 'this export ban was not always applied'. It adds that from 1978 Newitt had access to its export price-list and had the benefit of an export account opened in 1983, which indicates that it was actively promoting and encouraging exports by Newitt, which furthermore conceded in its complaint that DSI did not prevent parallel imports before 1985.

75 In addition, the applicant submits that the purpose of the letter of 3 September 1987 to Newitt's solicitors was to lift the alleged export ban and to make it

clear that the temporary suspension of deliveries to Newitt in mid-June 1987 had been lifted once Newitt had confirmed that it still wished to receive DSI goods. That letter therefore solely concerned a pricing policy towards Newitt without being evidence that the alleged export ban was being perpetuated

76 The Commission maintains that the letter of 14 December 1977, which must be read with the letter of 5 August 1985 and with the applicant's other letters to Newitt, cannot be interpreted as anything but evidence of the setting up and application of a general and continuous policy of prohibiting exports. In the Commission's view, an analysis to the contrary would mean that DSI allowed all other purchasers of its products to trade freely, without regard to the allocation of territory between its distributors, and restricted the activities of Newitt alone, which, as the applicant itself acknowledges, was merely an occasional or *ad hoc* customer and sold only comparatively small quantities.

77 The Commission states that at paragraph 5 of its complaint Newitt did not claim that the applicant had, up to 1985, allowed parallel trade in its products in general, but rather that, up to 1985, the applicant's distributors had complained to it about Newitt's parallel imports. According to the Commission, such complaints prove that there was a general policy of not allowing free trade in the applicant's products and that that system of absolute territorial protection, at which that prohibition was directed, was in place from 1977, Newitt's parallel trade being merely a limited exception proving the rule. As further proof of the continuous nature of the ban, the Commission relies on the letter of 5 August 1985 which, having been sent several months after BTR's acquisition of Dunlop Holdings, confirmed that Dunlop's new management was maintaining the previous export policy. Finally, Newitt's own role in the applicant's commercial policy, which the applicant describes as 'historic' and which consisted in exporting to markets with no exclusive distributors, indicates that the export ban was continuous as from 1977.

78 The Commission submits that, far from terminating the export ban, the letter of 3 September 1977 maintained it, given that, in its own words, Newitt was permitted to purchase for export only if it could 'procure specific export orders to named customers'.

Assessment of the Court

79 As a preliminary point, the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute concerning the existence of an infringement of competition law the Commission, which bears the burden of proving infringements which it finds, must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement. With specific regard to the alleged duration of an infringement, the same principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.

80 In this case, although it is clear from the abovementioned letters of 14 December 1977 and 5 August 1985 that on those two dates the applicant, by prohibiting generally the export of its products, was infringing Community competition law, the only evidence adduced by the Commission to show that that infringement continued between those two dates — that is, for some seven years — is in fact no more than a presumption, the justification for which must be examined.

81 First, the Court notes that although the reference made by the Commission to Newitt's role in marketing the applicant's products in support of its view that the

general export ban necessarily concerned not only Newitt but also other purchasers of the applicant's products demonstrates the general scope of that prohibition, it does not on the other hand enable the beginning and the precise duration of that infringement to be identified, nor does it show that it continued without interruption between 1977 and 1985.

82 Secondly, the Court considers that the doubt as to whether the infringement continued between 1977 and 1985 cannot be dispelled by the mere fact that the applicant's exclusive distributors complained to it about Newitt's exports. Even if it is accepted that, as the Commission maintains, those complaints were made before 1985, the fact that the documents before the Court contain no specific evidence precludes any more specific assumptions as to the date of those complaints and, *a fortiori*, as to their being regularly and continuously made between 1977 and 1985. Accordingly, those facts do not support any conclusion as to the duration of the general export ban, in so far as it was alleged that it was Newitt's infringement of that ban which provoked the complaints in question. In referring to paragraph 5 of Newitt's complaint, the Commission is itself merely making a simple assumption when it notes that Newitt recognized 'rather' that the applicant's distributors complained to it until 1985.

83 Finally, the Court notes that although the wording of the abovementioned letter of 5 August 1985, and relied on by the Commission, supports the conclusion that the applicant's policy consisting in a general export ban pre-dated that letter, as is clear from the fact that the applicant sought to 'confirm' that policy, that letter is not sufficiently precise evidence to support the Commission's allegation that the export ban, implemented in 1977, continued without interruption until 1985.

84 It follows that, since it has not been able to put forward any evidence that the applicant's alleged infringement was continuous between 1977 and 1985, the

Commission has not proved to the requisite legal standard (see the judgment of the Court of First Instance in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 69 et seq.) that the infringement necessarily started on the date of the abovementioned letter of 14 December 1977. Accordingly, the infringement disclosed by that letter was, at the date of the first step in the proceedings taken by the Commission, time-barred by virtue of Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

85 The applicant's alleged infringement must accordingly be regarded as having started on a different date from that found by the Commission in the Decision. In the letter of 5 August 1985, quoted above, the applicant sought to 'confirm' its policy of prohibiting exports to any world market where it had an exclusive distributor, which implies, as has been noted, that that prohibition already existed before 5 August 1985. Moreover, the Commission relies on two telexes of 1 February and 29 April 1985 which show that the applicant's exclusive distributor in Benelux, AWS, was already noting the identification codes on Dunlop tennis rackets imported through parallel channels so that it could subsequently eliminate those imports in concert with the applicant. That measure, which the applicant admits to having taken in cooperation with AWS from early 1985 (see paragraph 2.16(ii) of the application), in the context of the applicant's policy of prohibiting parallel exports of its products covered by the contracts, supports the conclusion that the general export ban already existed in early 1985 and, at least, from 1 February 1985. The infringement must accordingly be regarded as having started on 1 February 1985.

86 The Decision must therefore be annulled in so far as it finds that a general export ban existed before 1 February 1985.

II — *The measures implemented for the purpose of securing compliance with the general prohibition on exporting products covered by the distribution agreement*

87 With regard to the actual measures implemented by the applicant for the purpose of securing compliance by the parties to its agreements with the general prohibition on exporting relevant products already established above, the applicant disputes that it obtained or sought compliance with the prohibition at issue (A) by an appropriate pricing policy or (B) by using logos and labels of sporting federations. The Court must accordingly consider the validity of the applicant's claims relating to those issues.

88 Article 85(1) of the Treaty cannot in any event be held not to apply to an exclusive distribution agreement which in itself involves no prohibition on re-exporting the products concerned where the parties to the agreement participate in a concerted practice seeking to restrict parallel imports to an unauthorized reseller (*Hasselblad* v *Commission*, cited above). The practice in question must be considered in the light of those principles.

A — The pricing measures

89 The applicant (a) disputes the Commission's finding that it decided its pricing policy in concert with AWS; (b) submits that its pricing policy towards Newitt was decided autonomously and taking account of the importance of its commercial relationship with that customer; (c) submits that, even on the assumption that there was a pricing practice with an anti-competitive object or effect, that practice does not fall within the prohibition laid down in Article 85(1) of the Treaty since

it does not adversely affect intra-Community trade. The Court must examine each of these pleas in turn.

