JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

30 September 2003 *

In Case T-203/01,

Manufacture française des pneumatiques Michelin, established in Clermont-Ferrand (France), represented by J.-F. Bellis, M. Wellinger, D. Waelbroeck and M. Johnsson, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Wainwright, acting as Agent, and A. Barav, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

Bandag Inc., established in Muscatine, Iowa (United States), represented by H. Calvet and R. Saint-Esteban, lawyers, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin) (OJ 2002 L 143, p. 1),

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2003,

gives the following

Judgment

The applicant's commercial policy in the markets in question

1 Manufacture française des pneumatiques Michelin ('the applicant' or 'Michelin France') has as its main activity the manufacture of tyres for various vehicles. In France, it inter alia manufactures and sells new and retreaded tyres for heavy trucks.

2 So far as concerns new tyres, a distinction is drawn between the original equipment market and the replacement market. Original equipment tyres are sold by the tyre manufacturer direct to the vehicle producer, without passing through an intermediary. Replacement tyres, on the other hand, are sold to the final consumer primarily through a large number of specialised commercial outlets.

3 The demand for tyres for heavy goods vehicles is not satisfied only by the supply of new tyres. Provided the casing is in a sound condition, used tyres may be given a new tread: this is the retreading operation.

4 This case concerns the commercial policy pursued by Michelin in the French markets for new replacement tyres for trucks and for retreaded tyres for trucks. The policy consisted of the following three components, which will be examined in greater detail below: 'the general price conditions for France for professional dealers', the 'agreement for optimum use of Michelin truck tyres' ('the PRO agreement') and the 'agreement on business cooperation and assistance service' (known as the 'Michelin Friends Club').

1. *The general price conditions for France for professional dealers*

5 The 'general price conditions for France for professional dealers' ('the general conditions') laid down, first, a 'list' price known as the 'invoicing scale' (net price invoiced, less any rebates) and, secondly, a set of rebates or refunds.

6 From 1980 to 1996, the rebates provided for in the general conditions were divided into three categories: 'quantity rebates', rebates for the quality of the dealer's service to users ('service bonus') and rebates dependent on increases in new tyre sales ('progress bonus'). These were not 'invoice rebates' but were paid at the end of February of the calendar year following the financial year in question.

7 The quantity rebates system provided for an annual refund expressed as a percentage of the turnover achieved by the dealer with the applicant, the rate increasing gradually according to the quantities purchased. In that regard, the general conditions provided for three scales, depending on the tyres in question ('all types', 'heavy plant tyre' and 'retreads').

8 In 1995, for example, the 'all types' scale consisted of 47 steps. The rebate percentages ranged from 7.5% on a turnover of FRF 9 000 to 13% on a turnover of over FRF 22 million. The 'heavy plant tyre' and 'retreads' categories each had their own scale. In 1995 for example, the rebates ranged, in the case of retreads, from 2% on a turnover of over FRF 7 000 to 6% on a turnover in excess of FRF 3.92 million.

9 In 1995 and 1996, the general conditions provided, under certain conditions, for three advances on quantity rebates, payable in May, September and December of the current financial year.

10 The 'service bonus' was paid to the specialist dealer to improve his facilities and after-sales service. To qualify for such a bonus, a minimum annual turnover had to be achieved with the applicant in the course of the year. The amount ranged from FRF 160 000 in 1980 to FRF 205 000 in 1985. It then became FRF 50 000, falling to FRF 45 000 in 1995 and 1996. The size of the bonus, which was fixed at the beginning of the year by annual agreement with the dealer in a document entitled 'Service bonus', depended on compliance with commitments entered into by the dealer in a number of areas. Each commitment corresponded to a number of points, and where certain thresholds of points were exceeded the dealer was entitled to a bonus corresponding to a percentage of the turnover achieved with the applicant for all tyre types combined. This percentage ranged from 0% to 1.5% during the period 1980 to 1991 and from 0% to 2.25% for the period 1992 to 1996. The maximum score was 35 points and the maximum bonus was earned for a score of at least 31 out of 35 points. Amongst the commitments for which points could be earned were promoting the sale of the applicant's new products and providing the applicant with market information. The dealer earned an extra point if he systematically had Michelin casings retreaded by Michelin France. In 1996 only the systematic first retreading of Michelin tyres by Michelin was insisted upon. The service bonus was abolished in 1997.

11 The 'progress bonus' was intended to reward dealers who agreed at the beginning of the year to undertake in writing to exceed a minimum base (expressed in numbers of casings purchased per annum) fixed by mutual agreement, depending on past performance and future prospects, and who managed to exceed it. The base was proposed each year and was negotiated with the dealer. In 1995 and 1996, if the amount by which the base was exceeded was equal to or greater than 20%, the dealer was entitled to a rebate rate of 2% or 2.5% applied to the entire turnover in respect of new truck tyres achieved with the applicant.

12 Furthermore, dealers who, during two consecutive financial years, exceeded a fixed maximum turnover with the applicant could negotiate a 'commercial cooperation agreement' (known as an 'individual agreement'), which entitled them to additional rebates. Between 1993 and 1996, 16 to 18 major dealers signed this type of agreement.

13 As from 1997, the applicant changed its business conditions for dealers. So far as concerns new truck tyres, the main changes concerned the disappearance of quantity rebates, the service bonus and the progress bonus, and the appearance of new categories of rebate, namely 'invoice rebates', the 'achieved-target bonus', 'end-of-year rebates' and a 'multiproduct rebate'. Those rebates were applicable in 1997 and 1998. As from 1997, the bulk of the rebates previously paid at the end of February in the year following the reference period was 'shown on the invoice'.

14 'Invoice rebates' (of between 15% and 19%) were granted on the basis of the number of new truck/earthmover/light plant tyres purchased the previous year, the average purchases for the two previous years or the average purchases for the three previous years, depending on which was most favourable to the dealer.

15 Dealers wishing to obtain a larger invoice rebate than the amount to which they would have been entitled by virtue of their previous services were required to sign a target contract drawn up in agreement with the applicant which took account of the dealer's potential together with foreseeable market trends. The invoice rebate obtainable then corresponded to the tranche within which the commitment entered into by the dealer fell.

16 In 1997 dealers who had signed a target contract obtained an 'achieved-target bonus' of 2% of their net annual invoiced turnover, paid at the end of February, if the target was reached. In 1998 the bonus was set at 1.5%.

17 Depending on the invoice rebate originally granted and the net invoiced turnover, an 'end-of-year rebate' of between 0% and 3% was paid at the end of February. The 'multiproduct rebate' was granted to dealers whose total turnover in respect of tyres of all types accounted for more than 50% of their total turnover and who achieved significant sales in at least two of the following four categories: car/van, motorcycle/scooter, truck and agricultural tractor. They were entitled to an end-of-year rebate on their invoiced turnover in respect of new products (with the exception of heavy plant) and retreaded products according to a scale ranging from 1% to 2.20% in 1997 and from 1.5% to 2.70% in 1998.

18 As regards retreaded truck tyres, from 1997 the system comprised two rebates: (i) a 5% invoice rebate on all retreaded products; and (ii) an end-of-year quantity rebate depending on total net turnover in respect of retreads (van, truck, earthmover, agricultural tractor, light and heavy plant), increasing progressively from 1% (above FRF 6 500) to 4% (above FRF 2 500 000) of total net turnover in respect of retreads, according to a 16-step scale ranging from 1% at the bottom of the scale to 0.1% at the top.

19 Dealers who had signed an individual agreement continued to enjoy additional rebates (for both new tyres and retreads).

2. *Agreement for optimum use of Michelin truck tyres ('the PRO agreement')*

20 The agreement for optimum use of Michelin truck tyres ('the PRO agreement'), which was introduced in 1993, was intended only for dealers purchasing new truck tyres from Michelin France and enabled such dealers to obtain further rebates. To this end, a dealer was required to enter into a number of obligations, namely to sign with the applicant a truck progress bonus commitment for the current year and to present to Michelin for retreading Michelin truck tyres which had reached the legal tread wear limit. In return, for every truck casing considered retreadable by Michelin, the dealer received FRF 45.65 or 120 depending on the type of tyre concerned. If the casings had been regrooved and then reused, the dealer received an additional FRF 15, 25 or 40. A dealer could therefore earn a maximum rebate of FRF 160. The bonus was paid in the form of a credit towards the dealer's purchases of new truck tyres. The maximum number of 'PRO' bonuses was limited by the number of new truck tyres bought the previous year. As from 1997, the amount of the bonuses granted was limited by the number of tyres which the dealer had undertaken to buy in the course of the current year in his 1997 target contract. In 1998 the 'PRO agreement' was abolished.

3. *The agreement on business cooperation and service assistance (the 'Michelin Friends Club')*

21 The 'Michelin Friends Club', which was created in 1990, is composed of tyre dealers wishing to enter into a closer partnership with the applicant. Michelin

participates in the financial effort of the Club-member dealer notably by contributing towards investment and training and by making a financial contribution amounting to 0.75% of annual 'Michelin Service' turnover. In return, the applicant imposes, inter alia, the following conditions: the dealer must provide the applicant with certain information concerning his undertaking (he must communicate balance-sheets, statistics on turnover and services provided and information about the shareholders); the Club-member dealer must permit quality controls of the service, must promote the Michelin brand and particularly its new products, and carry a sufficient stock of Michelin products to meet any customer demand immediately. Up to 1995, he was required not to divert to other brands (spontaneous) customer demand for Michelin products. Finally, he was required to have the first retreading of truck tyres carried out at Michelin France. This last condition, which appeared in 1991, was removed in respect of vans in 1993 and abolished in 1995.

The administrative procedure and the contested decision

22 In May 1996, the Commission, acting on its own initiative, opened a file on the applicant. It considered that it had reasons for suspecting that the applicant was abusing its dominant position in the French market for replacement tyres for trucks and buses by imposing on dealers unfair commercial conditions, based inter alia on a loyalty-inducing rebate system. Requests for detailed information were sent on several occasions to the applicant, to its competitors and to tyre dealers and importers. Moreover, in June 1997, investigations were carried out at the applicant's offices pursuant to Article 14(3) of Council Regulation No 17, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

23 By letter of 30 April 1998, the applicant gave the Commission an undertaking to change its commercial conditions in the French market for new replacement tyres and retreaded tyres for trucks and buses, in order to eliminate all the aspects of its commercial policy called in question by the Commission.

24 On 28 June 1999, the Commission sent a statement of objections to the applicant, which replied on 8 November 1999. The applicant was given a hearing on 20 December 1999.

25 On 20 June 2001, the Commission adopted Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin) (OJ 2002 L 143, p. 1, 'the contested decision'). In the contested decision, the Commission establishes, first of all, that replacement tyres for trucks and buses comprise two relevant product markets, namely the market in new replacement tyres and the market in retreads. In France, the applicant occupies a dominant position in each of those product markets.

26 The Commission maintains that the applicant abused its dominant position in those two markets by pursuing a commercial and pricing policy in France with regard to dealers which was based on a complex system of rebates, discounts and/or various financial benefits whose main objective was to tie resellers to it and to maintain its market shares. The rebate systems introduced by the general conditions, the 'PRO Agreement' and the 'Business cooperation and service assistance agreement' are specifically regarded as abusive.

27 The operative part of the contested decision states:

'Article 1

The Commission finds that, during a period extending from 1 January 1990 to 31 December 1998, [the applicant] infringed Article 82 of the EC Treaty by applying a system of loyalty-inducing rebates to dealers in new replacement tyres and retreaded tyres for trucks and buses in France.

Article 2

For the infringement referred to in Article 1, a fine of EUR 19.76 million is hereby imposed on [the applicant].

...

Article 3

[The applicant] shall refrain from repeating any conduct described in Article 1, and from adopting any measure having equivalent effect.

Article 4

This Decision is addressed to [the applicant].'

Procedure

28 By application lodged at the Registry of the Court of First Instance on 4 September 2001, the applicant brought the present action.

29 By document lodged at the Registry of the Court of First Instance on 3 January 2002, Bandag Inc. ('Bandag') applied for leave to intervene in support of the form of order sought by the Commission.

30 By letter of 8 February 2002, the applicant requested that several pieces of confidential material should be excluded from the file which was to be communicated to Bandag.

31 By order of the President of the Third Chamber of the Court of First Instance of 28 February 2002, Bandag was granted leave to intervene in support of the form of order sought by the Commission. Non-confidential versions of the various documents in the file, prepared by the applicant, were sent to Bandag.

32 On 21 May 2002, Bandag lodged its statement in intervention, on which the main parties submitted their observations.

33 By order of 15 October 2002, the President of the Third Chamber of the Court of First Instance acceded in part to the applicant's request for confidentiality. The Registrar then sent Bandag a copy of the documents in the file which the Court considered non-confidential.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, the Court put a number of written questions to the main parties, to which they replied within the prescribed period.

35 The main parties presented oral argument and replied to the oral questions put by the Court at the hearing on 3 April 2003. Bandag did not attend the hearing.

36 At the hearing, the Commission presented to the Court the replies from the Michelin tyre dealers to the Commission's requests for information of 30 December 1996 and 27 October 1997, which, pursuant to the second subparagraph of Article 67(3) of the Rules of Procedure of the Court of First Instance, were not communicated to the applicant or Bandag. At the hearing, the main parties expressly consented that the Court should ascertain that the dealers' replies were consistent with the tables prepared by the Commission during the administrative procedure, which reproduced those replies without giving names.

37 At the request of the Court, the Commission, on 24 April 2003, produced the letters exchanged between Bandag and the Commission between October and December 1996 concerning the dealers who had information of use in the Commission's investigation. Those letters likewise were not communicated to the applicant. At the hearing the main parties gave their express consent for the Court to determine whether during the administrative procedure the Commission contacted only the dealers suggested by Bandag, as the applicant claims.

Forms of order sought

38 The applicant claims that the Court should:

— annul the contested decision;

— at the very least, cancel or substantially reduce the fine imposed by the contested decision;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

40 Bandag claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the intervention.

Law

41 The application consists of two parts. The first concerns the alleged unlawfulness of the contested decision in that it finds an infringement of Article 82 EC. The second part relates to the alleged unlawfulness of the fine imposed.

1. *The alleged unlawfulness of the contested decision in that it finds an infringement of Article 82 EC*

Preliminary observations

42 The applicant puts forward five pleas alleging various infringements of Article 82 EC. The first three relate respectively to the quantity rebates, the service bonuses and the characteristics of the Michelin Friends Club. By its fourth plea, the applicant denies that there was a further abuse resulting from the cumulative effect of the various rebate systems. By its fifth plea, it criticises the Commission for not having carried out a specific analysis of the effects of the impugned practices.

43 The Court notes that, in its action, the applicant does not challenge various findings made by the Commission in the contested decision.

44 Thus, the applicant does not challenge the definition of the relevant markets referred to in the contested decision, namely the French market for new replacement tyres for trucks and buses and the French market for retreaded tyres for trucks and buses (recitals 109 to 171 of the contested decision). Nor does it dispute the finding that it occupies a dominant position on those markets (recitals 172 to 208 of the contested decision).

45 Likewise, the applicant does not raise any specific pleas against the Commission's assessment of the abusive nature of the progress bonus (recitals 67 to 74 and 260 to 271 of the contested decision) and of the PRO Agreement (recitals 97 to 100 and 297 to 314 of the contested decision).

46 When asked at the hearing how the application could give rise to the annulment of the whole of the contested decision, as sought by the applicant (see paragraph 38 above), the applicant explained that it has raised a parallel plea in its application, relating to all the practices called into question by the contested decision. That is its fifth plea, alleging infringement of Article 82 EC in that the Commission did not carry out a specific analysis of the effects of the impugned practices (see paragraphs 235 to 246 below).

47 Should the fifth plea of the applicant's application not be upheld, therefore, the action could at the most give rise to the partial annulment of the contested decision and a reduction in the amount of the fine.

First plea: the Commission infringed Article 82 EC by holding that the quantity rebates constituted an abuse within the meaning of that provision

The contested decision

48 At recitals 216 and 217 of the preamble to the contested decision, the Commission states:

'216 Quantity rebates took the form of an annual rebate as a percentage of total turnover (trucks, cars and vans) achieved with Michelin France. To be eligible, the dealer had to achieve the turnover thresholds provided for in the rebate grids. In the first Michelin case..., and consistently in more recent cases, the Court of Justice has ruled against the granting of quantity rebates by an undertaking in a dominant position where the rebates exceed a reasonable period of three months (as is the case in this instance) on the grounds that such a practice is not in line with normal competition based on prices. Merely buying a small additional quantity of Michelin products made the dealer eligible for a rebate on the whole of the turnover achieved with Michelin and this was greater than the fair marginal or linear return on the additional purchase, which clearly creates a strong buying incentive effect. In the Court's view, a rebate can only correspond to the economies of scale achieved by the firm as a result of the additional purchases which consumers are induced to make.