(a) The claim that there was no concerted pricing practice

Summary of the pleas in law and main arguments of the parties

90 The applicant disputes the Commission's findings that the applicant, in concert with AWS and with the aim of eliminating parallel exports, took a number of measures affecting, as from June 1986, the prices charged to Newitt for its purchases of tennis and squash balls, tennis rackets and golfing equipment. It argues that insufficient evidence and reasons are given for those findings by the Commission and that the Commission wrongly applied Article 85(1) of the Treaty.

91 The applicant maintains that a number of changes in its system of setting sales prices to Newitt as from 1986 must be seen in the context of the new management policy, decided after the takeover of Dunlop Holdings plc in March 1985 by BTR. That orientation, moreover, had already been outlined in the offer document issued by BTR in its hostile bid for Dunlop, which referred to a new management philosophy to improve Dunlop's performance.

92 The applicant considers that the unilateral nature of the change in its pricing policy is shown by a telex which AWS sent it on 27 February 1986, concerning the prices charged to AWS, indicating to the applicant that AWS had agreed to support its new strategy on pricing on the explicit condition that DSI would have its distribution network under control.

93 On the question of a concerted practice relating to squash ball prices, the applicant submits that the only evidence adduced by the Commission is the applicant's request to AWS, at a meeting between them on 15 and 16 May 1986, not to export squash balls to the United Kingdom because of its low prices. It emphasizes that that request was made under Article 14 of their distribution agreement ('The Distributor shall not outside the Territory seek customers for the Goods or establish or maintain any branch or distribution for sale of the Goods'), a clause which satisfied the requirements of the block exemption on exclusive distribution agreements set out in Regulation No 1983/83, cited above. It considers that in any event the effect of the increase in the price Newitt was charged for squash balls could not have been to prevent its exporting to AWS's zone, given that squash ball prices in the United Kingdom, even before the increases vis-à-vis Newitt from June 1986, were higher than those in the Netherlands.

94 On the question of a concerted practice relating to tennis ball prices, the applicant stresses that the change in its pricing policy towards Newitt occurred shortly after DSI was taken over by BTR, in 1985, and not in 1986 as stated in the Decision (recital 23). According to the applicant, the change in its pricing policy towards Newitt could not therefore have been in response to AWS's complaints which, as is clear from the correspondence relied on in this connection by the Commission, was made in 1986-1987, after that change, therefore. Accordingly, the evidence adduced by the Commission is insufficient.

95 The Commission states, first, on the question of insufficient evidence for and reasons given in the Decision, that the Decision summarizes in recitals 22, 23 and 30 to 36 the written evidence of the existence of a concerted pricing practice, which had been described earlier in detail in paragraphs 41 to 76 of the statement of objections. The Commission adds that the applicant, which has not denied in the administrative procedure or in these proceedings the existence of documentary

evidence of the alleged concertation, has not produced any counter-evidence, in the form of minutes of board meetings or letters to Newitt or in any other form, to show that the change in its pricing policy was unilateral.

96 As for AWS's telex of 27 February 1986 to the applicant, cited at paragraph 42 of the statement of objections and included as Annex 8 to the defence, the Commission considers that it is clear from both its structure and its content that there was an infringement, even if it related only to the prices charged to AWS, given that the applicant's pricing policy was in any event discussed with AWS at length and in detail on numerous occasions.

97 So far as concerns the alleged concertation between the applicant and AWS as to the price of both tennis balls and tennis rackets, the Commission emphasizes that its position, summarized in the Decision, was stated fully in the statement of objections. It refers to recital 35 of the Decision and to paragraphs 42 to 57 of the statement of objections, for the balls, and to paragraphs 58 to 69 thereof for the rackets. It emphasizes that the passages from the statement of objections on which it relies refer expressly to Annexes 8 to 24 to its defence, so that the applicant has no basis for claiming that it was not aware of those documents before they were produced in these proceedings.

98 Furthermore, the Commission, while observing that the applicant does not dispute the Decision on this point, emphasizes that its position on the question whether there was a concerted practice relating to the price of golfing equipment is stated fully in paragraphs 70, 71 and 72 of the statement of objections and summarized in recital 35 of the Decision, that the documentary evidence in Annexes 11, 25 and 26 to its defence had been cited in the statement of objections and that the applicant had therefore been aware of it.

99 The question of the alleged concertation between the applicant and AWS as to the price of squash balls must, the Commission says, be seen in the more general context of concertation as to the prices of all the products at issue. It maintains that the purpose of the concerted strategy of the applicant and AWS was to set price levels in the United Kingdom and the Netherlands so as to eliminate all parallel trade, including such trade in squash balls. In response to DSI's argument that prices in the United Kingdom were higher that those in the Netherlands, even before the price increases imposed on Newitt in June 1986, and therefore in any event discouraged squash ball exports, the Commission points out that by increasing the price of its squash balls the applicant made it even more difficult for Newitt to engage in parallel trade with the Netherlands or other countries.

100 The Commission submits, finally, that the applicant's request to AWS not to export squash balls to the United Kingdom was not legitimate because AWS was not a direct exporter and that in reality, as is shown by the minutes dated 28 May 1986 of the meeting between the applicant and AWS on 15 and 16 May 1986, the intention was to stop AWS selling to a parallel trader, Ron Sports.

Assessment of the Court

101 The Court considers that the alleged concertation concerning the price of tennis balls, tennis rackets and golfing equipment is sufficiently proved by the clear documentary evidence produced by the Commission. The Court refers specifically to the following documents.

102 As regards first the existence of a concerted practice relating to setting the price of tennis balls, the Court notes that the Commission relies as evidence of the alleged

infringement on a series of documents, annexed to the defence and referred to in the statement of objections, which, according to the uncontradicted statements of the Commission, were submitted to the applicant. Those documents are as follows:

— a telex of 10 March 1986 from Rolf Thung of AWS to Graham Nicholas of DSI in which AWS complains to the applicant of the lower prices in the Netherlands because of parallel imports and asks DSI to stop permitting this;

— a telex of the same date from Graham Nicholas of DSI to Rolf Thung of AWS in which it is stated: 'We all know goods move across Europe but we have to identify the source/buyer. Everything is now vetted at this end so I need your held through your various contacts as well to firstly identify and ultimately eliminate this type of business ...';

— the abovementioned minutes dated 28 May 1986 of a meeting between DSI and AWS on 15 and 16 May 1986, which refers to the fact that the prices charged to Newitt, £7.50 per dozen in 1985, were increased to £8.50 in order to make parallel imports unattractive, thus depriving consumers of the opportunity to benefit from price differences resulting from competition between brands;

— minutes of an internal AWS meeting of 13 June 1986 recording important negotiations with DSI on the subject of fixing a ratio between tennis ball prices in Belgium and those in the United Kingdom;

— an internal AWS memorandum of 19 June 1986 referring to a meeting of 5 June 1986 between DSI and AWS following discussions on price, in which it is stated that the parallel channels would diminish significantly if a price ratio such as that sought by AWS and to be set in concert with DSI were applied;

— an internal AWS memorandum of 4 March 1987, mentioning the prices agreed with the applicant to put an end to parallel imports, where it is stated first that 'AWS has not been able to maintain the price of HFL 44.75 because of problems linked to parallel trade', secondly that 'it is for that reason that prices were changed in the second part of the tennis season (HFL 36/HFL 38 per dozen)' and finally that 'with a view to making parallel trade theoretically impossible, the following decisions were taken for 1987: price to AWS: £7.27 per dozen. Lowest net price in the United Kingdom: £10.40 (certain customers). If I start from the position that a "dealer" has an increase of 10%, that means that with a mark-up of 58% (net) AWS has the same price. The dealer risks no longer receiving the goods';

— a report by AWS of 5 May 1987 of a meeting on 7 and 30 April and 1 May 1987 between DSI and AWS, which states, *inter alia*, that 'Given the parallel problems ... Dunlop demands a plan from AWS for tennis balls for 1988 for the Netherlands and Belgium ...'.

103 With regard in particular to the telex of 27 February 1986, mentioned above, whose meaning and import are interpreted differently by the parties, it must be emphasized that, even on the assumption that it concerns the prices charged by the applicant to AWS and not the prices charged to Newitt, the support which AWS there states it will give to the applicant's pricing strategy is sufficient evidence in any event of the existence of concertation contrary to Article 85(1) of the Treaty, in particular sub-paragraph (a), in which the applicant in any event willingly participated.

104 As for the existence of a concerted practice relating to the price of tennis rackets, the Court refers to a series of documents annexed by the Commission to its defence (Annexes 11 to 14 and 21 to 24) and mentioned in the statement of objections which, according to the uncontradicted statements of the Commission, were submitted to the applicant. Those documents are as follows:

— minutes dated 12 May 1986 of a meeting on 6 and 7 May 1986 between the applicant and AWS, referring to requests made by AWS to the applicant seeking a satisfactory difference between the prices charged to it and those applying in the United Kingdom for tennis rackets;

— the abovementioned minutes of 28 May 1986 of the meeting of 15 and 16 May 1986, referring to AWS's requests to the applicant concerning the calculation of the difference between the prices charged to it and those applying in the United Kingdom;

— a report of a visit by AWS representatives to DSI on 5 June 1986, referring *inter alia* to a request by DSI to AWS seeking to know the quantities and purchase prices of tennis rackets imported through parallel channels;

— the abovementioned minutes of 13 June 1986 of an internal AWS meeting concerning AWS's negotiations with DSI, and an internal AWS memorandum of 19 June 1986 concerning the outcome of that meeting, stating that 'the proposals [of AWS] concerning price were seriously discussed' with DSI and that 'the

prices sought by AWS were approved by Dunlop and the required structure was confirmed ...' during the visit made by AWS representatives to DSI on 5 June 1986;

— a telex of 23 April 1987 from AWS to DSI, requesting information on 'customer and price' for Dunlop rackets imported through parallel channels;

— a telex of 10 September 1986 from AWS to DSI in which AWS complained of the effects of parallel imports because of price reductions, and two internal AWS memoranda of 22 September 1986 and 4 February 1987 also concerning the prices of goods threatened by parallel imports and the contacts made with DSI in relation to setting those prices.

105 So far as concerns, finally, the existence of a concerted practice relating to the price of golfing equipment, the Court refers to a series of documents, annexed to the defence (Annexes 11, 25 and 26) and mentioned in the statement of objections, which, according to the uncontradicted statements of the Commission, were submitted to the applicant. Those documents are as follows:

— the abovementioned minutes of 12 May 1986 of the meeting of 6 and 7 May 1986 between DSI and AWS concerning their discussions as to the low price of goods imported through parallel channels and the reductions which should be granted to AWS to enable it to meet the competition from those parallel imports;

— minutes of 5 September 1986 noting the competition suffered by AWS from low-price parallel imports, the joint consideration of this problem by AWS and DSI and their proposals to agree adapted prices;

— an internal AWS memorandum of 29 September 1986, also referring to existing or proposed agreements on price between AWS and DSI with a view to eliminating parallel imports of golfing equipment which would otherwise continue in 1987.

106 With regard, secondly, to the question whether there existed a concerted practice seeking the joint setting of squash ball prices, the Court considers that the applicant's request to AWS at the meeting of 15 and 16 May 1986 that it stop supplying squash balls to the United Kingdom must be looked at in the general context of the matter with a view to ascertaining whether, as claimed by the Commission, it was part of a concerted strategy seeking, by appropriate pricing of those articles in the United Kingdom and in the Netherlands respectively, to eliminate or to attempt to eliminate parallel trade in those balls. The Court notes first that that request was accompanied, according to the abovementioned minutes, by a request by the applicant to be kept informed of the activities of Ron Sports which was engaged in parallel trade between the markets concerned. It also notes that the changes in the prices which the applicant charged to Newitt, set out in the letter of 16 June 1986, entailed an increase in Newitt's purchase price for the goods sold. The effect for Newitt of the new pricing policy applying to it following the letter of 16 June 1986 was a change from the more advantageous export prices from which it had benefited since 1978 and which, moreover, were granted to it with a 20% discount, to the applicant's domestic prices. It is common ground that those prices were higher than the export prices and that furthermore Newitt's discount was from then on reduced to 15% of the base price. In sum, it is not disputed that the applicant's new pricing policy resulted for Newitt in an increase in the purchase price of the goods sold amounting to 27% for coloured balls and 54% for black balls.

107 In the light of those facts, the Court considers that the applicant's request to AWS that it stop exporting squash balls to the United Kingdom necessarily presupposes that before that request AWS was engaged in such supply. In any event, the Court further finds that AWS complied with the applicant's request by stopping its supplies to the United Kingdom so that the applicant was able to carry out the planned price increase on the United Kingdom market, since that increase could

not have been implemented if consumers had been able to benefit from lower prices due to the existence of imports from the Netherlands, where the prices of products identical to those distributed by the applicant on the domestic United Kingdom market were lower. In those circumstances, the applicant cannot validly claim that it did not participate in the implementation of a concerted practice seeking to stop or at least limit the parallel trade in squash balls.

108 Accordingly, the Court considers that the concertation between the applicant and AWS seeking to set squash ball prices jointly must also be regarded as established.

109 The plea that the Commission did not adduce sufficient evidence or give sufficient reasons in the Decision as to the existence of concertation between the applicant and AWS in setting the prices of tennis balls and rackets, golfing equipment and squash balls must therefore be rejected.

(b) The claim that the applicant acted autonomously in deciding its commercial policy

Summary of the pleas in law and main arguments of the parties

110 The applicant submits first that the level of prices charged to Newitt from 1986 was justified by economic considerations based on the distinction between independent wholesalers and exclusive distributors in so far as concerns in particular

their respective roles in marketing the supplier's goods and their respective costs, considerations which for the purposes of Article 85(1) of the Treaty would justify prices reflecting such differences. Moreover, the prices charged to Newitt from 1986 were set taking account both of the role played by its purchases in marketing the applicant's products and of their volume in comparison with the purchases of other United Kingdom customers and with those of the applicant's exclusive distributors. Finally, the applicant emphasizes that in any event it did not accept AWS's request that the prices which AWS was charged be the same as the lowest prices charged to United Kingdom dealers.

111 The Commission refers to the Decision (recital 56) where it is made clear that the applicant never set the prices charged to United Kingdom dealers and to its exclusive distributors by reference to their respective commercial importance or to the specific costs borne by each category of operator, but set them in concert with AWS and at a level which would remove any incentive for United Kingdom dealers to export DSI products.