217 In addition, since the rebates were not paid until February in the year following that in which the tyre purchases were made (Michelin is the only company which applies this practice, since all its competitors pay most of their rebates immediately), [various] abuses were evident.'

49 According to the Commission, the abuses resulting from the quantity rebate system were as follows.

50 First, the Commission maintains that the quantity rebates were unfair (recitals 218 to 225 of the contested decision). In that regard, it states that the dealers could not know with certainty the final purchasing price of Michelin tyres. Indeed, '[s]ince the rebates applied to all of the Michelin turnover and were calculated only about one year after the start of the first purchases, it was not possible for the dealers to know, before the very last orders had been placed, what the real unit purchase price of the tyres would be, which placed them in a situation of uncertainty and insecurity, prompting them to minimise their risks by purchasing mainly from Michelin' (recital 220 of the contested decision). Furthermore, according to the Commission, '[g]iven the intensity of competition and the low level of margins in the sector (about 3.7% according to the Commission's investigation), dealers were obliged to resell at a loss pending the payment of the rebates. The price paid to Michelin was generally higher than the price charged by the dealer to final consumers. The dealer thus initially sold "at a loss". It was only when he was paid the various "bonuses" and premiums that the reseller recovered his costs and re-established his profit margin' (recital 218 of the contested decision). The system thus placed an undue financial burden on dealers (recital 224 of the contested decision). Finally, the Commission states that, 'in view of the fact that the rebates were paid extremely late, dealers were forced to enter into quantitative commitments to Michelin (in connection with the progress bonus) before they had even received the quantity rebates for the previous year' (recital 223 of the contested decision).

51 Secondly, the quantity rebates were loyalty-inducing (recitals 226 to 239 of the contested decision). The Commission states that '[a]ny system under which rebates are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the foreseeable loss for the entire period' (recital 228 of the

contested decision). It further states that it was in the dealer's interest to go beyond the maximum figure stipulated, 'since this allowed him to sign a "commercial agreement" with Michelin, with all the advantages which this involved' (recital 230 of the contested decision).

52 Thirdly, the quantity rebates are alleged to have had a market-partitioning effect (recitals 240 to 247 of the contested decision). In the Commission's submission, '[t]he rebates applied only to purchases made from Michelin France and thus discouraged purchases made abroad or from importers. Conversely, the high level of prices in France, before rebates, discouraged purchases in France from abroad' (recital 240 of the contested decision).

Principles employed in determining whether a rebate system applied by an undertaking in a dominant position constitutes an abuse

53 The applicant claims that any rebate is loyalty-inducing since it encourages purchasers to purchase more from the person offering the rebate. In order to establish an infringement of Article 82 EC, the Commission is required to prove that the rebates are likely in due course to undermine the competitive structure of the market and ultimately to permit the undertaking concerned to abuse the consumer. Since the specific aim of competition law is to encourage price competition, the applicant maintains that a rebate system can be described as an abuse only if it has a foreclosure effect or, in other words, if it weakens competition in the longer term and enables the undertaking in a dominant position to recover the costs generated by its rebate policy.

54 In that regard, the Court points out that, according to a consistent line of decisions, an 'abuse' is an objective concept referring to the behaviour of an

undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 70; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 69; and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 111).

55 Therefore, whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 57, and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 112). Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 189; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 69; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 107; and *Irish Sugar* v *Commission*, cited above, paragraph 112).

56 With more particular regard to the granting of rebates by an undertaking in a dominant position, it is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant

position, is contrary to Article 82 EC. Such a rebate is designed through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 518; *Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraphs 89 and 90; *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 71; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission*, cited at paragraph 55 above, paragraph 120).

57 More generally, as the applicant submits, a rebate system which has a foreclosure effect on the market will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position. For that reason, the Court has held that a rebate which depended on a purchasing target being achieved also infringed Article 82 EC (*Michelin* v *Commission*, cited at paragraph 54 above).

58 Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC (see *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 71, and Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 50). If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff (Opinion of Advocate General Mischo in *Portugal* v *Commission*, cited above, at ECR I-2618, point 106). Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position.

59 It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies

from competitors (see *Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 90; *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85; *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 114; and *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 52).

60 In determining whether a quantity rebate system is abusive, it will therefore be necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (see *Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 90; *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 73; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 114).

The abusive nature of the quantity rebate system applied by the applicant

— Introduction

61 The applicant maintains, in essence, that quantity rebates are actually quantity discounts which an undertaking in a dominant position is entitled to grant its customers.

62 In that regard, the Court points out that the mere fact of characterising a discount system as 'quantity rebates' does not mean that the grant of such discounts is

compatible with Article 82 EC. It is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discounts, and to investigate whether, in providing an advantage not based on any economic service justifying it, the quantity rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (see the case-law cited at paragraph 60 above).

63 In the present case, unlike in *Suiker Unie and Others* v *Commission* (cited at paragraph 56 above), *Hoffmann-La Roche* v *Commission* (cited at paragraph 54 above), *Irish Sugar* v *Commission* (cited at paragraph 54 above) and *Portugal* v *Commission* (cited at paragraph 58 above), the Commission did not consider that the system called in question led to the application of dissimilar conditions to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

64 It is apparent from the contested decision that the Commission considers that the quantity rebate system applied by the applicant constitutes an infringement of Article 82 EC because it is unfair, it is loyalty-inducing and it has a partitioning effect (see paragraphs 48 to 52 above).

65 However, it may be inferred generally from the case-law that any loyalty-inducing rebate system applied by an undertaking in a dominant position has foreclosure effects prohibited by Article 82 EC (see paragraphs 56 to 60 above), irrespective of whether or not the rebate system is discriminatory. In *Michelin* v *Commission* (cited at paragraph 54 above), the Court, when considering the lawfulness of Commission Decision 81/969/EEC of 7 October 1981 relating to a proceeding under Article [82] of the Treaty (IV/29.491 — Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin) (OJ 1981 L 353,

p. 33, 'the NBIM Decision'), did not uphold the Commission's claim that the rebate system applied by Michelin was discriminatory but nevertheless held that it infringed Article 82 EC because it placed dealers in a position of dependence in relation to Michelin.

66 This Court considers that it is necessary, first, to consider whether the Commission had good reason to conclude, in the contested decision, that the quantity rebate system was loyalty-inducing or, in other words, that it sought to tie dealers to the applicant and to prevent them from obtaining supplies from the applicant's competitors. As the Commission acknowledges in its defence, moreover, the alleged unfairness of the system was closely linked to its loyalty-inducing effect. Furthermore, it must be held that a loyalty-inducing rebate system is, by its very nature, also partitioning, since it is designed to prevent the customer from obtaining supplies from other manufacturers.

— The loyalty-inducing nature of the quantity rebates

67 The applicant submits that to equate quantity rebates with target discounts, or even loyalty discounts, is to disregard the fundamental characteristics of the impugned system, namely a system composed of a graduated scale of discounts, based on a large number of very close thresholds, which require only small volumes of purchases to reach the next threshold. The discounts were calculated according to the volumes actually purchased and were on a sliding scale, since the discount granted for each threshold attained decreased as the purchaser moved up the curve. The system was therefore completely transparent to the purchaser. According to the applicant, it was a standard quantity discount system which did not constitute an abuse. The Court of Justice and the Court of First Instance have never imposed a limit on the reference period for quantity discounts. In support of its arguments, the applicant refers in particular to the judgment in *Portugal* v *Commission* (cited at paragraph 58 above).

68 The Court notes that there was a scale of quantity rebates for all types of tyres combined, except for 'heavy plant' tyres and retreads, and two different scales for the latter two categories. The contested decision refers only to the rebates in so far as they apply to new replacement truck tyres and to retreaded truck tyres.

69 The scale of quantity rebates (all types combined) comprised, for the period 1990 to 1996, between 47 and 54 steps. The scale of the quantity rebates which formed part of the 1995 general conditions, which is representative of the other years, was as follows:

T/O 95	Rate	T/O 95	Rate	T/O 95	Rate	T/O 95	Rate
9 000	7.50	172 000	10.65	5 855 000	11.85	10 660 000	12.45
15 000	8.50	241 000	10.75	6 242 000	11.90	11 170 000	12.50
25 000	9.00	492 000	10.85	6 604 000	11.95	11 730 000	12.55
30 000	9.25	757 000	10.95	6 934 000	12.00	12 520 000	12.60
35 000	9.50	1 030 000	11.05	7 280 000	12.05	13 380 000	12.65
45 000	9.85	1 306 000	11.15	7 640 000	12.10	14 314 000	12.70
60 000	10.00	1 656 000	11.25	8 020 000	12.15	15 314 000	12.75
80 000	10.10	2 100 000	11.35	8 415 000	12.20	16 385 000	12.80
100 000	10.20	2 663 000	11.45	8 830 000	12.25	17 532 000	12.85
118 000	10.35	3 376 000	11.55	9 260 000	12.30	18 792 000	12.90
142 000	10.50	4 280 000	11.65	9 710 000	12.35	20 145 000	12.95
		5 136 000	11.75	10 180 000	12.40	22 000 000	13.00

70 A similar table, contained in the 1995 general conditions and comprising 18 steps, existed for retreaded tyres during the period 1990 to 1996. For 1995, the table was as follows:

Retreading Turnover Excluding VAT	Discount rate
< 7 000	0
7 000	2
7 400	3
8 000	3.5
10 800	4
14 700	4.50
19 600	4.75
29 400	5
49 000	5.1
88 200	5.2
166 600	5.3
323 400	5.4
637 000	5.5
1 127 000	5.6
1 813 000	5.7
2 499 000	5.8
3 185 000	5.9
≥ 3 920 000	6

71 It is clear from the tables reproduced above that the quantity discount rate increased, as the applicant states, according to the turnover achieved with the applicant. The rate shows a rapid increase over the first steps while the increase is much less rapid for the higher steps.

72 In *Portugal* v *Commission* (cited at paragraph 58 above, paragraph 51), the Court of Justice held that 'it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices or — which amounts to the same — higher average reductions than those offered to smaller purchasers of that product or users of that service. It should also be noted that even where there is a linear progression in quantity discounts up to a maximum discount, initially the average discount rises (or the average price falls) mathematically in a proportion greater than the increase in purchases and subsequently in a proportion smaller than the increase in purchases, before tending to stabilise at or near the maximum discount rate. The mere fact that the result of quantity discounts is that some customers enjoy in respect of specific quantities a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase is inherent in this type of system, but it cannot be inferred from that alone that the system is discriminatory'.

73 However, it cannot be inferred from that paragraph of the judgment in *Portugal* v *Commission* (cited at paragraph 58 above) that the quantity rebate system applied by the applicant must automatically be regarded as compatible with Article 82 EC solely because the discount rate per tyre increases according to the quantities purchased. In that judgment, the Court of Justice examined the lawfulness of Commission Decision 1999/199/EC of 10 February 1999 relating to a proceeding pursuant to Article [86] of the Treaty (Case No IV/35.703 — Portuguese Airports) (OJ 1999 L 69, p. 31) in which a discount system had been considered discriminatory. However, the Court emphasised, at paragraph 51 of that judgment, that the application of a quantity rebate system leads to a situation in which 'larger purchasers' enjoy higher average reductions than 'smaller purchasers' and that it cannot be inferred from that alone that the system is discriminatory.

74 However, according to settled case-law (see paragraphs 56 to 60 above), a discount system which seeks to tie dealers to an undertaking in a dominant position by granting advantages which are not based on a countervailing economic advantage and to prevent those dealers from obtaining their supplies from the undertaking's competitors infringes Article 82 EC.

75 In the present case, the Commission infers that the quantity rebates are loyalty-inducing from the following evidence: the fact that the discount is calculated on the dealer's entire turnover with Michelin and the fact that the reference period applied for the purpose of the discount is one year (see recitals 216 and 226 to 239).

76 However, the applicant claims that the Commission never criticised it during the administrative procedure for having applied the quantity rebate percentage to the total turnover achieved by the dealers. The Commission has thus formulated a new objection and the contested decision should therefore be annulled in part for infringement of the rights of the defence.

77 The Court reiterates that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct to which the Commission objects. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 476).

78 However, the applicant must have realised upon reading the statement of objections that the Commission based the loyalty-inducing nature of the quantity rebates on, inter alia, the consideration that those rebates were calculated on the overall turnover achieved by the dealers with the applicant. The part of the statement of objections devoted to the loyalty-inducing nature of the quantity rebates states, at point 197, that 'a dealer could not take the risk at any given moment of diversifying his range to any significant extent at Michelin's expense since this could have jeopardised his ability to reach the rebate threshold and could thus have had a major effect on the *overall* cost price of the Michelin tyres purchased over the year' (emphasis added). For new tyres, point 199 of the statement of objections notes 'the application of quantity rebates to the *whole* of the turnover in Michelin products' (emphasis added) and, for retreaded tyres, point 200 states that 'the variations in the rate of the rebate resulting from a final order for retreads during a year affected the dealer's profit margin in respect of the *total amount* of retread sales for the whole of the year' (emphasis added).

79 It is also clear from the applicant's reply to the statement of objections that it realised that one of the aspects of the Commission's objections to the quantity rebate system was the fact that the discount attained applied to the overall turnover with the applicant and not only to the bracket of additional quantities. Thus, on page 136 of its reply, the applicant attempts to show that reaching one turnover threshold had only a slight effect on the increase in the rebate rate. It states: 'The example given by the Commission in point 198 of the statement of objections... speaks for itself: the Commission refers to the situation of a dealer whose annual turnover with Michelin is FRF 9 000, entitling him to a rebate of 7.5%, and who is clearly under "considerable" pressure to reach the next step, FRF 15 000, in order to receive 1% extra discount *on all his annual purchases*. The Commission does not appear to realise that 1% of a turnover of FRF 15 000 is only FRF 150,... a very modest sum' (emphasis added).

80 The applicant's argument therefore has no factual basis and must be rejected.

81 Also, as to whether the factors mentioned in paragraph 75 above show that the quantity rebate system has unlawful loyalty-inducing effects, it must be remembered that the Court of Justice held in *Michelin* v *Commission* (cited at paragraph 54 above, paragraph 81), that 'any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period'. As the Commission rightly points out in the contested decision (recital 230), '[a] factor which considerably increased the pressure was that a final extra order of truck tyres allowing the higher scale to be reached affected the dealer's profit margin on sales of new Michelin tyres in all categories...'.

82 However, the applicant claims that, contrary to what the Commission asserts in the contested decision (recital 216), the Community judicature has never imposed a maximum limit of three months on the reference period for quantity rebates. On the contrary, the Commission has always accepted that quantity discounts are calculated on an annual basis (Commission Decision 73/109/EEC of 2 January 1973 relating to proceedings under Articles [81] and [82] of the EEC Treaty (IV/26.918 — European Sugar Industry) (OJ 1973 L 140, p. 17, point 16) and Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article [82] of the EEC Treaty (IV/33.133-D — Soda Ash — ICI) (OJ 1991 L 152, p. 40, point 6); Notices pursuant to Article 19(3) of Regulation No 17 concerning the rebate schemes applied by British Gypsum (OJ 1992 C 321, pp. 9 to 11)). The applicant claims that the pressure to reach a higher step in the discount system at issue in the present case was significantly less than in the target discount system examined in *Michelin* v *Commission* (cited at paragraph 54 above). Indeed, unlike the pressure caused when there is a single high target, where the dealer has everything to lose if he does not reach it, the large number of thresholds in the present case makes it easy for the dealer to reach the level necessary to be entitled to a discount and to move on to a higher scale, and also ensures that he does not risk losing the whole discount by obtaining part of his supplies from other suppliers. Furthermore, in the applicant's submission, the higher the dealer climbs up the discounts scale, the less he earns in additional discounts as he reaches each threshold.

83 The Court points out that the Commission, in the previous decision-making practice to which the applicant refers, did not adjudicate on the compatibility with Article 82 EC of discount systems which are linked to the volume of annual purchases from an undertaking in a dominant position. In Decisions 73/109 and 91/300, referred to in the preceding paragraph, the Commission called in question systems of loyalty discounts granted by an undertaking in a dominant position in return for commitments to obtain all or virtually all supplies from the undertaking.