Assessment of the Court

112 The applicant's argument cannot be accepted since, contrary to its submissions, it is sufficiently clear from the above that its commercial policy towards Newitt, and in particular its pricing policy, was decided in concert with AWS with a view to eliminating Newitt's parallel imports into the latter's sales territory. Accordingly, the plea that the applicant decided its commercial policy autonomously and taking account of the nature and importance of its commercial relationship with the customer in question in not supported by the facts and must therefore be rejected.

(c) The claim that there was no effect on intra-Community trade

Summary of the pleas in law and main arguments of the parties

113 The applicant submits that even if a concerted pricing practice were deemed to have been proved, it would not fall within the prohibition laid down by Community competition law, since, as the Commission moreover stated in point 54 of its First Report on Competition Policy, published in 1971, the concept of parallel trade must be interpreted in the light of Articles 2 and 3 of the Treaty and the objective of market integration there referred to, and involves a dealer buying goods in one Member State with a view to reselling them in another where prices are higher, so that, taking advantage of those price differences in that way, he contributes to their alignment in the countries of the Common Market. Newitt is not a parallel trader as so defined in Community competition law because it simply took advantage of the peculiarly low prices and preferential trading terms which it had been granted without seeking to take advantage of the differences between prices in the United Kingdom and those in other Member States and thus to contribute by its activities to the alignment of prices on the various national markets within the Community.

114 Moreover, the applicant considers that, in finding unlawful the pricing measures taken vis-à-vis Newitt, the Commission is implicitly arguing that manufacturers/suppliers are under a duty to distort competition conditions in order actively to promote parallel trade and must thus disregard their normal contractual obligations to their exclusive distributors and act in competition with them by granting exceptionally favourable discounts to other customers in order to allow their products to be exported to countries where they have exclusive distributors.

115 The Commission observes that if the applicant had wanted unilaterally to put an end to the unfair commercial advantages allegedly enjoyed by Newitt it would

have informed Newitt in 1985, at the time of the alleged change in its pricing policy, instead of not doing so until 3 September 1987 by BTR's abovementioned letter to Newitt's solicitors, after Newitt's complaint and after concertation with AWS. Moreover, according to the Commission, the fact that DSI used Newitt to dispose of stocks at special end-of-year prices shows that the prices charged to Newitt for that purpose before the period in question were commercially justified and that the new prices to Newitt had the sole purpose of compartmentalizing the market when, after the applicant had used Newitt as a parallel export channel for its unwanted stock, Newitt's exports began to erode the margins of its exclusive distributors, including AWS.

116 Finally, according to the Commission, the applicant's arguments as to the true meaning to be given to the concept of parallel trade, as protected by Community competition law, and as to the necessity for it to fulfil its allegedly legitimate contractual obligations towards its exclusive distributors, are unfounded and academic with no relevance to the facts of the matter.

Assessment of the Court

117 It is clear from the body of serious, specific and convergent evidence set out in paragraphs 101 to 107 of this judgment (see the judgment of the Court of Justice in the 'Wood Pulp' cases, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307) that the applicant in concert with AWS sought to put an end to the competitive advantage which price differences on two separate national markets, the United Kingdom and the Netherlands, gave a trader who was not a party to the distribution agreement in question, such as Newitt. In particular, it is clear from the foregoing that the applicant in concert with AWS decided on a series of measures whose object or effect was to put an end to re-exports of a number of products covered by the agreement to the United Kingdom from the Netherlands,

where they were marketed at prices lower than those in the United Kingdom. Those findings are not invalidated, as claimed by the applicant, by the motivation or the trading arrangements of the parallel importers targeted by those measures, since, even if such considerations were proved, they would concern the conduct of a third party and are not in any event such as to have any bearing on the existence, the scope or the effects of a concertation which has been objectively established. The applicant, which nowhere alleges that the effect on trade is insignificant, has accordingly adversely affected trade between the Member States, within the meaning of Article 85(1) of the Treaty as interpreted moreover by the Commission in its First Report on Competition Policy, which the applicant wrongly relies on. The plea that the applicant did not adversely affect trade between Member States, and in particular parallel trade, must therefore be rejected.

118 Since, as found above, the applicant set its product prices to the complainant in concert with AWS, contrary to Article 85(1) of the Treaty, the applicant's submission as to the nature of the parallel trade allegedly protected by Community competition law and as to the legitimate obligations of manufacturers and suppliers towards their distribution network must in this case be rejected as serving no purpose.

B — The use of official logos and initials indicating endorsement by sporting federations

119 With respect to the use of logos and labels of sporting federations, the applicant (a) disputes that there was a practice decided in concert with AWS; (b) disputes that, even if such a practice were established, it was anti-competitive; (c) submits that printing the initials at issue gave it a competitive edge over other brands. Each of these three claims will be examined in turn.

(a) The existence of a practice decided in concert with AWS

Summary of the pleas in law and main arguments of the parties

120 The applicant maintains that printing the initials of the Netherlands national tennis federation (KNLTB) on its products was the result of unilateral action taken by it and was announced to AWS at their meeting on 15 and 16 May 1986, as the Commission accepted in the Decision where it acknowledged that 'the implementation of this measure ... was due to DSI' (recital 40). The use of these initials was moreover part of its general policy of seeking, in common with other businesses, national tennis federation endorsement for commercial reasons.

121 The Commission argues that, even if the measure was conceived by the applicant alone and even if the use of official logos and initials indicating endorsement by sporting federations may not in itself be contrary to Article 85(1) of the Treaty, the existence in this case of a concerted practice between the applicant and AWS with a view to thereby identifying and putting a stop to parallel imports is indisputable, as is shown by a series of documents which it adduces as evidence.

Assessment of the Court

122 The Court refers to the documents relied on by the Commission, and in particular to the following:

— the abovementioned minutes dated 28 May 1986 of a meeting between the applicant and AWS on 15 and 16 May 1986, which read: 'When the new tin is sold it will have a sticker on the lid: KNLTB official so that AWS can directly identify any parallel balls';

— the abovementioned minutes of an internal AWS meeting held on 13 June 1986 on the negotiations with DSI concerning the setting of a ratio between prices in Benelux and in the United Kingdom, which include the following passage: 'At the moment there are tough negotiations ongoing with Dunlop ... price ratio ... new tin ... KNLTB approved ... parallel tennis balls clearly identifiable';

— an internal AWS memorandum of 2 October 1986 concerning an agreement made on 1 October 1986 with the applicant concerning *inter alia* printing 'KNLTB official' on each tennis ball and affixing a sticker with the same initials on each tin of balls;

— minutes of a meeting between the applicant and AWS on 16 October 1986, concerning *inter alia* confirmation of the use of 'KNLTB official';

— minutes of a meeting between AWS and the Netherlands Sports Federation (hereinafter 'NSF') of 20 October 1986, during which Mr Thung, of AWS, stated: 'Parallel problems with Dunlop-Fort have required AWS in collaboration with Dunlop-England to take a number of stringent measures. On each Dunlop-Fort ball there will appear KNLTB official, the only approved and recommended tennis ball ...';

— an internal AWS memorandum of 4 March 1987, mentioning AWS's loss of a significant share of the tennis ball market in the Netherlands and Belgium and stating 'In order to make parallel trade impossible in theory the following has been agreed for 1987:

1. ...