84 As for the Commission notices concerning British Gypsum's commercial policy, mentioned in paragraph 82 above, the Commission did admittedly indicate that it intended to take a favourable approach to rebate schemes characterised by an annual reference period. However, in those notices, the Commission pointed out various specific features of the rebate schemes applied by British Gypsum which are absent in the present case. Thus, the rebates granted by British Gypsum were determined on the basis of the anticipated annual turnover and not on the basis of actual turnover. In those schemes, there was no readjustment of the discount for a customer whose annual turnover was lower than that initially anticipated, which significantly reduced the pressure on the customer to make additional purchases from British Gypsum at the end of the reference period. Furthermore, the British Gypsum rebates were granted quarterly. Before 1995, the quantity rebates applied by the applicant were granted once, at the end of February of the year following the reference year. Finally, in its notices, the Commission emphasised that the quantity rebates applied by British Gypsum were based on actual cost savings for that undertaking. Such justification is lacking in the present case (see paragraphs 107 to 110 above). The applicant therefore cannot find any support for its argument in the Commission notices concerning the rebate schemes applied by British Gypsum.

85 In *Michelin* v *Commission*, moreover, the discount system in issue was based, as in the present case, on an annual reference period (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 81). Admittedly, contrary to what the contested decision suggests (recital 216), the Court of Justice did not expressly hold that the reference period could not exceed three months. However, it cannot

be denied that the loyalty-inducing nature of a system of discounts calculated on total turnover achieved increases in proportion to the length of the reference period. A quantity rebate system has no loyalty-inducing effect if discounts are granted on invoice according to the size of the order. If a discount is granted for purchases made during a reference period, the loyalty-inducing effect is less significant where the additional discount applies only to the quantities exceeding a certain threshold than where the discount applies to total turnover achieved during the reference period. In the latter case, the saving which may be made by reaching a higher scale applies to total turnover achieved whereas, in the former case, it applies only to the additional amount purchased.

86 However, the applicant claims that the question whether the discount is calculated on total turnover or only on the additional amount purchased is merely a question of presentation. It states, in that regard, that a discount of a specific amount may always be expressed either as a percentage of the 'additional volume' purchased or as a percentage of the 'total volume', although the percentage will be higher when the basis of the discount is the additional volume rather than the total volume.

87 That argument must be rejected. When the discount is granted 'by tranche', the discount obtained for the purchase of an additional unit never exceeds the percentage for the tranche in question. If the table reproduced at paragraph 69 above comprised a quantity rebate system in which the discount was calculated 'by tranche', the consequence, for example, of reaching the FRF 30 000 threshold in turnover would be that, for purchasing units exceeding that turnover threshold, a dealer would obtain a discount of 9.25% instead of 9%. In other words, by increasing his turnover with the applicant from FRF 29 999 to FRF 30 000, the dealer would obtain, in a discount system calculated 'by tranche', an additional discount of 0.25% or FRF 0.0025 (0.25% additional discount on the amount of FRF 1). A dealer's interest in reaching such a threshold is relatively limited. On the other hand, if, as in the present case, the discount applies to the total volume purchased, an increase in turnover with the applicant from FRF 29 999 to FRF 30 000 brings the dealer an additional discount of

FRF 75 (0.25% additional discount on the amount of FRF 30 000), which is 7 500% of the additional turnover achieved (FRF 75 additional discount on an additional turnover of FRF 1). A dealer has a genuine interest in reaching a further threshold as regards both the thresholds at the lower end of the scale, as the above example shows, and those at the upper end of the scale. For example, by increasing his turnover from FRF 16 384 999 to FRF 16 387 000, a dealer would earn an additional discount of FRF 1 in a 'by tranche' discount system (0.05% additional discount on the amount of FRF 2 001)]. In the system applied by the applicant, the additional discount was FRF 8 193.5 (0.05% additional discount on an amount of FRF 16 387 000), or an additional discount of approximately 410% of the additional turnover achieved (FRF 8 193.5 additional discount on an additional turnover of FRF 2 001).

88 The incentive to purchase created by a quantity rebate system is therefore much greater where the discounts are calculated on total turnover achieved during a certain period than where they are calculated only tranche by tranche. The longer the reference period, the more loyalty-inducing the quantity rebate system.

89 Furthermore, in *Portugal* v *Commission* (cited at paragraph 58 above), which the applicant cites on a number of occasions as evidence of the lawfulness of the quantity rebates examined in the present case, the discount rate set was applicable 'by tranche' and the reference period was one month.

90 The applicant also draws attention to the fact that the variations between the discount rates for the last steps on the scale were slight.

91 It is apparent from the tables reproduced at paragraphs 69 and 70 above that, in the quantity rebate system applied by the applicant, the discount rates varied considerably between the lower and higher steps. It is true, as the applicant submits, that the increase in the discount rate at the lower end of the scale was greater than at the upper end of the scale (0.05% for the final steps). However, the Court of Justice held in *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 81, that 'the variations in the rate of discount [between 0.2% and 0.4%] over a year as a result of one last order, even a small one, affected the dealer's margin of profit on the whole year's sales of Michelin heavy-vehicle tyres. In such circumstances, even quite slight variations might put dealers under appreciable pressure'.

92 Furthermore, the variations in the discount rates were not as slight as the applicant claims. The abusive nature of the quantity rebate system cannot be assessed in isolation. A dealer who exceeded the maximum figure stipulated for quantity rebates was allowed to sign a commercial agreement with the applicant (see paragraph 51 above). The dealer could thus have an 'extension' of the tables corresponding to the quantity rebates and thus be entitled to an additional discount of up to 2% of turnover.

93 However, in reply to a question put at the hearing, the applicant disputed, for the first time, the finding made in recitals 76 and 230 of the contested decision that the commercial agreements offered the dealers concerned an 'extension' of the quantity rebate tables. It contended that the additional discount which could be obtained by concluding a commercial agreement applied to the progress bonus and not to the quantity rebates.

94 That argument must be rejected. The Commission enclosed with its defence a copy of the commercial agreement for 1994. Article 1 of that agreement, entitled 'Quantity rebates', states unequivocally that the rebate scale annexed to the

commercial agreement 'supplements' the quantity rebate scale in the general conditions and 'forms part of it'. The variation between the lower and higher rates on the scale attached to the general conditions, which takes as its starting point the last step of the quantity rebates in the general conditions, is 2%. It therefore follows that the Commission was correct to state in the contested decision that an extension of the tables corresponding to the quantity rebates could 'potentially [result] in a difference of up to 2% of turnover' (recital 76). Furthermore, the applicant acknowledged, in point 18 of its reply, that 'the scale to which a dealer had access by signing a commercial agreement' formed part of the quantity rebate system.

95 It follows from all of the foregoing that a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period, has the characteristics of a loyalty-inducing discount system.

96 Admittedly, as the applicant points out, the aim of any competition on price and any discount system is to encourage the customer to purchase more from the same supplier.

97 However, an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 57). Not all competition on price can be regarded as legitimate (*AKZO* v *Commission*, cited at paragraph 54 above, paragraph 70, and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 111). An undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits (*Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 111).

98 In those circumstances, it is necessary to consider whether, in spite of appearances, the quantity rebate system applied by the applicant is based on a countervailing advantage which may be economically justified (see, in that regard, *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 73; *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 114; and *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 52) or, in other words, if it rewards an economy of scale made by the applicant because of orders for large quantities. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff (Opinion of Advocate General Mischo in *Portugal* v *Commission*, cited at paragraph 58 above, point 106).

99 In that regard, the applicant criticises, first, the fact that the Commission first raised in its defence (points 60 and 100) the objection that in the present case the quantity rebates are not justified by economies of scale. Since that objection was not stated in the statement of objections or in the contested decision, the applicant maintains that all the Commission's arguments relating to it must be rejected as inadmissible.

100 It must be borne in mind that, according to settled case-law, discounts granted by an undertaking in a dominant position must be based on a countervailing advantage which may be economically justified *(Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85; *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 114; and *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 52). A quantity rebate system is therefore compatible with Article 82 EC if the advantage conferred on dealers is 'justified by the volume of business they bring or by any economies of scale they allow the supplier to make' (*Portugal* v *Commission*, cited at paragraph 58 above, paragraph 52).

101 It must be stated first of all that, in the contested decision, the Commission makes express reference to that case-law, stating that 'a rebate can only correspond to the economies of scale achieved by the firm as a result of the additional purchases which consumers are induced to make' (recital 216). After examining the

arrangements, the Commission, paraphrasing the judgment in *Michelin* v *Commission*, concludes that the quantity rebate system '[was] not based on any economic service justifying [it]' (recital 227 of the contested decision).

102 It follows that the Commission did not alter the scope of the contested decision by claiming, in its defence, that the quantity rebates were not justified by economies of scale.

103 Furthermore, the statement of objections and the contested decision are also consistent on this point, so that the applicant cannot invoke an infringement of its rights of defence during the administrative procedure.

104 At point 195 of its statement of objections, the Commission already complained to the applicant that the quantity rebates '[were] not based on any economic service justifying [them]'.

105 Finally, the applicant fully understood that objection since, in its reply to the statement of objections, it stated that, in the present case, '[t]he granting of rebates [was]... economically justified in the case of a manufacturer who makes economies of scale in manufacture and distribution' (p. 129). Similarly, at the hearing, the applicant reiterated that a quantity rebate system was lawful, referring to 'the economy of scale in manufacture and distribution which results from the purchase of increasing quantities' (transcript of the hearing, p. 82).

106 In those circumstances, the argument set out at paragraph 99 above must be rejected.

107 It is then necessary to examine whether the applicant has established that the quantity rebate system, which presents the characteristics of a loyalty-inducing rebate system, was based on objective economic reasons (see, in that regard, *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 188, and *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 56).

108 It must be stated that the applicant provides no specific information in that regard. It merely states 'that orders for large amounts involve economies and that the customer is entitled to have those economies passed on to him in the price that he pays' (point 57 of the application). It also refers to its reply to the statement of objections and to the transcript of the hearing (reply, point 91). Far from establishing that the quantity rebates were based on actual cost savings (Opinion of Advocate General Mischo in *Portugal* v *Commission*, cited at paragraph 58 above, point 118), the applicant merely states generally that the quantity rebates were justified by 'economies of scale in the areas of production costs and distribution' (transcript of the hearing, p. 62).

109 However, such a line of argument is too general and is insufficient to provide economic reasons to explain specifically the discount rates chosen for the various steps in the rebate system in question (see, in that regard, *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 56).

110 It follows from all of the foregoing that the Commission was entitled to conclude, in the contested decision, that the quantity rebate system at issue was designed to tie truck tyre dealers in France to the applicant by granting advantages which were not based on any economic justification. Because it was loyalty-inducing, the quantity rebate system tended to prevent dealers from being able to select

freely at any time, in the light of the market situation, the most advantageous of the offers made by various competitors and to change supplier without suffering any appreciable economic disadvantage. The rebate system thus limited the dealers' choice of supplier and made access to the market more difficult for competitors, while the position of dependence in which the dealers found themselves, and which was created by the discount system in question, was not therefore based on any countervailing advantage which might be economically justified (see *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85).

111 The applicant cannot find support in the transparent nature of the quantity rebate system. A loyalty-inducing rebate system is contrary to Article 82 EC, whether it is transparent or not. Furthermore, the quantity rebates formed part of a complex system of discounts, some of which on the applicant's own admission constituted an abuse (see paragraph 45 above). The simultaneous application of various discount systems — namely, the quantity rebates, the service bonus, the progress bonus, and the bonuses linked to the PRO Agreement and the Michelin Friends Club — which were not obtained on invoice, made it impossible for the dealer to calculate the exact purchase price of Michelin tyres at the time of purchase. That situation inevitably put dealers in a position of uncertainty and dependence on the applicant.

112 The applicant's argument alleging that the Directorate-General for Competition, Consumer Affairs and Fraud Prevention ('the DGCCRF') approved the quantity rebate system must also be rejected. Firstly, the documents referred to by the applicant provide no proof of the DGCCRF's approval (see paragraphs 305 to 308 below). Secondly, it is in any event immaterial whether granting the discounts was compatible with French law or was approved by the DGCCRF, given the primacy of Community law on the matter and the direct effectiveness of Article 82 EC (Case 127/73 *BRT and Others* [1974] ECR 51, paragraphs 15 and 16; Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 23; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 211). The alleged conformity of the quantity rebate system with United States competition law is likewise irrelevant in the present case.

113 It follows from the foregoing that the Commission was correct to find that the quantity rebate system applied by the applicant infringed Article 82 EC, inter alia because it was loyalty-inducing. There is therefore no longer any need to examine those parts of the contested decision dealing specifically with the unfairness (recitals 218 to 225 of the contested decision) and the market-partitioning effect (recitals 240 to 247 of the contested decision) of the quantity rebate system (see paragraph 66 above).

114 It follows that the first plea must be rejected in its entirety.

Second plea: the Commission infringed Article 82 EC by finding that the service bonus system constituted an abuse within the meaning of that provision

The contested decision

115 In recital 60 of the contested decision, the Commission states that the 'service bonus' was an additional incentive proposed by Michelin to the specialised dealer 'to improve his equipment and after-sales service'. In recital 62 of the contested decision, it describes the system as follows:

'The size of the bonus, which was fixed at the beginning of the year by annual agreement with the dealer in a document entitled "Service bonus", depended on compliance with commitments entered into by the dealer in a number of areas. Each commitment corresponded to a number of points, and the exceeding of certain thresholds of points gave entitlement to a bonus corresponding to a

percentage of the turnover achieved with Michelin France, all tyre types combined. This percentage ranged from 0 to 1.5% between 1980 and 1991 and from 0 to 2.25% between 1992 and 1996.'

116 The Commission considered that the service bonus infringed Article 82 EC since (i) it was unfair because of the way in which it was fixed; (ii) it had a loyalty-inducing effect; and (iii) it was in the nature of a tied sale (recital 249 of the contested decision).

117 As regards the unfairness of the service bonus, it is stated in recital 250 of the contested decision:

'The granting of the points was somewhat subjective and gave Michelin a margin of discretion in its assessment. In addition, some of the points depended on the provision of very precise strategic information on the market (from 1980 to 1992), which was not in the dealer's interest (no return in the form of studies, for example).'

118 The Commission adds in recital 252 of the contested decision: 'Some of the headings were by their very nature subjective in their assessment and/or the number of points granted could vary "depending on the quality of the service provided". However, the tally of the points scored was calculated by Michelin's representative, who also set the targets and the corresponding points for the current year. Michelin's ability to unilaterally decrease the bonus during the year if the targets were not met is yet another factor which enabled Michelin to make the conditions granted to dealers dependent on its subjective assessment. Michelin's argument that use was made of this possibility only in exceptional cases does not alter the fact that it was an abuse'. The Commission goes on to

refer to a number of replies given by Michelin tyre dealers to the requests for information made by the Commission during the administrative procedure.

119 The loyalty-inducing effect of the service bonus is described as follows in recital 254 of the contested decision:

'Up to 1992, points were granted if the dealer achieved a minimum percentage of purchases of Michelin products. Meeting this target set by Michelin as part of the service bonus greatly strengthened the links between Michelin and dealers by means of a loyalty-inducing effect which must be regarded as [an] abuse. Up to 1992 at least, a heading "service new products" enabled the dealer to obtain additional points if his purchase of new products amounted to a specific percentage in relation to the regional share of such products. However, since the earning of points did not depend on quantities, but on the achievement of a given percentage in relation to the regional share of such products, this was a variant of a loyalty bonus which must be regarded as an abuse where it is required by an undertaking in a dominant position. The heading constituted an improper incentive to promote new Michelin products at the expense of competing products.'

120 Finally, as to the tied sales effect, the Commission points out in recital 256 of the contested decision:

'One point was granted if the dealer committed himself to systematically returning used Michelin tyres to Michelin for retreading. The service bonus was thus also a means of achieving tied sales, an abuse which enabled Michelin to use its dominant position on the market for new truck tyres to enhance its position on the adjacent retread market.'

121 It further states, in recital 257 of the contested decision:

'The possible loss of that point and the possible reduction in the total amount of the annual bonus that could be earned meant a direct increase in the unit cost of all the tyres purchased from Michelin, since the dealer lost not only the bonus on retreads, but also that linked to the whole of his turnover with Michelin.'

The abusive nature of the service bonus

— Introduction

122 In connection with this plea, the applicant claims, first of all, that its rights of defence were infringed during the administrative procedure in that it did not have access to the Michelin tyre dealers' answers to the Commission's requests for information of 30 December 1996 and 27 October 1997. Next, the applicant contends that the contested decision misinterprets Article 82 EC and misconstrues the fundamental characteristics of the service bonus system in that it maintains that the service bonus system (i) was unfair; (ii) was loyalty-inducing; and (iii) had a tied sales effect as regards retreaded tyres.