2. ... Dunlop-Fort will have KNLTB official and a KNLTB official sticker ... This indication is the main advertising theme and at the same time a sales argument for customers';

— a record by AWS, dated 5 May 1987, of a meeting with the applicant on 7 April 1987, which states: 'Given the parallel problems ... Dunlop demands a plan from AWS for tennis balls for 1988 for the Netherlands and Belgium given the current problems. To be considered by AWS ... Dunlop-KNLTB instead of Dunlop-Fort. To take lower margin on tennis balls'.

123 It is therefore clear from all the documents analysed above that the commercial practice at issue, far from being decided by the applicant unilaterally and autonomously, was decided in concert with AWS. Accordingly, the applicant's claim must be rejected.

(b) The anti-competitive nature of the commercial practice in question

Summary of the pleas in law and main arguments of the parties

124 The applicant submits that, having placed distinctive marks on its tennis ball tins enabling parallel imports to be identified, which it admits, it had no interest in placing the initials of the KNLTB as an additional distinctive sign on its products with the same aim. Moreover, it considers that the mere identification of parallel imports by means of such a practice does not in itself constitute an infringement of Article 85 of the Treaty. Such an infringement would occur only if, after obtaining the right to use a logo or initials and actually printing them on their goods, the undertakings concerned entered into an agreement or engaged in concerted practices whose object or effect was to prevent parallel trade, which has not in this case been proved by the Commission.

125 The Commission emphasizes that the distinctive marks, already placed by the applicant on its tennis ball tins, were invisible to the naked eye and that it was for that reason that the applicant resorted to printing the initials of the KNLTB in a clearly visible manner, in order to facilitate the tracing of parallel imports, as is sufficiently apparent from the content of the abovementioned minutes of the internal AWS meeting on 13 June 1986 and the meeting between AWS and the NSF on 20 October 1986. According to the Commission, once an agreement to make such use of distinctive initials is contrary to Article 85(1) of the Treaty, it is not necessary to consider its actual effects on the market (judgments of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 and Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 22).

Assessment of the Court

126 As a preliminary point, it should be noted that the concertation between the applicant and AWS, found by the Commission to be contrary to Article 85(1) of the Treaty, consisted in the elimination of parallel imports of products covered by the distribution agreement, identified by distinctive signs placed on the applicant's products.

127 It is clear from the documentary evidence analysed above (see paragraph 122) that the applicant and AWS reached an understanding to place one or more distinctive signs on the products marketed by the applicant with a view to enabling certain of the products covered by the distribution agreement and imported through parallel channels to be identified. The Commission is accordingly correct in maintaining that such a consensus is anti-competitive and, as such, is prohibited by Article 85(1) of the Treaty, without its being necessary to consider whether, as claimed by the applicant, it had no effects on the market (judgments in *Consten and Grundig* v *Commission* and *Sandoz Prodotti Farmaceutici* v *Commission*, cited above).

128 That claim must accordingly be rejected.

(c) The existence of a competitive advantage

Summary of the pleas in law and main arguments of the parties

129 The applicant disputes the Commission's finding in the Decision (recital 60) that the aim of using the initials of the KNLTB on tennis balls and tins marketed by AWS was to favour its exclusive distribution network, by giving the consumer the impression that goods so marked were of a superior quality and that higher prices were justified, to the detriment of goods imported through parallel channels. The applicant considers that the only competitive advantage which it derived from using the initials of the KNLTB was to encourage the sale of its products as against those of its competitors, and states that it did not make use of the right to reproduce the initials in question on its products to prevent parallel imports.

130 The Commission, while accepting that to mark a manufacturer's products with initials may be done in such a way as to have no anti-competitive effect, emphasizes that in this case the use of the initials of the KNLTB had been designed in part to prevent sales of tennis balls imported through parallel channels, or at least to make such sales more difficult than those of the balls marked with those initials, which would to that extent have reduced the volume of parallel sales to the benefit of the applicant's exclusive distributors. Moreover, it considers that, once it has proved the existence of a concerted practice, it is irrelevant whether AWS and the applicant were in a position to make use of the right granted to them to use the initials so as actually to prevent parallel imports into the Netherlands, given that that right was in any event being unlawfully used, since, as is apparent from the evidence adduced as to this and in particular from the abovementioned telex sent on 10 March 1986 by the applicant to AWS, it was intended to enable parallel imports to be identified with a view to putting an end to them.

Assessment of the Court

131 In the light of the evidence adduced by the Commission, establishing concertation between the applicant and AWS of which the purpose — if only in part — was, with the help of particular initials printed on the goods covered by the distribution agreement, to trace goods which had been imported through parallel channels with a view to eliminating those imports, the question whether the applicant and its exclusive distribution network might at the same time derive legitimate competitive advantages from using the initials is irrelevant to the outcome of the proceedings. Accordingly, that complaint must be rejected as serving no purpose.

132 It follows from all the above that the Decision must be annulled in so far as it finds an infringement of Article 85(1) of the Treaty before 1 February 1985. As for the remainder, the claims seeking annulment of the Decision, other than those relating to the fine imposed, must be rejected.

Claims seeking annulment or reduction of the fine

133 The applicant considers that the amount of the fine is unjustified and excessive. It submits that, in fixing the amount, the Commission misused its powers under Article 15 of Regulation No 17 and breached the principle of proportionality. It sets out its reasons under the headings 'General submissions' and 'Specific submissions'.

134 The Court finds that under the heading 'General submissions' the applicant in fact simply repeats the pleas and arguments relied on in support of its claims seeking annulment of the Decision. In the light of all the foregoing, therefore, there is no

need to reconsider its pleas and arguments and it is accordingly appropriate to analyse the 'Specific submissions' which seek the same result as the applicant's 'General submissions', namely annulment or reduction of the fine.

135 The Court notes that the applicant pleads five different factors which in its view justify annulment or reduction of the fine imposed on it: (A) in setting the amount of the financial penalty imposed on it, account should be taken of the fact that some of the practices found to be infringements had never been penalized by the Commission before the date of the Decision; (B) account should be taken of the fact that, during the administrative procedure, it altered its conduct on the market to take account of the complaints notified to it by the Commission; (C) the duration of the infringement by reference to which the amount of the fine was decided was determined incorrectly; (D) the turnover on the basis of which the fine was decided is incorrect; (E) finally, the applicant pleads various specific factors.

A — The lack of precedent

Summary of the pleas in law and arguments of the parties

136 The applicant emphasizes first that the buying back of parallel imports, as a measure which contributed to the gravity of its alleged infringements, had not been clearly condemned by the Commission before its decision 88/172/EEC of 18 December 1987 relating to a proceeding under Article 85 of the EEC Treaty in *Konica* (IV/31.503; OJ 1988 L 78, p. 34) and that the buying back of goods of which the Commission complains in the Decision took place before the date of the abovementioned decision.

137 The applicant then notes that the Commission had never previously maintained that the printing of logos and initials indicating endorsement by sporting federations on a manufacturer's goods in the context of an exclusive distribution network was contrary to Article 85(1) of the Treaty.

138 Finally, the applicant emphasizes that the Commission had never previously found that either differentials between prices charged to an exclusive distributor in one Member State and those charged to an independent trader in another Member State or measures taken to equalize prices charged to purchasers operating in equivalent conditions in the same Member State infringed Article 85(1). Nor had the Commission previously considered that suppliers who hitherto were simply under a duty not to impede parallel trade should in addition actively facilitate and foster that trade.