— Infringement of the rights of the defence

123 The applicant complains that it never had access, during the administrative procedure, to the dealers' answers to the Commission's requests for information.

The Commission communicated to it only the tables enclosed as annexes 10 and 16 to the application. Therefore, the answers given by the dealers cannot be considered valid pieces of evidence (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 23 et seq., and Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 58 et seq.). The applicant submits that it should have had access, during the administrative procedure, to the actual documents in the file. It refers in that regard to Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54, to Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 91 to 95, and also to the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3). In the applicant's submission, the Commission's failure to communicate those documents deprived it of the opportunity to check that there were no errors in the preparation of the tables to which it had access. Furthermore, if it had known the identity of the dealers alleged to have been harmed, it would have been able to ascertain their real reasons for criticising it.

124 In that regard, the Court observes that, with regard to answers by third parties to requests by the Commission for information, the Commission must take into account the risk that an undertaking holding a dominant position might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 26, and Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 98).

125 In view of that risk, the applicant cannot criticise the Commission for not informing it of the identity of the dealers who answered the requests for information. The Commission only refused the applicant access to those parts of the dealers' answers to the requests for information which would have enabled them to be identified. Thus, in order to avoid the dealers concerned being identified by the applicant, the Commission sent the applicant a table reproduc-

ing, without mentioning names, the answers provided by each of the dealers to the requests for information which it had sent to them (annexes 10 and 16 to the application). By preparing a non-confidential version of those answers, it scrupulously observed the requirements of the case-law, which seek to balance the protection of confidential information against the safeguarding of the right of the person to whom a statement of objections is addressed to have access to the whole of the file (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 77 above, paragraph 147).

126 As for the argument alleging that it was impossible for the applicant to verify that there had been no errors in the preparation of the tables to which it had access, it must be remembered that the parties expressly consented at the hearing that the Court should ascertain that no such errors were present (see paragraph 36 above). After examining them, the Court finds that the tables prepared by the Commission contain only one material inaccuracy. The percentage which the Michelin brand represented in the turnover of the first dealer mentioned under Question 2 of the request for information of 30 December 1996 is, according to the Commission's table (annex 10 to the application), between 25% and 30%, whereas it was, in fact, in the order of 23.4% (document 36041-14745). That inaccuracy cannot have affected the applicant's rights of defence since the information given in the table is close to the correct figure.

127 Also, a comparison of the dealers' answers with the tables to which the applicant had access during the administrative procedure reveals that the applicant had access to all the non-confidential answers provided by the dealers to the requests for information, with the exception of an extract cited in recital 252 of the contested decision. The extract reads as follows; '[a]nother dealer explains that he has been subject to retaliatory measures in the form of the "drastic reduction of certain bonuses: service bonus"' (document 36041-15166). The applicant had also claimed in its application that it had not been aware of that incriminating evidence during the administrative procedure.

128 The Commission concedes that, as a result of an administrative error, the applicant did not have access to that part of the answer during the administrative procedure.

129 In that regard, it has been consistently held that the answer identified in paragraph 127 above must be excluded as evidence (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 77 above, paragraph 364, and the case-law cited there). Its exclusion would lead to the annulment of the contested decision in so far as it refers to the service bonus only if the objection relating to that bonus could be proved only by reference to that document (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 77 above, paragraph 364, and the case-law cited therein).

130 It is apparent from the contested decision (recital 252) that the Commission refers to the answer concerned only in order to show that the service bonus is unfair. However, the Commission concludes that the service bonus constitutes an abuse not only because it is unfair but also because it is loyalty-inducing and has a tied sales effect.

131 Furthermore, it is apparent from the analysis to be carried out below (see paragraphs 136 to 150) that, even disregarding that answer, it was established to the requisite legal standard in the contested decision that the service bonus was unfair.

132 Finally, the applicant claims that, during the administrative procedure, the Commission contacted only the dealers suggested by Bandag. That situation was, it alleges, to the detriment of the applicant.

133 That argument must be rejected. It is clear from the correspondence between Bandag and the Commission, submitted to the Court on 24 April 2003 (see paragraph 37 above), that Bandag suggested to the Commission the names of six dealers who had information relevant to the Commission's investigation. Although those six dealers were all among the addressees of the request for information of 30 December 1996, that request was also sent to 13 other dealers. Furthermore, none of the dealers suggested by Bandag is among the 20 addressees of the request for information of 27 October 1997. The names of the dealers indicated by Bandag were therefore used only for a small proportion of the requests for information.

134 In any event, it is apparent from the contested decision that, for the purposes of establishing the infringement of Article 82 EC, the Commission relied principally on the characteristics of the discount systems applied by the applicant and not on the dealers' answers to the requests for information. It is quite clear that the Commission referred to the dealers' answers only to show the existence of a dominant position — which the applicant does not dispute — (recital 201 of the contested decision) and to show that the service bonus was unfair (recital 252 of the contested decision). As already stated above, the Commission concluded that the service bonus constituted an abuse not only because it was unfair but also because it was loyalty-inducing and had a tied sales effect.

135 It follows from the foregoing that the argument alleging infringement of the rights of the defence must be rejected.

— The unfairness of the service bonus

136 In its application, the applicant states that the aim of the service bonus was to encourage dealers to improve the quality of their services and the brand image of

Michelin products and to give them, in exchange, a specific reward. The service bonus rate was fixed annually by mutual agreement with the dealer according to the commitments entered into by him, which were set out and quantified in an annex to the general conditions. The service bonus was not a discount but remuneration for services rendered.

137 In that regard, the Court points out that the fact that the service bonus remunerates services rendered by the dealer has no relevance for the purpose of determining whether the bonus in question infringes Article 82 EC. Indeed, if it is shown that, as the Commission claims, the service bonus system was unfair and loyalty-inducing and had a tied sales effect, it would have to be concluded that the system, when applied by an undertaking in a dominant position, does not correspond to normal price competition policy and that it is therefore prohibited by Article 82 EC.

138 Next, the Court notes that the applicant does not deny the fact that the granting of the points which entitled dealers to the service bonus was not free from subjectivity. It observes, however, that the quality of a service rendered by a dealer may be objectively deserving of reward even if a certain subjectivity is inherent in the assessment of the quality of a service.

139 The Court finds that, as the tables relating to the service bonus expressly show, the bonus was fixed according to 'the quality of service which the dealer was able to provide'. The points obtained — 31 out of 35 gave entitlement to the maximum bonus — depended on whether the various commitments made by the dealers were met. Often, the applicant had a considerable margin of discretion in determining whether those commitments had been met. It is apparent, for example, from the 1996 table, that the dealer could earn three points if he

'[made] a positive contribution to the launch of new Michelin products' or if he provided Michelin with '*relevant* information on his statistics and sales forecasts per product' (emphasis added).

140 The granting of a discount by an undertaking in a dominant position to a dealer must be based on an objective economic justification (*Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 218). It cannot depend on a subjective assessment by the undertaking in a dominant position of the extent to which the dealer has met his commitments and is thus entitled to a discount. As the Commission points out in the contested decision (recital 251), such an assessment of the extent to which the dealer has met his commitments enables the undertaking in a dominant position 'to put strong pressure on the dealer... and allow[s] it, if necessary, to use the arrangement in a discriminatory manner'.

141 It follows that a discount system which is applied by an undertaking in a dominant position and which leaves that undertaking a considerable margin of discretion as to whether the dealer may obtain the discount must be considered unfair and constitutes an abuse by an undertaking of its dominant position on the market within the meaning of Article 82 EC (see, in that regard, *Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 105). Because of the subjective assessment of the criteria giving entitlement to the service bonus, dealers were left in uncertainty and on the whole could not predict with any confidence the rate of discount which they would receive by way of service bonus (see, in that regard, *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 83).

142 The Commission further supports that finding by referring to three answers from dealers, one of which must be excluded as evidence (see paragraph 129 above). The other two answers confirm the subjectivity displayed by the applicant in the application of the service bonus system. The dealers in question confirm, in fact, that '[t]he assessment made is dependent on Michelin's goodwill' or again that 'Michelin can use this bonus in whatever way it wants. We have had unilateral changes imposed on us'.

143 However, the applicant maintains that the quotation from a dealer's answer in recital 252 of the contested decision, to the effect that 'Michelin can use this bonus in whatever way it wants. We have had unilateral changes imposed on us', was taken out of context. The applicant maintains that it is apparent from the dealer's full answer that, 'by putting pressure on Michelin' and 'without changing the nature of [his] relationship [with Michelin]', the dealer had managed to obtain the maximum bonus rate.

144 The passage in the dealer's answer to which the applicant refers reads as follows:

'In 1993, I put pressure on Michelin. I had seen the 1992 service bonus of a colleague who is much smaller than us and who did not do trucks. He received a higher percentage bonus. Michelin then changed the number of points for certain criteria and in 93 we obtained, without changing anything, a [...]% progress bonus. In 1995, I continued to put pressure on Michelin and, still without changing the nature of our relationship,... obtained a [...]% progress bonus. Continuing in 1996, I managed to obtain the maximum, that is 2.25%.'

145 However, that passage does not support the applicant's argument. Rather, it confirms Michelin's subjectivity in granting the bonus which, as the Commission states, is 'almost inevitably a source of discrimination' (recital 253 of the contested decision).

146 The applicant further criticises the fact that the Commission chose two adverse replies from dealers concerning Michelin without mentioning the other answers from dealers who, instead, are in favour of the service bonus.

147 That argument must also be rejected. The subjectivity in the granting of the service bonus is already clear from the rules for fixing the bonus. Furthermore, other dealers confirm: 'Michelin alone decides' and 'if we do not meet the criteria, Michelin may withdraw the bonus' or again 'the bonus may be reduced during the year if the service commitments are not fulfilled'. The applicant itself also confirms in its application that 'of course, the bonus could not be earned if dealers did not supply the users with the corresponding services' (point 136 of the application). It was in assessing compliance with the commitments, in particular, that Michelin took a subjective approach.

148 Finally, the applicant points out that, in order to ensure that the service bonus was applied uniformly, it drew up instructions entitled 'Instructions for using the service bonus form'.

149 However, that document does not show that the assessment of the service rendered by the dealer was not subjective. For example, as regards the market information to be supplied by dealers, the instructions state only that 'the relevant information [had] to relate to statistics or projections made on the basis of reliable figures'. As for the 'new products' service, the instructions state that the dealer [had] to offer the new Michelin products 'systematically to his customers, with technical reasons to support the offer'. Compliance with this commitment is difficult to monitor and the way is thus open for the applicant to make a subjective assessment.

150 It is therefore clear from all of the foregoing that the Commission was correct to find in the contested decision (recital 253) that the service bonus was unfair, because of the subjectivity of the assessment of the criteria giving entitlement to the bonus, and that it must be regarded as an abuse within the meaning of Article 82 EC.

— The loyalty-inducing nature of the service bonus

151 The applicant states first of all that in the contested decision (recital 254) the Commission complains of only one heading in the service bonus system as having a loyalty-inducing effect, namely the heading 'new products service'. The dealer could obtain up to two extra points if he purchased new Michelin products amounting to a specific percentage in relation to the regional market share of those products. However, that requirement was last imposed in the 1991 general conditions. The impugned facts therefore did not exist during virtually the entire period covered by the contested decision.

152 It must be stated that the Commission never asserted that the commitment referred to in the preceding paragraph existed until the end of the infringement period. It states in the contested decision that '[u]p to 1992, points were granted if the dealer achieved a minimum percentage of purchases of Michelin products' (recital 254 of the contested decision).

153 Admittedly, the Commission did not adduce evidence that the contested clause was applied until 1992. The 1992 general conditions did not include the clause. Moreover, the Commission acknowledges, in its reply to a written question put by the Court, that the expression '[u]p to 1992' must be understood as excluding 1992.

154 However, that assertion has no impact on the lawfulness of the contested decision.

155 The applicant does not dispute that the clause was applicable in 1990 and 1991. However, it cannot seriously be disputed that the possibility for a dealer to earn

up to two points if he purchases new products amounting to a specific percentage in relation to the regional market share of those products has a loyalty-inducing effect. As the Commission states, '[t]he heading constituted an improper incentive to promote new Michelin products at the expense of competing products. The dealer was unlikely to risk the loss of two points that could result in a reduction in the total amount of his annual bonus' (recital 254 of the contested decision) corresponding to a percentage (up to 2.25%) of his turnover with Michelin France, all categories combined.

156 Nor does the assertion made at paragraph 153 affect the determination of the duration of the infringement, since the abusive nature of the service bonus was also inferred from the fact that it was unfair, which is in itself sufficient to establish that the applicant had abused its dominant position (see paragraphs 136 to 150 above) throughout the entire period during which the bonus was applied, that is, until 1997.

157 The applicant further claims that it is clear from the dealers' answers to the Commission's requests for information that the service bonus had no loyalty-inducing effect.

158 However, the Court finds that the dealers gave very varied answers when asked what the heading 'new products service' entailed. For some, it 'did not involve commitments', for others it was a requirement to purchase stocks, for yet others, it meant obligations concerning point-of-sale advertising or promotion. The dealers' answers thus confirm that the application of subjectively-assessed criteria gave rise to discrimination between dealers.

159 The applicant further maintains that it was possible for a dealer to achieve the maximum discount without being required to accept obligations which would normally be regarded as loyalty-inducing, since in order to obtain the maximum discount it was enough to earn 31 out of the 35 possible points.

160 The fact remains that a dealer could earn two points if he sold new Michelin products amounting to a percentage higher than the regional market share forecast for those products and one point if he sold a percentage of new Michelin products equal to the regional market share. It was not an onerous commitment. It was frequently more onerous to meet other commitments, such as those relating to the quality of the plant and equipment of the sales outlets and the service provided to customers. In any event, it cannot be denied that, through the commitment in question, the applicant, by granting a financial advantage, sought to prevent dealers from obtaining their supplies from rival manufacturers.

— The tied sales effect of the service bonus

161 The applicant observes that the Commission states in recital 256 of the contested decision that 'one point was granted if the dealer committed himself to systematically returning used Michelin tyres to Michelin for retreading'. Compliance with that commitment would have been worth only one point out of 35, while 31 points were enough to obtain the maximum bonus. In those circumstances, the applicant fails to understand how that heading could have constituted a device enabling it to make tied sales.

162 The Court finds that it is apparent from the file that, from 1992, a dealer could earn an extra point if he systematically returned used Michelin tyres to the applicant for retreading. That condition was changed in 1996. The 1996 general

conditions state that a dealer who '[s]ystematically returns used Michelin tyres to Michelin for the first retreading = 1 point'.

163 The applicant therefore used its financial weight in the tyre sector in general and in the new tyre market in particular as a lever to ensure it was chosen as retreader by dealers. If other criteria were also satisfied, fulfilment of that commitment could lead to a discount calculated on the dealer's overall turnover with the applicant. The application of that condition thus had a tied sales effect, prohibited under Article 82 EC (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 137, and the case-law cited therein).

164 As for the argument that it represented only one point out of 35, it must be pointed out that, as the Commission states in the contested decision (recital 255), the commitment concerning retreading was one of the easiest to fulfil. It was frequently more onerous to fulfil other commitments, such as those relating to the quality of the plant and equipment of the sales outlets and the service provided to customers. In any event, it cannot be denied that, by imposing the condition in question, the applicant sought to ensure that dealers systematically returned Michelin tyres to it for retreading. That condition was thus designed to prevent dealers from exercising a choice with regard to retreading and to block the access of other retreaders to the market.

165 Finally, the applicant points out generally that the DGCCRF was in favour of the service bonus. It refers in that regard to the minutes of the meetings of 7 February and 23 May 1991 between the DGCCRF and the applicant (annexes 8 and 12 to the application). Nor does United States competition law preclude such a bonus.

166 That argument must be rejected for the reasons stated at paragraph 112 above. Firstly, the minutes to which the applicant refers do not prove in any way that the service bonus was approved by the DGCCRF. It is even clear from the minutes of the meeting of 23 May 1991 that the DGCCRF considers that the service bonus 'may be questionable if it is an advantage granted overall and subjectively'. Secondly, it is in any event irrelevant whether the granting of the discounts is in accordance with French law or has been approved by the DGCCRF, given the primacy of Community law on the matter and the direct effectiveness of Article 82 EC (*BRT and Others*, cited at paragraph 112 above, paragraphs 15 and 16; *Ahmed Saeed Flugreisen and Others*, cited at paragraph 112 above, paragraph 23; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 211). Nor is the alleged conformity of the service bonus with United States law competition of relevance to an assessment of the bonus from the point of view of Article 82 EC.

167 It is apparent from all of the foregoing that the second plea cannot be upheld either.

Third plea: the Commission infringed Article 82 EC by holding that the 'Michelin Friends Club' constituted an abuse within the meaning of that provision

The contested decision

168 The 'Michelin Friends Club' ('the Club'), which was created in 1990, is made up of tyre dealers who wish to enter into a closer partnership with the applicant. The applicant participates in the financial effort of dealers who are members of the Club, notably by contributing towards investment and training and by making a financial contribution amounting to 0.75% of annual 'Michelin Service' turnover.

169 The Commission distinguishes between three abusive characteristics of the Club.

170 First, the Commission maintains that the Club was 'used by Michelin as a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres' (recital 317 of the contested decision). In that regard, it refers first of all to the obligation on dealers who were members of the Club to 'promote the Michelin brand' and not to divert spontaneous customer demand away from Michelin tyres. It states that '[s]pontaneous demand for Michelin products is very high, so that an obligation of this kind must necessarily be considered abusive, as it is aimed directly at eliminating competition on the part of other manufacturers, guaranteeing the maintenance of Michelin's position, and limiting competition on the market' (recital 317 of the contested decision). It adds that 'this clause became an obligation on the dealer to guarantee a certain market share for Michelin products (the Michelin "temperature"), probably at a level varying from one dealer to another and from one region to another, but certainly at around [...]% [1] of sales only on the new tyre market' (recital 318 of the contested decision).

171 According to the Commission, the fact '[t]hat Michelin did indeed set out to oblige the members of its Club to guarantee a Michelin "temperature" is also shown by the clause in the agreement requiring the dealer to "carry a sufficient stock of Michelin products to meet any customer demand immediately". It is expressly stated there that an individualised stock grid may be drawn up "which takes account of the local, regional and national market segments", and which is to be expressed "in percentage form".... But as a result of this clause they always will have a stock of Michelin products "in a volume that matches Michelin's market share", and not in a volume that matches their own wishes. There is consequently a barrier to entry by other manufacturers, and Michelin's own market shares are rigidified' (recital 321 of the contested decision).

1 — Confidential data withheld.

172 Secondly, the Club agreement ties 'dealers by a series of obligations which allow Michelin an exceptionally far-reaching right to monitor the activities of the members, and which do not appear to be in any way justified otherwise than by Michelin's desire to supervise distribution in detail' (recital 322 of the contested decision). This is true of the Club member's obligation 'to supply Michelin with detailed financial information, or the obligation to keep Michelin informed of the identities of all the partners or shareholders in the business and of any circumstance which might affect control of the company and its strategic choices' (recital 323 of the contested decision). The Commission also criticises other obligations imposed on Club members, in particular the fact that '[t]he dealer must [allow] Michelin to carry out a wide-ranging outlet audit, and above all [the fact that he] must accept a list of areas for progress suggested by Michelin; otherwise the promised financial advantages will be withheld. The dealer must take part in numerous promotion programmes, notably for truck tyres, and use Michelin signs and advertising. The dealer's staff is to be trained at the Michelin training centre. All aspects of the business, and investments in particular, are inevitably influenced by Michelin's wishes' (recital 324 of the contested decision). Finally, the Commission also mentions 'the obligation on the dealer to keep Michelin informed of the dealer's statistics and sales forecasts, category by category for all brands, and of the development of Michelin's market share' (recital 325 of the contested decision). That obligation entitles Michelin 'to monitor the dealer's commercial policy. As Michelin has a large sales force with instructions to assemble this information, the dealer can never decide to sell competing products without Michelin being aware of the fact: and membership of the Club requires a spirit of partnership and observance of Michelin volumes and the Michelin "temperature"' (recital 325 of the contested decision).

173 According to the Commission, '[t]his leaves the dealer completely dependent on Michelin, so that there is necessarily a loyalty-inducing effect. Any change in the dealer's commercial or strategic policy would leave him open to reprisals on the part of Michelin. Certainly the members of the Club all shared the feeling that there could be no turning back. It would be very difficult for members of the Club to give up not just the financial contributions but also the know-how they have

obtained with the help of the dominant manufacturer' (recital 326 of the contested decision).

174 Thirdly, the Commission criticises the fact that 'until October 1995 the Business Cooperation and Service Assistance Agreement expressly required the dealer to have the first retread of Michelin truck and earthmover casings carried out by Michelin' (recital 329 of the contested decision). These are 'forms of exclusive dealing with effects analogous to those of tied sales, and must therefore be considered to constitute abuse within the meaning of Article 82 of the Treaty' (recital 330 of the contested decision). According to the Commission, 'dealers are under pressure to send their carcasses to Michelin: they will be reluctant to endanger their partnership with Michelin, with all the advantages it brings for the whole of their business, over a question of retreading, which is in any event a minor part of their tyres business as a whole. Thus the dealer's choice is being restricted: the dealer will not be able to have Michelin casings retreaded by other retreaders, and the other retreaders are faced with an obstacle barring their access to this market' (recital 331 of the contested decision).

Preliminary observations

175 In its reply and at the hearing, the applicant states, with reference to points 225 and 228 of the defence, that the Commission no longer claims that, taken individually, the various obligations placed on Club members constitute abuses of a dominant position within the meaning of Article 82 EC. In its defence, the Commission stated that all the obligations taken together constituted an abuse, since they are linked to the 'temperature' obligation. This constitutes a reversal of the Commission's position in relation to the contested decision. The applicant states that it never imposed a 'temperature' obligation on its dealers. Consequently, the Commission's new position confirms the validity of clauses such as the obligation to promote the Michelin brand and the obligation on dealers not to divert spontaneous demand for Michelin tyres.

176 The Court notes that, at point 225 of its defence, the Commission states that 'the obligation to "promote the Michelin brand" and "not to divert spontaneous demand for Michelin tyres", and the "temperature" obligation are different aspects of one and the same abusive conduct: the use of the Club as a tool for rigidifying Michelin's market shares'. Point 228 of the defence mentions that the contested decision refers to the obligation to maintain adequate stock 'as further evidence of the existence of a "temperature" obligation'.

177 However, the Commission's presentation at points 225 and 228 of its defence is perfectly consistent with what is stated in recitals 317, 318 and 321 of the contested decision (see paragraphs 170 and 171 above). Both in the contested decision and in the defence, the Commission refers to the obligation to 'promote the Michelin brand' and 'not to divert spontaneous demand away from Michelin tyres', and also to the 'temperature' obligation, to demonstrate one of the three abusive characteristics of the Club, namely, the applicant's use of the Club 'as a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres' (recital 317 of the contested decision). The argument must therefore be rejected.

The abusive nature of the various characteristics of the Club

— The characterisation of the Club as a tool for rigidifying and improving Michelin's position on the market in new replacement truck tyres

178 The applicant denies that a Michelin 'temperature' obligation was imposed on the members of the Club. It submits that the Commission infringed the rules on the taking of evidence by not proving to the requisite legal standard the existence of that 'temperature' obligation and that it made a manifest error of assessment by concluding that the dealers who were members of the Club were subject to such an obligation.

179 The fact remains that the Commission inferred the existence of a 'temperature' obligation from various pieces of direct documentary evidence, namely an internal note from the applicant of 6 June 1997 entitled 'Increasing the Club membership' (recital 315 of the contested decision) and the documents referred to in footnote 43 of the contested decision, which were all obtained during the investigation carried out at the applicant's premises on 12 June 1997. Certain other factors also confirm the existence and content of the 'temperature' obligation, namely the Michelin market shares observed among dealers belonging to the Club (recital 319 of the contested decision) and the obligation to carry sufficient stock to meet any customer demand immediately (recital 321 of the contested decision).

180 The Court must therefore examine whether the various pieces of evidence on which the Commission relies establish the existence and terms of a 'temperature' obligation imposed on Club members.

181 It is necessary to analyse, first, the documentary evidence on which the Commission relies.

182 Michelin's internal note of 6 June 1997, entitled 'Increasing the Club membership' (document 36041-1772 and 1773), mentions as the second 'criterion... for joining the Club' 'the customer's partnership or market share'. The note explains: 'This is of course a criterion which does not appear anywhere, but which is a condition, amongst others, of entry to the Club'. The note also explains that '[a] customer who achieves [...]% [2] or more of his [turnover] with us is a partner and he may and must rely on our support to the extent of his partnership. We must offer him all the services which enable him to maintain or develop his professionalism'.

183 The Court must point out that Michelin's internal note of 6 June 1997 shows unequivocally that a dealer could join the Club only if he achieved a certain

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market share in Michelin products. It is therefore clear from the note that a 'Michelin market share' or Michelin 'temperature' obligation was a condition of entry into the Club. The note also reveals that a dealer whose 'Michelin market share' was [...]% [3] of his turnover satisfied that condition.

184 However, the applicant claims that the extract reproduced at paragraph 182 above is followed by a question which shows that in the author's opinion, it was not obvious that a 'temperature' obligation was a condition of admission to the Club.

185 The extract to which the applicant refers is the following:

'Can a customer who has good potential, is consumer-orientated and dynamic and provides a good service, although he is only a [...]% [3] partner, and who is on Michelin's wavelength, be a member of the Club? Apart from sales matters (local strategy), I think it is important to give the Route (that is, Michelin's sales representatives) a clear position.'

186 The purpose of the note of 6 June 1997, as its title indicates, was to consider 'increasing the Club membership'. The note states that, 'in order to achieve that purpose', it is important 'to consider in particular two criteria for entry to the Club', one of which is the dealer's obligation to achieve a 'Michelin market share' of a certain level. Far from suggesting any doubt on the part of the author as to the existence of that criterion for entry to the Club, the question to which the applicant refers only shows that, in the opinion of the author of the note, the level of the 'temperature' might be too high.

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187 Other documents confirm the existence of a Michelin 'temperature' obligation and also provide information about its level.

188 First of all, in the minutes of two meetings between a Michelin representative and a dealer on 15 and 28 February 1995 (document 36041-1515 to 1517), the author states that he told the dealer, who wished to enter the Club, that 'admission to the Club depend[ed] on market shares'. The dealer was informed of the fact that 'he could not join the Club with [...]% [4] in new truck tyres' but that, on the other hand, Michelin was 'prepared to do what [was] necessary during the year if his market shares [were] compatible with [Michelin's] national positions'. Moreover, the minutes state that the dealer confirmed 'his wish to achieve the objectives and to join the Club' which he said was 'the only means of increasing [his] Michelin remuneration'.

189 Those minutes therefore unequivocally confirm that a Michelin market share or 'temperature' obligation was a condition for joining the Club. Furthermore, it is apparent from the minutes that 'the market shares [had to be] compatible with [the] national positions'. Since it is not disputed that at the material time Michelin had a market share of more than [...]% [4] on the new replacement truck tyre market (recitals 176 to 178 of the contested decision), it may be inferred from the minutes that the Michelin 'temperature' for those tyres was also greater than that percentage.

190 Furthermore, the minutes of a meeting between a Michelin representative and a dealer in 1996 (document 36041-1545 and 1546) show that the following points were discussed at the meeting:

'(a) Why the Club

4 — Confidential data withheld.

(b) The objective of the Club.

(c) Resources.

(d) Market shares.'

191 The report states:

'[The dealer] understands the Club structure and the objective pursued. The market share is at present an obstacle to joining the Club, but [the dealer] is going to think about the opportunities with Michelin because he cannot imagine forging a connection with a manufacturer other than Michelin.'

192 A note dated 26 November 1996, from one of the addressees of the minutes referred to at paragraph 190 above and concerning the same dealer (document 36041-1547), refers to a visit made to the dealer by the author of the note, a Michelin representative, on the day on which the note was written. The note first of all provides information about the Michelin 'temperature' achieved at that time by the dealer in question: The Michelin 'temperature is [...]% [5].' The note states that a 'reworking of the offer made, (withdrawal of one or even two secondary lines) and a DPV [Dynamisation Points de Vente — Revitalisation of Points of Sale] with the aim of channelling sales towards superior products by departing from normal pricing structures ought to enable us to earn 10 temperature points'. According to the author of the note, the dealer 'is aware that he must develop and become more professional and secure loyal customers' and the author states that he confirmed to the dealer that '[Michelin] wished to integrate [the dealer] at the beginning of 1998, after a financial year in 1997 which would enable him to achieve the required market share ([...]%[5] M)'.

5 — Confidential data withheld.

However, the dealer, who hoped that he would be able to join the Club in 1997, was 'deeply disappointed'. The author of the note, after pointing out that the dealer in question is 'a man of his word holding the same values as [Michelin]', suggests that Michelin 'reconsider [its] position and integrate him from 1997, for one year, with specific T percentages, [...]% [6] at the end of [July], [...]%[6] at the end of 1997, [which] would make it possible to... tie the man [to Michelin]'.

193 The fact remains that it is clear from the two documents referred to at paragraphs 190 to 192 above that a Michelin market share or 'temperature' of a certain level was a condition of membership of the Club. In the case of the dealer in question, his market share was an 'obstacle to membership of the Club'. The minimum 'temperature' was around [...]%.[6]

194 Finally, a Michelin representative's handwritten note dated 30 January 1996 (document 36041-1564 and 1565) again confirms the existence of a Michelin 'temperature' obligation. The note refers to the commencement, in respect of a dealer, 'of a procedure for joining the Professionals' Club (planned for 96-97) accompanied by an increase in the customer's market shares and sales'. The note fixes the 'Target market share for joining the Club' at [...]%[6] for vans and cars and [...]%[6] for trucks. The Michelin 'temperature' is therefore, according to the note, [...]%[6] for truck tyres.

195 It is apparent from the above analysis that the applicant required, as a condition for joining the Club, that a dealer have a Michelin market share or 'temperature'. Only the precise percentage of the Michelin market share cannot be deduced with certainty from the documents referred to above. Moreover, it is quite possible that the level varied from one dealer to another and from one region to another (recital 318 of the contested decision). Nevertheless, it may reasonably be deduced from the documents referred to above that the minimum market share required for entry to the Club was higher than [...]%.[6]

196 It therefore follows that the documentary evidence examined at paragraphs 182 to 194 above establishes in itself the existence of a 'temperature' obligation imposed on dealers wishing to join the Club. On the other hand, it cannot be

6 — Confidential data withheld.

concluded on the basis of those documents alone that the level of the 'temperature' was 'certainly at around [...]% [7] of sales', as the Commission claims in recital 318 of the contested decision. It will be necessary to examine later whether the other evidence on which the Commission relied in the contested decision shows the existence of a 'temperature' obligation of that high level.

197 According to the applicant, no importance should be attached to the abovementioned documentary evidence. It consists of isolated statements which, furthermore, are contradicted by the dealers' answers to the Commission's requests for information. All the dealers apart from two stated that they had not been subjected to any Michelin 'temperature' commitment.

198 The Court points out, first of all, that the five documents considered above were written by representatives of the applicant and may therefore be regarded as emanating from the applicant itself. All five documents confirm the existence of a policy pursued by Michelin with regard to the admission of dealers to the Club, namely the imposition of a Michelin 'temperature' obligation.

199 Furthermore, two dealers confirmed in their answers to the Commission's requests for information the existence of a 'temperature' obligation. Thus, one dealer states: 'The car temperature recommended by Michelin was [...]%.[7] The new truck temperature was around [...]%.'[7] The other dealer explains: 'The temperature is not official but it is definitely an indispensable condition of Club membership. It is based on market/sale shares.'

200 It is true that some dealers deny that membership of the Club entailed market share commitments. However, that finding does not affect the probative force of the five documents referred to above, which emanate from Michelin and clearly express its commercial policy. Moreover, the answers provided by those dealers is

7 — Confidential data withheld.

not at all surprising if account is taken of the fact that the 'temperature' obligation was 'of course a criterion which does not appear anywhere' (Michelin's internal note of 6 June 1997 entitled 'Increasing Club membership'). One dealer offers a clear explanation of the negative response to the question as to whether membership entailed market share commitments. He states: 'In fact, in the regions in which we are established... demand for Michelin products has always been high and our undertaking has chosen never to go against that demand. Consequently, our Michelin "temperature" has certainly always been regarded as good for that supplier and no request has been made to us in any category whatsoever.'