139 The Commission submits that the buying back of products imported through parallel channels, as a measure which limits or controls markets, is prohibited by Article 85(1) of the Treaty when carried out by two or more undertakings acting in concert and that the existence of precedents is not a pre-requisite for the implementation of rules of Community competition law, which are applicable in themselves, where the undertakings concerned must have known that the purpose of their conduct was to restrict competition, as in this case.

140 As for the lack of precedent censuring the printing of logos on sporting goods, the Commission observes that in this case the parties concerned must have known that the purpose of that practice was anti-competitive, since what was in issue was the identification by those means of goods imported through parallel channels so as to eliminate those channels.

141 Finally, the Commission submits that the applicant's arguments as to the alleged novelty of certain aspects of the Decision concerning manufacturers' pricing policies serve no purpose since it has taken part in a concerted practice to maintain

price differences between the markets of the various Member States in order to impede any parallel trade, which, according to settled case-law, constitutes a serious infringement (judgment of the Court of Justice in Joined Cases 100-103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 107).

Assessment of the Court

142 In so far as the applicant pleads the lack of precedents in which the Commission has incriminated conduct by undertakings comparable to its alleged conduct in this case, the Court notes that, while it is acknowledged that there cannot be a fine without fault (judgment of the Court of Justice in Case 83/83 *Estel* v *Commission* [1984] ECR 2195), it is clear from the case-law of the Court of Justice (see *inter alia* Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117 and Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261) and of the Court of First Instance (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157) that the infringements of competition law which are liable to be penalized are those which are committed deliberately or negligently and that it is sufficient for this that the party committing the act in question must have known that its conduct would result in a restriction of competition.

143 Although it is true that in determining the amount of the fine to be imposed on an undertaking for anti-competitive practices, the Commission or the Community judicature may in certain circumstances take account of the fact that at the date of the events at issue, the practice or practices condemned had not been clearly identified as such by decision of the Commission (judgment of the Court of Justice in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359), the applicant cannot seriously claim that that applies to a general prohibition on an exclusive distribution network against re-exporting the products concerned, accompanied by various coercive measures to secure the contracting parties' compliance with that prohibition, since it is common ground that such practices, whose object and effect, are, by partitioning the different national markets, to thwart the Treaty's very objective of achieving the single market, are according to settled case-law inherently contrary to Article 85(1) of the Treaty. Such a policy of partitioning national markets

inevitably involves the existence of a differential pricing policy for the different national markets in question and the applicant cannot rely before the Community judicature on the alleged novelty of certain coercive methods implemented by it, such as buying back certain of the goods concerned with a view to securing compliance with the general prohibition laid down by it. On the contrary, in assessing the amount of the fine to be imposed on the applicant, account must be taken of the fact that, far from simply requiring parties to its contracts to comply with an anti-competitive prohibition laid down by it, the applicant used numerous and various coercive means to ensure that its distributors and resellers complied with a prohibition which to its knowledge was anti-competitive.

B — The applicant's conduct during the administrative procedure before the Commission

Summary of the pleas in law and main arguments of the parties

144 The applicant disputes the Commission's allegations that it did not alter its conduct either after communication of Newitt's complaint or after the formal letter before action of 29 October 1987 warning it against continuing practices which restricted exports and that it asked its exclusive distributors in its letter of 12 October 1987 not to reply to any questions from the Commission without first consulting it. It submits that its letter of 12 August 1987 was not intended to achieve and did not result in any distortion or suppression of evidence. It emphasizes furthermore that, after Newitt's complaint had been communicated, it carefully considered the complaint and its position was set out in its letter to Newitt's solicitors of 3 September 1987, a copy of which was sent to the Commission in August 1988. In addition it complains that when fixing the level of the fine the Commission did not take account of measures which it had taken of its own initiative to comply with the competition rules after receiving the statement of objections, unlike in other cases where the Commission took account of such conduct (Commission Decisions relating to proceedings under Article 85 of the EEC Treaty 82/853/EEC of 7 December 1982 (IV/30.070 — National Panasonic;

OJ 1982 L 354, p. 28), 85/79/EEC of 14 December 1984 (IV/30.809 — John Deere; OJ 1985 L 35, p. 58) and Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.178 — Napier Brown — British Sugar; OJ 1988 L 284, p. 41)). Finally, the applicant considers that the Commission should have taken account of the fact that it voluntarily accepted that certain aspects of its conduct were unlawful.

145 The Commission notes that it penalized the applicant not for seeking by its above-mentioned letter of 12 August 1987 to coordinate its distributors' responses to the complaint but for not altering its conduct after receiving the complaint and for seeking to benefit from its distributors' silence. The applicant cannot now plead that silence in order to seek a reduction of the fine imposed on it. The Commission emphasizes that, after the communication of the complaint and the above-mentioned letter before action, the applicant continued to infringe Article 85 of the Treaty and took steps actually to comply with the Treaty rules only after replying on 16 July 1990 to the statement of objections. As for BTR's letter of 3 September 1987 to Newitt's solicitors, it did not substantially change the applicant's commercial policy and accordingly cannot be effectively relied on. Finally, the Commission considers that the applicant could not but admit the unlawfulness of certain of its activities so that to allow this to be a mitigating factor would undermine the deterrent element of fines.

Assessment of the Court

146 Discontinuing an infringement during the administrative procedure may amount to a mitigating factor when the amount of the fine imposed by the Commission is decided (*Sandoz Prodotti Farmaceutici* v *Commission*, cited above). However, the Court finds that in this case, after Newitt's complaint had been communicated to the applicant and the letter before action stressing the gravity of its alleged infringements had been sent, the applicant took steps vis-à-vis its US subsidiary to

prevent orders made by Newitt in 1988 from being satisfied, referring to 'adjusted policy', as is clear from a telegram dated 1 February 1989 sent by that US subsidiary to Newitt.

147 As for the import of BTR's letter to Newitt's solicitors of 3 September 1987, it could only be assessed in the light of both the fact that the applicant's alleged infringements did not in any event stop after that date and the actual content of that letter, which shows that the termination of the general export ban imposed on Newitt could only operate subject to certain conditions, including the applicant's agreement as to the recipients of exports, to be identified by Newitt.

148 Furthermore, the applicant did not adopt the measures to comply with competition law notified to the Commission by letters of 12 December 1990 and 22 January 1991 until several months after the response to the statement of objections and more than three years after Newitt's complaint had been communicated to it in June 1987.

149 Finally, although it is unquestionably relevant that the applicant accepted and regretted certain aspects of its conduct, that consideration cannot, particularly in the circumstances of this case, affect the actual nature of the infringement found (judgment of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

150 The applicant's submissions that, in assessing the amount of the fine imposed on it, the Commission did not take sufficient account of its conduct during the administrative procedure must accordingly be rejected.

C — The period of infringement

Summary of the pleas in law and main arguments of the parties

151 With regard to the date when the alleged infringements started, the applicant reasserts its submission that, even if the letter which it sent Newitt on 14 December 1977 could prove that there was an infringement, there is no link between that letter and the policy which it initiated in 1985 following the takeover by BTR. Accordingly, the infringement committed in 1977 falls outside the five-year limitation period laid down in Regulation No 2988/74. As for the date when the infringements stopped, it submits that none of the measures which it acknowledges having taken continued to have any significant effect and that the measures which the Commission complained of were solely isolated incidents of short duration during a period when its commercial relations with Newitt were difficult.