201 Next, in the contested decision the Commission set the level of the 'temperature' at around [...]% [8] referring inter alia to the average market share of Michelin tyres in sales by Club members which is [...]%[8] (although the Michelin share for independent specialised dealers is only [...]%[8]) (recital 319 of the contested decision).

202 The applicant states that, even if that percentage were shown to be correct, it might quite simply reflect a fact unconnected with any Michelin 'temperature' obligation. In any event, as regards the calculation in the contested decision (recital 319) of the Michelin market share of the Club members, the applicant maintains that the Commission provides no details of the calculation method which enabled it to reach the figure of [...]%.[8] The applicant states that, contrary to the Commission's contentions, more than 31% of dealers belonging to the Club who were questioned did not reach the alleged threshold of [...]%[8] in Michelin truck tyres.

203 It is true that the Commission does not explain how it calculated the market share of [...]%.[8] However, as stated above, the existence of a 'temperature' obligation as a condition of Club membership emerges unequivocally from the five documents analysed in paragraphs 182 to 194 above. The issue of whether that

8 — Confidential data withheld.

'temperature' was [...]% [9] or [...]% [9] is irrelevant to an assessment of the lawfulness of the contested decision. Indeed, what the Commission criticised, when referring to the 'temperature' obligation, is the fact that Michelin used the Club as 'a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres' (recital 317 of the contested decision).

204 It is clear from the documents examined in paragraphs 182 to 194 above that the 'temperature' obligation was imposed from that aspect. Those documents show that the dealers in question were required to increase their Michelin 'temperature' significantly in order to be able to join the Club, when joining the Club was perceived as being 'the only means of increasing [the] Michelin remuneration' (see the note cited at paragraph 188 above). Likewise, it is clear from the note dated 26 November 1996 (see paragraph 192 above) that Michelin suggested that dealers, in order to increase their 'temperature', should review the products they offer and withdraw products of other brands.

205 As for the obligation to maintain a stock of Michelin products, the applicant considers that the Commission bases its argument on the possibility that an 'individualised stock grid' might be drawn up 'which [would take] account of the local, regional and national market segments'. On that basis, the Commission concludes in the contested decision (recital 321): 'It would seem, then, that this grid is to be drawn up on the basis of Michelin market shares, or at the very least on the basis of the shares Michelin would like to achieve.' However, according to the applicant, it is clear from the contested decision (recital 321) that the Commission's argument is based on mere supposition ('[i]t would seem, then'). The applicant states that it never drew up individualised stock grids. Furthermore, all the dealers questioned by the Commission stated that they had never agreed an individualised stock grid with the applicant.

206 The applicant also complains that the Commission characterised as abusive the obligation placed on Club members to promote the Michelin brand. The only obligation was for the dealer to set up the advertising provided at his sales outlet.

9 — Confidential data withheld.

The Commission has held in the past that such a requirement was not abusive (Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 — Virgin/British Airways) (OJ 2000 L 30, p. 1). The obligation not to divert spontaneous demand for Michelin tyres reasonably stems from the principle of good faith which any distributor must observe and which requires him not to denigrate the product which he is supposed to be distributing.

207 The Court notes that, in the contested decision, the Commission considers (recital 321) that '[the fact that] Michelin did indeed set out to oblige the members of its Club to guarantee a Michelin "temperature" is also shown by the clause in the agreement requiring the dealer to "carry a sufficient stock of Michelin products to meet any customer demand immediately"' (see Article 6.1 of the Club agreement). Furthermore, it is stated in so many words in the agreement that an individualised stock grid may be drawn up 'which takes account of the... local..., regional and... national market segments'.

208 Since a dealer was required to achieve a certain high market share in Michelin products in order to join the Club, it must be held that a clause requiring the dealer to carry a sufficient stock of Michelin products to meet any customer demand immediately is a means of consolidating the applicant's dominant position in the market concerned. Furthermore, the possibility, provided for by Michelin in the Club agreement, that an individualised grid could be drawn up — even though all the dealers questioned by the Commission state that no such grid was ever drawn up — confirms that the stock obligations were imposed by the applicant through the Club agreement in the context of a plan intended to consolidate its market shares and to block access to the market for other tyre manufacturers (see, in that regard, *AKZO* v *Commission*, cited at paragraph 54 above, paragraph 72).

209 As regards the obligations imposed on Club members to promote the Michelin brand and not divert spontaneous demand for Michelin tyres, the Court observes that, contrary to the submission in the application, the obligations were not criticised in isolation by the Commission in the contested decision. It referred to

those two obligations, together with the 'temperature' obligation, in reaching the conclusion that the Club 'was used by Michelin as a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres' (recital 317 of the contested decision).

210 However, in the present case, since a dealer could not join the Club unless he achieved a certain high market share in Michelin products and since, once he was a member of the Club, he was required to promote the Michelin brand, could not divert spontaneous demand for Michelin products and was required to carry sufficient stocks to meet that spontaneous demand immediately, the Commission was entitled to conclude that those conditions together were aimed 'at eliminating competition on the part of other manufacturers, guaranteeing the maintenance of Michelin's position, and limiting competition on the market' (recital 317 of the contested decision). The dealer was induced to fulfil those obligations, since membership of the Club brought numerous disadvantages which are not disputed by the applicant (recitals 104 to 106 of the contested decision).

211 Nor is there inconsistency between the analysis made by the Commission in the contested decision and that made in Decision 2000/74 (cited at paragraph 206 above). In that decision, the Commission held that British Airways had infringed Article 82 EC by operating systems of commission and other incentives with the travel agents from whom it purchased air travel agency services in the United Kingdom (Article 1). One of the incentive schemes referred to in the decision was the 'Marketing Agreements' which included, for travel agents, the obligation to promote British Airways products and, more generally, the obligation to treat British Airways no less favourably than any other carrier (points 6 and 19 of Decision 2000/74). The Commission held that those clauses, even though not abusive in themselves, must be regarded as prohibited by Article 82 EC because they reinforced — as in the present case — the effect of the impugned discount system (point 104 of Decision 2000/74).

212 On the basis of all of the foregoing, it must be concluded that the Commission was right to find in the contested decision that '[t]he Club was used by Michelin as a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres' (recital 317 of the contested decision). Since an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 57), the Commission was entitled to characterise the applicant's efforts to use the Club for the aforementioned purposes as an abuse of a dominant position within the meaning of Article 82 EC.

— The obligations to provide information and to accept the lists of areas

213 The applicant claims that the information requested from dealers was not exceptional. Even an undertaking in a dominant position is entitled to investigate the position of its distributors in order to optimise the management of its distribution network and to limit unpaid accounts. Indeed, most of the information in question is public.

214 The organisational data was requested in order to enable the applicant to assess the features of the sales outlets with the aim of suggesting changes or improvements to the dealers concerned. The information requested is comparable with that inherent in any kind of franchise and which was acknowledged to be lawful by the Court of Justice in Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 17, and then by the Commission itself in Commission Regulation (EEC) 4087/88 of 30 November 1988 on the application of Article [81](3) of the Treaty to categories of franchise agreements (OJ 1988 L 359, p. 46). It is also clear from the dealers' answers to the Commission's requests for information that the data which the dealers supplied to the applicant were very general. As regards the outlet audits and lists of areas suggested (recital 324 of the contested decision), the applicant maintains that they were also designed to help the dealer improve his sales outlets.

215 The Court observes that the Club agreement imposes various obligations on a dealer to provide information and also an obligation to accept the lists of areas suggested by the applicant. The dealer undertakes to communicate to the applicant not only the balance-sheet and income statement but also particulars of turnover and services provided (Annex I to the Club agreement). The dealer must also let the applicant know 'the identity of all direct or indirect shareholders in the business and [keep] Michelin informed of any circumstances likely to affect control of the company and/or its future strategy' (Annex I to the Club agreement). The dealer must also communicate 'its statistics and sales forecasts' to Michelin (Article 6.2 of the Club agreement). It is not disputed that those statistics and forecasts relate to the development of sales, category by category for all brands, and the development of the dealers' Michelin market shares (recital 325 of the contested decision and document 36041-2726). Finally, Michelin is entitled to carry out an audit of the dealer's sales outlets (Article 1.1 of the Club agreement). Such an audit 'will enable the dealer and Michelin to establish an annual areas commitment in one sphere or another or any list of areas suggested and accepted jointly. Compliance with that commitment, duly recorded by Michelin's representatives, will be a precondition for the annual payment of a bonus 0.75% of the amount of the Service Turnover' (Article 1.1 of the Club agreement).

216 The Court finds that, contrary to the applicant's claims, the obligations imposed on dealers go far beyond the obligations to provide information which may be imposed in the context of a franchise agreement under Regulation No 4087/88. Indeed, Article 3(2) of that regulation mentions, as the only obligations to provide information compatible with Article 81(1) EC, the obligation for the franchisee 'to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience' and the obligation 'to inform the franchisor of infringements of licensed industrial or intellectual property rights'. In any event, any analysis of the Club agreement from the aspect of Article 81(1) EC is irrelevant in the context of the assessment of the obligations to provide information imposed on dealers from the aspect of Article 82 EC (see, in that

regard, Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 30 and 130 to 136; Case C-310/93 P *BPB Industries and British Gypsum* v *Commission*, cited at paragraph 124 above, paragraph 11; and Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 25).

217 Next, it must be borne in mind that an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 57). Since the obligations referred to at paragraph 215 above enable the applicant to obtain detailed information about the activities of the Club members, it is necessary to consider whether those obligations are objectively justified (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 73; *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 114; and *Portugal* v *Commission*, cited at paragraph 58 above, paragraph 52).

218 In that regard, the applicant refers to the need to optimise the management of its distribution network and to the need to avoid unpaid invoices. Those obligations also enable the applicant to assess the features of the sales outlets of the dealers concerned with a view to suggesting changes or improvements.

219 The fact remains that, by its arguments, the applicant merely accepts the conclusion which the Commission reached in the contested decision, namely that the obligations imposed on dealers to provide information and the obligation to accept the list of areas suggested by Michelin only reflect Michelin's desire to supervise distribution in detail (recital 322 of the contested decision). Although some of that information (the balance-sheet and income statement) is public, most of it is not. The applicant's sole aim in imposing on dealers obligations to communicate detailed information on turnover, statistics and sales forecasts, future strategies and the development of Michelin market shares is to obtain information about the market which is not public and which is of value for the

carrying out of its own marketing strategy (see, in that regard, *Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 107). Furthermore, the applicant's right, by way of exception, to examine in detail the activities of the Club members must inevitably increase the dependence on Michelin of the Club members, who, in exchange for fulfilling those obligations, receive financial advantages (recitals 104 to 106 of the contested decision). Dealers are no longer able to increase the market share of products of rival brands without Michelin being aware of the fact.

220 The obligations referred to at paragraph 215 above are therefore designed to monitor the Club members, to tie them to the applicant and to eliminate competition from other manufacturers. The Commission was therefore correct to characterise those obligations as abusive in the contested decision.

— The obligation to have the first retread of Michelin carcasses carried out by Michelin

221 The applicant claims that the obligation to have the first retread of Michelin carcasses carried out itself was abolished in 1995 and that, before that date, compliance with the obligation was never monitored. That fact is confirmed by the dealers' answers to the Commission's requests for information. As regards the Commission's claim that the applicant 'threatened to refuse entry to the Club to dealers who wished to cooperate with competing retreaders' (recital 329 of the contested decision), the applicant points out that the Commission does not cite any evidence in support of that claim.

222 The fact remains that the applicant does not dispute that 'until October 1995 the [Club] agreement expressly required the dealer to have the first retread of Michelin truck and earthmover casings carried out by Michelin' (recital 329 of the contested decision).

223 In response to the applicant's argument that it never monitored compliance with that requirement, the Commission states in the contested decision that 'the great majority of retreads for Club dealers were [none the less] carried out by Michelin, and this continued after 1996'. The applicant does not challenge that finding, which, moreover, is confirmed by the dealers' statements.

224 The Club members' obligation to have the first retread carried out at Michelin infringes Article 82 EC, since, as the Commission states in recital 331 of the contested decision, other retreaders are faced with 'an obstacle barring their access to [the] market'.

225 That conclusion is not affected by the fact that the Commission does not state on what evidence it bases its claim that Michelin threatened to refuse entry to the Club to dealers who wished to cooperate with competing retreaders (recital 329 of the contested decision). The obligation is expressly stated in the Club agreement.

Conclusions regarding the Club

226 It is apparent from all of the foregoing that the Commission was correct to characterise as abusive the characteristics of the Club identified at paragraphs 170 to 174 above.

227 However, the applicant also challenges the determination of the duration of the infringement. It submits that, even if it is conceded that the Commission established to the requisite legal standard that the dealers belonging to the Club had a 'temperature' obligation, it did not establish that that obligation existed throughout the entire period in question. The few statements cited by the Commission relate only to the period from 1995 to 1997. It is for the Commission to prove not only the existence of the infringement but also its duration (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 77 above, paragraph 4270).

228 In that regard, it must be held, first of all, that in the contested decision the Club agreement was considered to be a discount system contrary to Article 82 EC. It constitutes one of the loyalty-inducing discount systems which, according to the Commission, were applied during the period from 1 January 1990 to 31 December 1998 (Article 1 of the contested decision). Nowhere in the contested decision did the Commission hold that the infringement relating to the Club (see paragraphs 266 and 267 below), and *a fortiori* each of the Club's abusive characteristics, was established throughout the entire period in question.

229 Even on the assumption that the 'temperature' obligation did only exist between 1995 and 1997, that circumstance could not therefore be capable of affecting the lawfulness of the contested decision.

230 Finally, it must be stated that the fact that the unlawful nature of the Club was established at least for the period between 1 January 1990 and 15 June 1998. It is not disputed that the Club had existed since 1990 and that, at that time, the three abusive characteristics identified by the Commission were present. One of those three characteristics, namely the obligations to supply information and to accept the lists of areas, covers at least the entire period between 1 January 1990 and 15 June 1998. The applicant undertook on 30 April 1998 to withdraw the clauses relating to the Club regarded as abusive by the Commission by no later than 15 June 1998.

231 It is apparent from all of the foregoing that the third plea must also be rejected.

Fourth plea: the Commission made an error of assessment in holding that the combination of the various conditions imposed on the dealers had a further impact

232 The applicant points out that, in recital 274 of the contested decision, the Commission states that 'the combination and interaction of the various conditions helped to reinforce their impact and thus the abusive nature of the "system" considered as a whole'. The applicant contends that lawful discounts cannot become unlawful as a result of the cumulative or contagious effect produced by the coexistence of several parallel discount systems. In any event, the Commission has failed to state the reasons why a lawful discount becomes unlawful solely because another discount exists alongside it.

233 The premiss on which the applicant bases its argument is misconceived. In the contested decision, the Commission established that the various discount systems applied by the applicant were unlawful. The Commission did not therefore, in the contested decision, infer the unlawful nature of the 'system' applied by Michelin from the combination of discount systems which were lawful in themselves.

234 Therefore, the fourth plea cannot be upheld either.

Fifth plea: the Commission should have carried out a detailed analysis of the effects of the practices called in question

235 The applicant submits that an 'abuse' is a concept referring to the conduct of an undertaking in a dominant position 'which... has the effect of hindering the

maintenance of the degree of competition still existing in the market or the growth of that competition' (*Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 91). Therefore, in order for Article 82 EC to apply, it is essential that the practice in issue had an effect.

236 However, in the present case, the Commission did not examine the actual economic effect of the criticised conduct. Had it carried out such an examination, it would have found that the conduct in question did not have the effect of either reinforcing the applicant's position or limiting the degree of competition existing on the market. The applicant submits, in that regard, that its market shares and its prices are steadily falling, that its competitors have significantly reinforced their position on the market and that new foreign manufacturers have entered the market. However, since the conditions called in question were removed, the applicant's market shares have increased, which in the applicant's submission also shows that the conditions imposed did not have a loyalty-inducing effect.

237 The Court points out that Article 82 EC prohibits, in so far as it may affect trade between Member States, any abuse of a dominant position within the common market or in a substantial part thereof. Unlike Article 81(1) EC, Article 82 EC contains no reference to the anti-competitive aim or anti-competitive effect of the practice referred to. However, in the light of the context of Article 82 EC, conduct will be regarded as abusive only if it restricts competition.

238 In support of its argument, the applicant refers to the consistent line of decisions which show that an 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or

services on the basis of the transactions of commercial operators, has the *effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche* v *Commission*, cited at paragraph 54 above, paragraph 91; *Michelin* v *Commission*, cited at paragraph 54 above, paragraph 70; *AKZO* v *Commission*, cited at paragraph 54 above, paragraph 69; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 111; emphasis added).