152 The Commission reiterates on this issue its submission that the applicant's alleged infringements started in 1977 and continued without interruption until 1990.

Assessment of the Court

153 As the Court has already established (see paragraphs 79 to 85 above), the start of the period of infringement should be set at 1 February 1985.

154 Accordingly the duration of the infringement which, as expressly provided in Article 15 of Regulation No 17, is one of the factors to be taken into consideration in

deciding the amount of the fine to be imposed on the applicant, has been reduced to a period of some five years. The Court in the exercise of its unlimited jurisdiction should therefore vary the Decision and reduce the amount of the fine imposed on the applicant in accordance with the criteria set out below.

155 Moreover, in so far as concerns the duration of the infringements comprising the various measures taken by the applicant with the aim of eliminating the parallel imports directly covered by the general export ban, the Court notes that the Decision found that those measures were the result of concertation between the applicant and its exclusive distributors, including AWS. Those infringements must therefore be held to have started on the date when, on the basis of the evidence adduced by the Commission, the concertation complained of between the applicant and AWS started. The Court refers in this regard to two telexes of 1 February and 29 April 1985 which show that AWS was noting the identification codes on Dunlop rackets imported through parallel channels in implementation of the concerted practices between the applicant and AWS seeking to eliminate parallel imports after identifying goods so imported. The various infringements alleged by the Commission to have been committed by the applicant must therefore be held to have started at the beginning of 1985 (see paragraph 85 above). The same applies to the pricing measures, which, resulting from concertation between the applicant and AWS, must also have been taken in 1985, as is clear from the abovementioned telex of 27 February 1986 in which AWS states that it had agreed to support the applicant's pricing strategy of the previous year on the explicit condition that it have its distribution network under control.

156 As for the date when the concertation ended, it must necessarily be in April 1989, when AWS stopped being the applicant's exclusive distributor so that it may be assumed that concertation between them came to an end, and not in 1990, as the Commission implicitly maintains, given that it makes no distinction between the general export ban and the other measures to eliminate parallel exports (recital 70 of the Decision).

157 In assessing the amount of the fine which the applicant must pay by reason of the anti-competitive practices described above, account must therefore also be taken of the fact that those measures stopped in 1989 and not in 1990 as the Decision incorrectly alleges.

D — The turnover on the basis of which the fine was calculated

Summary of the pleas in law and main arguments of the parties

158 The applicant emphasizes that the turnover to be taken into account is its turnover attributable to sales to AWS, the party with which it is alleged to have concerted (2.2% of its Community turnover and 1.9% worldwide in 1988), while the amount of the fine imposed on it corresponds to 7% of its worldwide turnover, as stated by the Commission in its defence. The applicant emphasizes that a very significant proportion of its worldwide turnover (ECU 73 400 000 in 1988 and ECU 75 400 000 in 1989 for tennis balls and rackets, squash balls and golfing equipment) is attributable, as regards 'product market', to sales of golfing equipment in the United Kingdom and, as regards 'geographical sector', to non-Community sales in the Middle and Far East of goods manufactured there. It concludes from this that the calculation of the fine was based on an 'irrelevant' amount of its turnover.

159 The Commission stresses that the infringements were particularly serious and of long duration, that they were not confined to the Community or to Europe but extended to the United States by virtue of the applicant's prohibiting its subsidiary there from supplying tennis balls to Newitt in January 1988, and even extended to 'any world market' where the applicant had exclusive distributors according to the applicant's abovementioned letter to Newitt of 5 August 1985. Consequently, in imposing on the applicant a fine equal to 7% of its world turnover in the products

in question the Commission was well within its rights under Article 15(2) of Regulation No 17, since the fine imposed is considerably less than the maximum of 10% of world turnover and since in calculating the fine it took account of all the mitigating factors which could validly be taken into consideration.

Assessment of the Court

160 The Court of Justice (in *Musique Diffusion Française* v *Commission*, cited above) and Court of First Instance (in *Hilti* v *Commission*, cited above) have held that the amount of 10% of the turnover in the preceding business year, on the basis of which fines imposed for infringement of competition law are calculated, pursuant to Article 15 of Regulation No 17, refers to the total turnover of the undertaking concerned.

161 The Court finds that the applicant has not alleged that the fine of ECU 5 000 000 imposed on it exceeds the ceiling of 10% of its turnover and there is nothing in the documents before the Court to suggest that that limit was exceeded.

162 The Court accordingly considers that, even if the total amount of the fine imposed on the applicant must be reduced, as stated above, the gravity of the infringement and the adverse effect on competition in the common market sufficiently justifies the percentage of turnover taken into account by the Commission in assessing the amount of the fine originally imposed on the applicant.

163 Accordingly this plea must be rejected.

E — The other factors to be taken into account in assessing the amount of the fine

164 In disputing the amount of the fine imposed on it, the applicant also refers to various specific factors based on (a) lack of reasonable diligence by the Commission; (b) absence of detriment suffered by consumers and (c) failure to give undertakings equal treatment.

(a) The Commission's alleged lack of diligence in investigating the matter

165 The applicant submits that it should not have to suffer as a result of the abnormally long interval between the lodging of the complaint in March 1987 and the adoption of the Decision in March 1992, during which time the Commission altered its policy in the direction of increasing the amount of fines imposed on undertakings.

166 The Commission does not reply explicitly to this complaint.

167 The Court considers that although in certain circumstances in setting the amount of the fine to be imposed on the undertaking concerned account may be taken of the Commission's diligence in investigating the matter (judgment of the Court of Justice in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223), the interval in this case between the decision to initiate infringement proceedings, on 7 May 1990, and the date when the Decision was adopted is in any event evidence of reasonable diligence by the Commission. Similarly, it has been shown that, before the decision to initiate proceedings, the Commission took the

necessary steps within the relevant time-limits to investigate the complaint lodged with it on 23 June 1987, in particular by carrying out an investigation in 1988 at the premises of AWS. It should be added that the applicant could have avoided the consequences of the investigation of which it complains by complying with Community competition law as soon as the Commission notified Newitt's complaint to it, on 20 October 1987.

168 It follows from the above that the applicant's submission that the Commission did not act with reasonable diligence in investigating the matter must be rejected.

(b) The alleged absence of detriment suffered by consumers

169 The applicant submits that its activities at issue caused no detriment whatsoever to consumers and that its pricing measures and their effects were largely the result of normal market forces. It notes first that other suppliers of the products in question also operated on the markets of the countries concerned and that there is no evidence that consumer prices of its products in those countries rose during the period in question other than as a result of normal inflationary pressures. Secondly, the applicant emphasizes that it would in any event have been obliged to increase the abnormally low prices charged to Newitt in order to correct the anomaly deriving from the fact that Newitt was supplied with tennis balls at prices broadly equivalent to those charged to the applicant's exclusive distributors outside the United Kingdom.

170 The Commission does not reply explicitly to this complaint.

171 As a preliminary point, the Court notes that the detriment suffered by consumers who are victims of practices prohibited by Community competition law is not simply direct financial prejudice, such as that alleged by the applicant, but also the indirect prejudice resulting from the impairment of the competitive structure (see, in the context of the interpretation of Article 86 of the Treaty, *Commercial Solvents* v *Commission*, cited above, paragraph 32). It is clear that a general export ban imposed on an exclusive distribution network, ensuring absolute territorial protection for the members of the network approved by the supplier, deprives consumers of the effective competition structure envisaged by the EEC Treaty, in particular Article 3(f). A commercial arrangement of that type, by prohibiting all competition with the supplier's branded products, in circumstances where, precisely because of that supplier's distribution method, competition between brands is already very restricted, thus puts consumers in a position of dependence on a sole supplier. Contrary to the applicant's submission, organizing the market in that way accordingly causes a particularly serious detriment to consumers. Moreover, in so far as concerns purely financial prejudice, such as that described by the applicant, the Court considers that, contrary to the applicant's submission, eliminating or curbing parallel imports may in themselves have a detrimental effect on consumers in so far as they have the effect of preventing the fall in price which normally results from parallel imports. As for the justification of the applicant's pricing measures, the Court considers that whatever economic justification there may otherwise be for the conduct of market operators, pleas and arguments to the effect that conduct is economically justified are to no avail if in fact that conduct takes place in the context of a concertation prohibited by Article 85(1) of the Treaty, at least where such conduct is, as in this case, not such as to fall under Article 85(3) of the Treaty.

172 Consequently, the applicant's submissions that the practices at issue did not result in detriment directly suffered by consumers and that the undertaking's normal commercial policy would have led to a pricing policy identical to the policy complained of must be rejected.

(c) The alleged failure to give undertakings equal treatment

173 The applicant submits that the Commission has not explained the general criteria for setting the level of fines or the differences between the level of the fines imposed on the undertakings in question, in disregard of the principles laid down by the Court of First Instance in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, at paragraph 352. It points out that, although the Decision mentions that the infringements committed by AWS stopped in 1989 and that that undertaking encountered financial problems which culminated in a takeover (recitals 70 and 71), it did not take account of the fact that the applicant had also suffered financial problems leading to its takeover by BTR in 1985. The applicant claims that by imposing on it a fine which is more than 30 times higher than that imposed on AWS, the Commission has infringed the principle of equal treatment. Moreover, the Commission has nowhere set out its reasons for not fining Pinguin, despite finding that Pinguin had also infringed Article 85(1) of the Treaty and despite the fact that it did not even reply to the statement of objections.

174 The Commission explains that the fine imposed on AWS was equal to 5% of its turnover in the products in question and that the difference between that fine and the fine imposed on the applicant is justified by the respective duration of each undertaking's infringements. With regard to Pinguin, the Commission points out that not only did it not reply to the statement of objections but also, although found to have infringed Article 85(1) of the Treaty, it did not challenge the Decision. The Court is therefore unable to review the manner in which Pinguin was treated in comparison to the applicant. Finally, the Commission stated at the hearing that Pinguin was a small undertaking which played a minor and passive role in the infringement at issue.

175 The Court notes that, contrary to the applicant's submission, the Commission did set out in the Decision the considerations which led to its assessment of the level of the fine, in particular the gravity of the respective infringements of the under-

takings concerned, the duration of those infringements and the respective economic strength of the applicant and AWS. Accordingly, there is no basis for the applicant's submissions that the Decision does not set out the general criteria for setting the level of the fine or that the Commission breached the principle of equal treatment, given its economic stature compared with AWS and its pivotal role in the infringements at issue.

176 As to the fact that no fine was imposed on Pinguin, the Court notes that, in accordance with the case-law of the Court of Justice, an applicant cannot plead the fact that the Commission did not impose a fine on another undertaking implicated in the infringement in order itself to escape the fine imposed on it for infringement of Article 85 of the Treaty where that other undertaking's circumstances are not even before the Community judicature (see *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 197).

177 The applicant's submissions that the Commission has not explained the general criteria for setting the level of the fine imposed and that no fine was imposed on Pinguin must consequently also be rejected.

178 It follows from all the above that the fine imposed on the applicant must be upheld in principle but reduced on the ground that the applicant's infringements must be regarded as lasting from 1985 to 1990, as regards the general export ban, and from 1985 to 1989, as regards the various measures taken in order to ensure compliance with that prohibition (see paragraphs 153 to 157 above). However, the Court considers that the reduction of the fine does not necessarily have to be proportionate to the amount by which the Court has reduced the duration of the infringements, given the Commission's findings as to the gravity and the cumulative nature of the infringements while they were being actually committed.

179 In this case, the Court considers, in the exercise of its unlimited jurisdiction, that reducing the fine to be imposed on the applicant from ECU 5 000 000 to ECU 3 000 000 would represent a fair assessment of the circumstances of the case.

The claims seeking reimbursement of the expenses of providing security for payment of the fine

180 The applicant claims, finally, that the Court should order the Commission to reimburse it for all expenses incurred in providing security for payment of the fine.

181 The Commission, in its defence, raises an objection as to admissibility concerning that part of the form of order sought by the applicant. It notes that it was the applicant's choice to provide security instead of paying the fine and that in any event the Court has no jurisdiction to make such an order in the context of the review of legality which it is carrying out (judgment of the Court of Justice in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965).

182 The applicant makes no submissions in its reply in relation to the objection as to admissibility raised by the Commission.

183 The Court notes that, pursuant to Article 19 of the Statute of the Court of Justice of the EEC and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, every application is to contain a summary of the pleas in law on which it is based and that that information must be sufficiently clear and precise to enable

the defendant to prepare its defence and the Court to rule on the action (order of the Court of First Instance in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1269, paragraph 21). The same considerations must apply to all claims, which must be accompanied by pleas and arguments enabling both the defendant and the Court to assess their validity.

184 The Court finds that, in this case, the claims considered above do not specify the legal basis on which they are made and are not accompanied by any plea or argument enabling their validity to be assessed. In particular, those claims do not specify whether they form part of this action for annulment, whether they are brought under Articles 178 and 215 of the Treaty or whether they refer to recoverable costs.

185 It follows that the claims that the Commission be ordered to reimburse the applicant for the costs incurred in providing security for payment of the fine, must be rejected as inadmissible, without its being necessary to rule on the objection as to admissibility raised by the Commission.

Costs

186 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In this case, since each party has been unsuccessful in part, the Court considers that a decision that the applicant should bear its own costs and half the Commission's costs would represent a fair assessment of the circumstances of the case.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Commission Decision 92/261/EEC of 18 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.290 — Newitt/Dunlop Slazenger International and Others) in so far as it decides that:**

   (a) **the applicant's infringement consisting in a general export ban started on a date before 1 February 1985;**

   (b) **the various measures taken by the applicant to secure compliance with the requirement prohibiting the export of goods covered by the contract came to an end on a date after 1989;**

2. **Reduces the fine imposed on the applicant from ECU 5 000 000 to ECU 3 000 000;**

3. **Dismisses the remainder of the application;**

4. **Orders the applicant to bear its own costs and half of the Commission's costs.**

Cruz Vilaça Briët Kalogeropoulos

Barrington Biancarelli

Delivered in open court in Luxembourg on 7 July 1994.

H. Jung J. L. Cruz Vilaça

Registrar President