239 The 'effect' referred to in the case-law cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.

240 Thus, in *Michelin* v *Commission* (cited at paragraph 54 above), the Court of Justice, after referring to the principle reproduced at paragraph 238 above, stated that it is necessary 'to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition' (paragraph 73). It concluded that Michelin had infringed Article 82 EC, since its discount system '[was] calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage' (paragraph 85).

241 It follows that, for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing

(see, in that regard, *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 170). If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect.

242 Thus, with regard to the practices concerning prices, the Court held in *AKZO* v *Commission* (cited at paragraph 54 above) that prices below average variable costs applied by an undertaking in a dominant position are regarded as abusive in themselves because the only interest which the undertaking may have in applying such prices is that of eliminating competitors (paragraph 71) and that prices below average total costs but above average variable costs are abusive if they are determined as part of a plan for eliminating a competitor (paragraph 72). In that case, the Court did not require any demonstration of the actual effects of the practices in question.

243 In the same sense, the Community judicature has held that whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its *purpose* is to strengthen that dominant position and thereby abuse it (*United Brands* v *Commission*, cited at paragraph 55 above, paragraph 189; Case T-65/89 *BPB Industries and British Gypsum* v *Commission*, cited at paragraph 55 above, paragraph 69; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission*, cited at paragraph 55 above, paragraph 107; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 112; emphasis added).

244 In the contested decision, the Commission demonstrated that the purpose of the discount systems applied by the applicant was to tie the dealers to the applicant. Those practices tended to restrict competition because they sought, in particular,

to make it more difficult for the applicant's competitors to enter the relevant market.

245 The applicant cannot base an argument on the fact that its market shares and prices fell during the period in question. When an undertaking actually implements practices with the aim of restricting competition, the fact that the result sought is not achieved is not enough to avoid the application of Article 82 EC (Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission,* cited at paragraph 55 above, paragraph 149). In any event, it is very probable that the fall in the applicant's market shares (recital 336 of the contested decision) and in its sales prices (recital 337 of the contested decision) would have been greater if the practices criticised in the contested decision had not been applied.

246 The fifth plea, alleging that the Commission should have carried out a specific analysis of the effects in issue, must therefore also be rejected.

2. *The alleged unlawfulness of the fine imposed*

247 The applicant puts forward five pleas in connection with the various aspects of the determination of the amount of the fine imposed on it by the Commission. In the first plea, the applicant disputes the setting of the starting point for calculation of the fine at EUR 8 million. The second plea concerns the calculation of the duration of the infringement and the third plea relates to the increase in the basic amount of the fine for aggravating circumstances. The fourth plea concerns the Commission's alleged failure to take certain mitigating circumstances into consideration. Finally, the fifth plea relates to the alleged infringement of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

First plea: the Commission infringed the principles of fairness, proportionality and equal treatment, Article 253 EC and Article 15(2) of Regulation No 17 by setting the starting point for the calculation of the fine at EUR 8 million

The contested decision

248 In recitals 354 to 358 of the contested decision, it is stated:

'354 The conduct in question consists of a system of loyalty-inducing discounts of a kind consistently condemned in the past by the Commission and by the Community judicature; it is a serious abuse of a dominant position, aimed at eliminating or at the very least preventing the growth of Michelin's competitors on the French markets in new replacement and retread truck tyres. Such conduct must be considered a serious infringement of Community competition law.

355 France is the only country in the Community where Michelin holds a share of the market in retreaded tyres which is greater than its share of the market in new replacement tyres. The tying of sales of new and retreaded tyres which is the effect of the progress bonus and the PRO agreement may be considered at least one factor helping to explain this singular situation.

356 Michelin's market shares are larger in France than they are in any other Member State. The situation might indeed be due to the history of the brand, but the strength of the Michelin Friends Club on the French market may also be a factor. The effect of the Club policy certainly helps to

maintain Michelin's market share among the Club dealers, where its share is not surprisingly much higher than it is among independent specialised dealers.

357 The infringement took place in a substantial part of the common market, and because of the partitioning of the common market which it caused its effects extended beyond the relevant market, which is the French market.

358 For these reasons the amount of the fine imposed to reflect the gravity of the infringement should be EUR 8 million, reflecting the serious nature, extent and impact of the infringement.'

Examination of the applicant's arguments

249 First, the applicant claims that the Commission infringed the principles of fairness, proportionality and equal treatment, Article 253 EC and Article 15(2) of Regulation No 17 in setting the starting point for the calculation of the amount of the fine at a level which is double that chosen in respect of similar facts in Decision 2000/74 (cited at paragraph 206 above). The applicant refers to points 96 and 118 to 121 of that decision and states that the conduct complained of in that case and that complained of in the present case are identical and confined to one Member State. Furthermore, the undertakings concerned are similar in size. The applicant maintains that, even if the Commission is entitled to vary the general level of the fine, it is required to treat comparable situations in the same way (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 118). Furthermore, the

fact that the Commission has adopted guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) means that it now has specific obligations to act with stringency, objectivity and transparency in determining that amount.

250 The applicant further submits that, in the contested decision, the starting point for the calculation of the fine should have been significantly lower than that used by the Commission in Decision 2000/74 (cited at paragraph 206 above), since the turnover of British Airways, the undertaking affected by the practices at issue in that decision, was considerably higher than the applicant's in the market in question. Moreover, the Commission, in order not to infringe Article 253 EC, should have departed from its previous practice in taking decisions and at least have given more explicit reasons for its assessment of the gravity of the infringement in order to allow the applicant to understand the reasons for the high starting point used by the Commission to calculate the basic amount of the fine (Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1974] ECR 1491, paragraph 31, and Case C-350/88 *Delacre* v *Commission* [1990] ECR I-395, paragraph 15).

251 The Court notes, first of all, that in the Guidelines the Commission characterises 'loyalty discounts made by dominant firms in order to shut competitors out of the market' as a serious infringement. According to the Guidelines, the starting points envisaged for such infringements vary between EUR 1 million and EUR 20 million. The starting amount of EUR 8 million imposed on the applicant in the present case is below the middle of that range.

252 It is true that in Decision 2000/74 (cited at paragraph 206 above), which also concerns a loyalty-inducing discount system, the starting amount for the calculation of the fine was set at EUR 4 million.

253 However, the applicant cannot claim that the Commission infringed the principle of non-discrimination in the present case. First, there are objective differences between the case to which Decision 2000/74 related and the present case. British Airways, the undertaking concerned by the practices at issue in Decision 2000/74, occupied a weaker dominant position than that occupied by the applicant in the present case and the incidences of abusive conduct found against British Airways were fewer than the incidences of abusive conduct established in the applicant's case.

254 Secondly, it is in any event permissible for the Commission to increase the level of fines in order to reinforce their deterrent effect. Therefore, the fact that in the past the Commission imposed fines of a particular level for certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17 and in the Guidelines, if that is necessary in order to ensure the implementation of Community competition policy (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 108; Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 385; and *Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraphs 245 to 247). The Commission's previous decision-making practice therefore does not in itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see, in that regard, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 234 and 337).

255 In those circumstances, the Commission was likewise not required to state in the contested decision the reasons why the starting amount chosen for the calculation of the fine was not the same as that set in Decision 2000/74 (cited at paragraph 206 above) (see also paragraph 280 below).

256 Secondly, the applicant states that, in the contested decision (recitals 355 to 358) the Commission based its assessment of the seriousness of the infringement on its alleged effects, without carrying out a detailed analysis. It maintains that the

Commission made a serious error of assessment in evaluating the alleged effects of the infringement for the purpose of determining its seriousness. The applicant, submits that the practices complained of never had the anti-competitive effects which the Commission alleges.

257 In that regard, the applicant states that its market shares have fallen significantly during the last 20 years and that the prices of its new truck tyres fell substantially during the period in question. A correct assessment of the actual effects of the practices complained of should have led to the finding that the infringement was much less serious than claimed by the Commission in the contested decision. The starting amount for the calculation of the fine should therefore have been significantly lower than EUR 8 million.

258 The Court notes that, in the contested decision, the Commission did not examine the specific effects of the abusive practices. Nor was it required to do so (paragraphs 237 to 245 above). It is true that, in recitals 355 to 357 of the contested decision, the Commission speculated on the effects of the abusive conduct. However, the seriousness of the infringement was established by reference to the nature and the object of the abusive conduct. The Commission considered that the discount systems applied by the applicant constituted a serious abuse of its dominant position because they were loyalty-inducing discount systems which were 'aimed at eliminating or at the very least preventing the growth of Michelin's competitors on the French markets in new replacement and retread truck tyres' (recital 354 of the contested decision).

259 The arguments relating to the development of the applicant's market shares and selling prices cannot invalidate the finding that the infringement was serious. Firstly, it is highly probable that the fall in the applicant's market shares and prices would have been greater if the practices complained of in the contested decision had not been applied. Secondly, it is clear from settled case-law (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 636, and

Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 199) that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

260 It follows from the foregoing that the first plea must be rejected.

Second plea: in determining the duration of the infringement, the Commission made manifest errors of assessment and infringed the rules relating to the taking of evidence, the principles of fairness and legitimate expectations, Article 15(2) of Regulation No 17, the Guidelines and Article 253 EC

The contested decision

261 In recitals 359 and 360 of the contested decision, the Commission states:

'359 The infringement extended over a period of 19 years or more, since the commercial policy at issue was in operation at least from 1980 onward and, as indicated in Section E Michelin agreed to amend its agreements with effect from 1 January 1999. But the Commission has concentrated its enquiries on the period 1990 to 1999, and accordingly it will take account here only of the period from 1 January 1990 to 31 December 1998. For purposes of this Decision, therefore, the duration of the infringement is considered to be nine years.

360 The amount of the fine to be imposed on the basis of the gravity of the infringement should therefore be increased by 90% to take account of its duration. This brings the basic amount of the fine to EUR 15.2 million.'

Examination of the applicant's arguments

262 Firstly, the applicant states that the contested decision (recitals 359 and 360) refers to the duration of the infringement (in the singular). The various 'abuses' are therefore regarded as a single infringement. Contrary to the Commission's assertions (recital 359 of the contested decision), the alleged infringement was not uniform, continuous and constant. The practices complained were either of decreasing intensity or applied during only part of the period under consideration. Accordingly, the quantity rebate system was changed in 1995 (the grant of quarterly advances) and was abolished with effect from 1 January 1997. It was replaced by an invoice rebate system which the Commission acknowledged was 'less unfair and less loyalty-inducing' (recital 282 of the contested decision). With effect from 1 January 1999, the applicant also changed the invoice rebate system and abolished the last characteristics which in the Commission's view still gave it a certain anti-competitive effect. The service bonus was abolished on 1 January 1997. The progress bonus was replaced in 1997 by the achieved-target bonus. This bonus was also amended on 30 April 1998 in order to abolish retroactively for 1998 any allegedly loyalty-inducing effect. The PRO agreement was not introduced until 1993 and was replaced on 1 January 1998 by the 'Carcass Quality Service', which, as the Commission concedes (recital 311 of the contested decision), eliminated the abusive components in the system. The applicant submits that the characteristics of the Club with which the Commission found fault were also gradually abolished. It claims the 'temperature' obligation never existed and that the dealers' obligation to have the first retreading of his carcasses carried out by the applicant was abolished in October 1995. All the other elements complained of were abolished on 30 April 1998.

263 Finally, according to the applicant, the argument that the infringement was uniform, continuous and constant is contradicted by the Commission itself in recital 80 of the contested decision.

264 The Court points out that in Article 1 of the contested decision the Commission finds that 'during a period extending from 1 January 1990 to 31 December 1998, [the applicant] infringed Article 82 EC by applying a system of loyalty-inducing rebates...'.

265 The Commission has demonstrated that each discount system identified in the contested decision is abusive for the purposes of Article 82 EC. It is irrelevant whether the contested decision considers those various abusive discount systems to be a single infringement or different infringements of Article 82 EC. The Commission is entitled to impose a single fine for a multiplicity of infringements (Case T-83/91 *Tetra Pak* v *Commission*, cited at paragraph 163 above, paragraph 236, and Case T-144/89 *Cockerill Sambre* v *Commission* [1995] ECR II-947, paragraph 92). The Court of First Instance also held in *Tetra Pak* v *Commission* (cited above, paragraph 236) that the Commission is not required to state specifically in the grounds of the contested decision how it took into account each of the abusive components complained of for the purposes of setting the fine.

266 In the contested decision, the Commission never claimed that all the abusive components identified existed throughout the entire period in question, namely from 1 January 1990 to 31 December 1998. The contested decision indicates on each occasion the date on which one or other of the discount systems was introduced and, where appropriate, abandoned.

267 The single fine imposed on the applicant therefore deals globally with all of the infringements established, which together cover the entire period in question. In that regard, it is sufficient to state that the quantity rebates were applied until

31 December 1996 and that they were replaced in 1997 by invoice rebates which were applied at least until 31 December 1998, as may be seen from the applicant's undertaking of 30 April 1998. It is true that the Commission acknowledges in the contested decision that the quantity rebate system developed into a system which was 'less unfair and less loyalty-inducing' (recital 282 of the contested decision), but it then stated, in recitals 283 to 285, the reasons why the invoice rebates should still be regarded as abusive for the purposes of Article 82 EC. The applicant does not put forward any argument capable of upsetting that assessment by the Commission.

268 The infringement relating to the Club covers at least the period from 1 January 1990 to 15 June 1998 (see paragraph 230 above).

269 The progress bonus, which was already in existence on 1 January 1990 and which was replaced by the achieved-target bonus in 1997, was applied until at least 30 April 1998. By its undertaking of 30 April 1998, the applicant undertook to pay each dealer the maximum bonus for 1998, whatever the volume of sales achieved during that year.

270 Although some discount systems to which the contested decision applies do not cover the entire period in question — a fact, moreover, which the Commission takes into account in the contested decision (see recitals 250, 259, 297 and 311 of the contested decision) —, the Commission was entitled to find, in Article 1 of the contested decision, that 'during a period extending from 1 January 1990 to 31 December 1998' the applicant infringed Article 82 EC 'by applying a system of loyalty-inducing rebates...'.

271 Secondly, the applicant maintains that the rate of increase in the fine applied by the Commission, namely 10% for each year of the infringement, was disproportionate, discriminatory and insufficiently reasoned.

272 Referring to the judgment of the Court of Justice in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 48, and to the judgment of the Court of First Instance in Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127, the applicant claims that the rate of increase applied is excessive, for the following reasons: the infringement it is alleged to have committed was of decreasing intensity; the practices in question had no effect on the market, whereas under the Guidelines the 10% maximum rate is reserved for infringements which 'have had a harmful impact on consumers over a long period'; the applicant cooperated fully and consistently with the Commission during the administrative procedure; the territory affected by the practices penalised by the Commission was restricted to France.

273 The rate of increase applied is also discriminatory. In the light of the Commission's previous practice in taking decisions (Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article [81] of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60, point 260 et seq.) which applies a rate of increase of 5% per annum; Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141 — Deutsche Post AG) (OJ 2001 L 125, p. 27, points 50 and 51) which applies an increase rate of 3% per annum), it appears that the Commission took a much stricter approach towards the applicant than towards other undertakings facing proceedings for infringements of Community competition law.

274 The contested decision also infringes Article 253 EC in that it does not contain sufficient reasoning to enable the applicant to understand the reasons why the Commission considered that an increase in the amount of the fine at the maximum rate was appropriate and justified in the present case.

275 The Court notes, first, that the Guidelines state that for 'infringements of long duration (in general, more than five years)' there may be an increase of 'up to 10% per year in the amount determined for gravity'. The 10% per annum

increase is therefore wholly consistent with the principles stated by the Commission in the Guidelines.

276 The Commission states in point 1 B of the Guidelines that 'the increase in the fine for long-term infringements represents a considerable strengthening of the previous practice with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period'. In the light of the nature, object and duration of the abuses in question, it may be inferred that the applicant's conduct significantly distorted competition in the market and, as a result, must also have had lasting harmful consequences for consumers. The effects of the discount systems, through the partitioning of the market which they entail, necessarily extended beyond the French market.

277 As regards the alleged infringement of the principle of non-discrimination, the fact that in the past the Commission imposed a particular rate of increase in the amount of the fine, depending on the duration of the infringement, does not mean that it is estopped from raising that rate, within the limits set out in Regulation No 17 and in the Guidelines, if that is necessary in order to ensure the implementation of Community competition policy (see, in that regard, *Musique Diffusion Française and Others* v *Commission*, cited at paragraph 254 above, paragraph 309, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). In any event, in recent decisions the Commission has increased the fine by up to 10% per annum owing to the duration of the infringement (Decision 2000/74 (cited at paragraph 206 above) and Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81] of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1)).

278 As regards the assertion that the infringement which the applicant is alleged to have committed was diminishing in intensity, it must be pointed out that, in *Tate*

& Lyle and Others v *Commission* (cited at paragraph 249 above, paragraph 106), the Court of First Instance held that an increase in the fine by reference to the duration of the infringement is not limited to a situation in which there is a direct relation between the duration and serious harm caused to the Community objectives referred to in the competition rules. In any event, the loyalty-inducing discount systems applied by the applicant during the whole of the period in question (see paragraphs 264 to 270 above) constituted a serious infringement of the competition rules justifying an increase in the fine of up to 10% per year of infringement even though the intensity of certain abusive components may have varied over the period in question.

279 Next, the applicant's cooperation was taken into account as mitigating circumstances.

280 Finally, as regards the obligation to state reasons, it should be borne in mind that the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 42). The Commission satisfied that requirement in recitals 348 to 365 of the contested decision. Those reasons state the criteria used by the Commission in calculating the fine with reference to the gravity and duration of the infringement. Furthermore, they include, as well as the procedural requirements of Article 253 EC, the figures which influenced the Commission in the exercise of its discretion when setting the fine (*KNP BT* v *Commission*, cited above, paragraph 45).

281 It follows that the second plea must be rejected in its entirety

Third plea: the Commission made a manifest error of assessment and infringed Article 15(2) of Regulation No 17 and the Guidelines by increasing the basic amount of the fine for alleged aggravating circumstances

The contested decision

282 The Commission states, in recitals 361 to 363 of the contested decision:

'361 Michelin was fined by the Commission in 1981 in the NBIM case, and that decision was upheld by the Court in 1983, for abuse of a dominant position of the same kind, namely a system of loyalty-inducing discounts. The Commission guidelines... expressly refer to repetition of the infringement as an aggravating circumstance justifying an increase in the amount of the fine.

362 Michelin argues that the fact that the Court's earlier judgment was concerned with an infringement on another geographic market means that Michelin's abusive practices here do not constitute repetition of the same infringement. The Commission takes the view, however, that when a dominant undertaking has been censured by the Commission it has a responsibility not only to put an end to the abusive practices on the relevant market but also to ensure that its commercial policy throughout

the Community conforms to the individual Decision notified to it; Michelin did not do this, quite the reverse.

363 It must be concluded that the abuses committed by Michelin on the defined relevant markets are aggravated by the fact that this was a repeated infringement, which justifies an increase of 50% in the basic amount of the fine, that is to say an increase of EUR 7.6 million.'

Examination of the applicant's arguments

283 The applicant claims that, in the contested decision, the Commission wrongly censures it for its conduct in repeating an infringement. Firstly, it maintains that the practices in respect of which it was sanctioned in the contested decision are not of the same kind as those censured in the NBIM decision (cited at paragraph 65 above) and in *Michelin* v *Commission* (cited at paragraph 54 above).

284 In that regard, the Court points out that recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements (*Thyssen Stahl* v *Commission*, cited at paragraph 259 above, paragraph 617). One of the examples of aggravating circumstances given in the Guidelines is 'repeated infringement of the same type by the same undertaking'.

285 The Commission was entitled to consider that the infringement to which the NBIM decision (cited at paragraph 65 above) relates and which led to the judgment in *Michelin* v *Commission* (cited at paragraph 54 above) was similar to the infringement referred to in the contested decision.

286 Both in the NBIM decision (cited at paragraph 65 above) and in the contested decision the Commission called in question the application by an undertaking occupying a dominant position in the new replacement truck tyre market of a discount system 'calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage' (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85). The discount systems examined in both decisions 'thus limit[ed] the dealers' choice of supplier and ma[de] access to the market more difficult for competitors' (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85). In both decisions, the Commission therefore called in question discounts which could not be considered equivalent to 'mere quantity discount[s] linked solely to the volume of goods purchased' (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 72) but which, on the contrary, should be regarded as loyalty-inducing discounts placing the dealers in a 'position of dependence' (*Michelin* v *Commission*, cited at paragraph 54 above, paragraph 85).

287 The applicant's argument that the NBIM decision (cited at paragraph 65 above) refers to a target discount system simply cannot succeed since, firstly, in the NBIM decision (cited at paragraph 65 above), the Commission criticises, as in the contested decision, the loyalty-inducing nature of the discount systems and, secondly, the contested decision also criticises inter alia a genuine target discount system, namely the progress bonus, which became the 'achieved-target bonus' (recitals 67 to 74 and 260 to 271 of the contested decision).

288 It follows therefore that the NBIM decision (cited at paragraph 65 above) and the contested decision refer to similar infringements.

289 Secondly, the applicant points out that it has never previously been censured by the Commission for abusing its dominant position or for other anti-competitive practices. The Commission was therefore not entitled to increase the fine imposed on the applicant by taking into account the infringement committed by NBIM in the NBIM decision (cited at paragraph 65 above).

290 It must be held that, in response to a written question from the Court, the applicant confirmed that the company referred to by the NBIM decision (cited at paragraph 65 above) and the company referred to by the contested decision are subsidiaries more than 99% owned, directly or indirectly, by the same parent company, namely the Compagnie Générale des Établissements Michelin, established in Clermont-Ferrand. There are therefore reasonable grounds for concluding that those subsidiaries do not determine independently their own conduct on the market. Since Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11; Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50) and since, in accordance with the case-law, the Commission, had it so wished, could have imposed the fine on the same parent company in both decisions (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 130 to 140; Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215, paragraph 15; Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 36 to 41; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission*, cited at paragraph 55 above, paragraph 154), the Commission was entitled to consider in the contested decision that the same undertaking had already been censured in 1981 for the same type of infringement.

291 Thirdly, the applicant claims that the Commission infringed Article 253 EC, the principles of fairness and equal treatment, Article 15(2) of Regulation No 17 and the Guidelines by applying a rate of increase of 50% to the basic amount of the fine for recidivism. First, the Commission does not state its reasons for applying a rate of 50%. Secondly, the rate is excessive in the light of the differences between the practices censured in *Michelin* v *Commission* (cited at paragraph 54 above) and in the present case and in the light of the Commission's previous practice in taking decisions (Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1), in which a 33.3% increase was applied).

292 It must be borne in mind that, when fixing the amount of the fine, the Commission has a margin of discretion (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59). It is not required to apply specific mathematical formulae. The mere fact that, in another decision, it increased a basic amount by 33.3% for recidivism does not mean that it was required to apply the same percentage increase in the contested decision. The Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see, in that regard, *LR AF 1998* v *Commission*, cited at paragraph 254 above, paragraphs 234 and 337).

293 Next, it must be recalled to mind that, for the purpose of determining the amount of the fine, the Commission must ensure that its action has the necessary deterrent effect (*Irish Sugar* v *Commission*, cited at paragraph 54 above, paragraph 245). Recidivism is a circumstance which justifies a significant increase in the basic amount of the fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent. In the present case, the Commission was entitled to increase the basic amount of the fine by 50% in order to direct Michelin's conduct towards compliance with the Treaty's competition rules.

Fourth plea: the Commission made a manifest error of assessment, infringed the principles of fairness, proportionality, equal treatment and legitimate expectations, Article 15(2) of Regulation No 17, the Guidelines and Article 253 EC by not taking certain mitigating circumstances into consideration

The contested decision

294 Recital 364 of the contested decision states:

'364 As indicated in Section E, Michelin submitted amendments to its commercial policy in February 1999 which took effect on 1 January 1999, and which were aimed at bringing the infringement to an end. The undertaking had therefore made these amendments even before the Commission sent the statement of objections; this has to be considered a mitigating circumstance, justifying a reduction of 20% in the basic amount of the fine, that is to say a reduction of EUR 3.04 million.'

Examination of the applicant's arguments

295 The applicant claims, first, that, in the contested decision, the Commission did not take sufficient account of its exemplary cooperation.

296 First, the Commission undervalued the applicant's cooperation during the administrative procedure. The applicant had actively cooperated with the Commission since 1997. Secondly, that cooperation was misinterpreted by the

Commission, since the amendment to the applicant's commercial conditions in line with the Commission's wishes dates from a time well before February 1999. Thus, in December 1996, the applicant unilaterally amended its commercial conditions and abolished practices which were subsequently called in question by the Commission. On 30 April 1998, it gave the Commission a formal undertaking to amend its commercial conditions along the lines desired by the Commission.

297 The position adopted by the Commission in the contested decision is all the more surprising because in other cases, in which it was found that the undertakings concerned had cooperated at a much later stage and in which the conduct censured was much more serious than the practices in respect of which the applicant was criticised, the Commission brought the procedure to an end either without adopting a decision or by imposing a token fine. A proper assessment of the applicant's cooperation should therefore have led to a reduction in its fine of much more than 20%.

298 In that regard, the Court points out that, over a long period of at least nine years, the applicant committed a serious infringement of Article 82 EC. Furthermore, this constitutes recidivism on the applicant's part. Although the applicant commenced discussions with the Commission in 1997, the infringement none the less lasted until 31 December 1998. Admittedly, the applicant put an end to the infringement before the statement of objections was sent, but that fact was reflected in particular in a 20% reduction in the base amount of the fine. As regards the references to other cases, which were closed or which culminated in the imposition of a lower or token fine, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see, in that regard, *LR AF 1998* v *Commission*, cited at paragraph 254 above, paragraph 234). Therefore, the fact that the Commission considered in previous decisions that certain factors constituted mitigating circumstances for the purposes of determining the amount of the fine, as a result

of which the fine was significantly reduced or the procedure closed, does not mean that it was obliged to make the same assessment in the present case (see, in that regard, T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368, and *LR AF 1998* v *Commission*, cited at paragraph 254 above, paragraph 337).

299 In any event, the Commission took due account of the applicant's cooperation by reducing the fine by 20%.

300 Secondly, the applicant claims that the Commission should have taken various other mitigating circumstances into account. The applicant claims, first, that it contacted the Commission on its own initiative in July 1996. The Commission expressed its objection to certain practices for the first time on 16 December 1997. The applicant amended its commercial conditions in line with the Commission's wishes in a little over four months (on 30 April 1998). The applicant maintains that the infringement could have lasted a shorter time if the Commission had clarified its position sooner (see *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, cited at paragraph 290 above, paragraph 51; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 1158). The applicant also maintains that it was in regular contact with the DGCCRF. It refers in particular to the DGCCRF's letter of 31 May 1989, to the minutes of the meeting between the DGCCRF and the applicant on 6 August 1991 and to a statement by Mr de La Laurancie, former head of department at the DGCCRF. From 1991, the contacts related specifically to the compatibility of the applicant's pricing policy with French competition law. The DGCCRF's investigation also related to Community competition law. As the minutes of the meeting of 6 August 1991 show, the DGCCRF stated that the applicant's pricing policy would not cause 'partitioning within the EEC countries' and that 'Brussels ought not to have any criticisms to make'. The applicant maintains that its conduct shows that it made no attempt to conceal its discount systems. On the contrary, it presented them in good faith to the competent authority of its Member State for approval. The applicant maintains that its contacts with the DGCCRF gave rise to legitimate expectations on its part as regards the lawfulness of its conditions of

sale, including its discount systems (which were specifically examined by the DGCCRF), or, at least, the legitimate expectation that it would not be penalised for that conduct. The applicant further states that, for the same reasons, the Commission cannot claim that the infringement was committed deliberately.

301 Finally, the applicant maintains that the Commission has for the first time censured the straightforward practice of a quantity rebate because the reference period exceeds three months. Since this represented a novel characterisation as an abuse, the Commission should not have imposed a fine or imposed a token fine.

302 The Court finds, first, that the fact that the applicant contacted the Commission on its own initiative in July 1996 cannot constitute a mitigating circumstance, since the Commission itself had already opened an investigation in May 1996 (recital 2 of the contested decision).

303 Next, as regards the argument that the duration of the infringement would have been shorter if the Commission had clarified its position more rapidly, the relative length of the Commission's investigation, which lasted for three years, and then of the administrative procedure, which lasted for two years, may be explained by the complexity and the scale of the Commission's investigations, which concerned various complex discount systems applied by the applicant (see, in that regard, Case T-83/91 *Tetra Pak* v *Commission*, cited at paragraph 163 above, paragraph 245).

304 In any event, the applicant did not need any clarification from the Commission to realise that loyalty-inducing discount systems were contrary to Article 82 EC. That conclusion follows from a consistent line of decisions (see paragraphs 56 to 60 above).

305 So far as concerns the contacts made with the DGCCRF, there are no documents showing that that Directorate approved the discount systems applied by the applicant in the light of Article 82 EC. Admittedly, it is clear from the letter of 31 May 1989 that those discount systems were the subject of discussions with the DGCCRF because the Directorate considered that 'all discounts, rebates and allowances "granted in principle"' should 'appear on [the] invoices... whatever the date of payment'. According to the DGCCRF, a reference to the rebates on the invoices would enable a dealer 'to calculate his resale price on a basis closer to reality'. Although the DGCCRF tolerated for the time being the applicant's proposal, namely 'the drawing up... at the beginning of the year of an "estimate of Michelin conditions" for the current year', it considered that 'in due course the only correct way to apply the rules is by entering [all the discounts granted in principle] on the invoice' It is therefore not clear from that letter that the DGCCRF considered that the discount systems applied by the applicant were compatible with Article 82 EC or with French law. As Mr de La Laurancie's statement shows, the discussions related to the problems caused by the discount systems applied by Michelin for determining the 'level of the threshold of resale at a loss'. French law prohibited resale at a loss.

306 The minutes of a meeting which took place between the applicant and the DGCCRF on 7 February 1991 show that, far from approving the discount system applied by the applicant, the DGCCRF raised questions concerning 'the lawfulness of the end-of-year... discount system'. The discount system was regarded as 'a distortion of competition' and the DGCCRF warned the applicant that, if it 'continu[ed] with its current practices, "[it could be] involved in proceedings which might be very costly"'.

307 As regards the minutes of the meeting of 6 August 1991, that document clearly shows that, on the occasion of that meeting, the applicant informed the DGCCRF of its 10% price increase. When asked whether that operation '[was] applicable to the whole of the EEC', the applicant replied in the affirmative. The DGCCRF's reaction was as follows: 'There will therefore be no partitioning within the EEC

countries. Michelin cannot be accused of fragmenting the market. Brussels ought not to have any criticisms to make.' The applicant relies on this extract on a number of occasions as evidence that its discount system was approved by the DGCCRF. However, the fact remains that the meeting related only to the applicant's price increases and not to the lawfulness of its discount systems.

308 It follows that the applicant's contacts with the DGCCRF could not have given rise to legitimate expectations on its part that its discount system was compatible with Article 82 EC. Its contacts with that Directorate cannot therefore be regarded as a mitigating circumstance or as an element invalidating the finding that the infringement was committed deliberately.

309 Finally, contrary to the applicant's claims, the quantity rebates which it applied are not merely quantity discounts. It operated a loyalty-inducing discount system which, according to settled case-law and established practice in taking decisions, is prohibited by Article 82 EC where it is applied by an undertaking in a dominant position (see the case-law cited at paragraphs 56 to 60 above). There is therefore nothing 'novel' about the characterisation of the applicant's practices as an abuse of a dominant position.

310 It follows that the fourth plea cannot be upheld either.

Fifth plea, alleging infringement of Article 7(1) of the ECHR

311 The applicant claims that the Commission infringed Article 7(1) of the ECHR by imposing penalties on it for the abuses allegedly committed. It submits that a

large number of complaints made against it do not follow the Commission's previous practice with regard to abuse of a dominant position. In that regard, it refers expressly to the approach taken by the Commission in the contested decision concerning the quantity rebates and the obligation on dealers to promote Michelin products. In its submission, Article 7(1) of the ECHR prohibits sudden changes in practices in taking decisions which have the effect that conduct previously regarded as lawful is rendered punishable.

312 This plea must also be rejected. It is incorrectly based on the alleged novelty of the questions of law settled in the contested decision (see paragraph 309 above).

3. *General conclusions*

313 It follows from all of the foregoing that the application must be dismissed in its entirety.

Costs

314 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, it must be ordered to pay the costs incurred by the Commission in addition to its own costs.

315 Pursuant to the third subparagraph of Article 87(4) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Dismisses the application.**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission.**

3. **Orders Bandag Inc. to bear its own costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung K. Lenaerts

Registrar President