

Case T-203/01

Manufacture française des pneumatiques Michelin

v

Commission of the European Communities

(Article 82 EC — Rebate system — Abuse)

Judgment of the Court of First Instance (Third Chamber), 30 September
2003 II - 4082

Summary of the Judgment

1. *Competition — Dominant position — Abuse — Meaning — Objective concept referring to conduct likely to influence the structure of the market and with the effect of hindering the maintenance or development of competition — Obligations on dominant undertakings — Exercise of competition only on the merits (Art. 82 EC)*

2. *Competition — Dominant position — Abuse — Discounts with a foreclosure effect on the market — Loyalty rebate — Abusive practice*
(Art. 82 EC)

3. *Competition — Dominant position — Abuse — Quantity rebates — Whether permissible — Conditions — Abusive nature of the rebate system — Criteria for assessment*
(Art. 82 EC)

4. *Competition — Administrative procedure — Statement of objections — Matters to be stated*

5. *Competition — Dominant position — Abuse — Quantity rebates with a loyalty-inducing effect — Rebate, granted annually, representing a percentage of the overall turnover achieved with the customer over the preceding year and rising progressively and significantly with that figure*
(Art. 82 EC)

6. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Limits — Obligation to communicate to the dominant undertaking the identity of its customers which collaborated in the investigation — None*

7. *Competition — Administrative procedure — Commission decision finding an infringement — Exclusion of evidence in documents not disclosed to the parties — Consequences — Relevant objection may not be proved by reference to those documents*

8. *Competition — Dominant position — Abuse — System of rebates leaving the dominant undertaking with a broad scope for subjective assessment — Rebates devoid of objective economic justification*
(Art. 82 EC)

9. *Competition — Dominant position — Abuse — Tyre manufacturer — Contracts granting a rebate to retailers undertaking systematically to have carcasses retreaded by that manufacturer — Condition with a tied sales effect — Permissible under national law — Irrelevant — Primacy of Community law*
(Art. 82 EC)

10. *Competition — Dominant position — Abuse — Obligations imposed on retailers of the dominant undertaking's products in return for financial advantages — Obligations aimed at eliminating competition from other manufacturers*
(Art. 82 EC)
11. *Competition — Dominant position — Abuse — Obligations to provide information and submit to supervision without objective justification imposed on retailers of the dominant undertaking's products in return for financial advantages — Application of Regulation No 4087/88 allowing obligations to provide information in the context of franchise agreements — Excluded*
(Art. 82 EC; Commission Regulation No 4087/88, Art. 3(2))
12. *Competition — Dominant position — Abuse — Meaning — Conduct having either the effect or the object of hindering the maintenance or development of competition*
(Art. 82 EC)
13. *Competition — Fines — Amount — Determination thereof — Raising of the general level of fines — Whether permissible — Condition — Duty to state reasons — None*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
14. *Competition — Fines — Amount — Determination — Criteria — Fine for abuse of a dominant position — Assessment of the seriousness of the infringement — Account to be taken of the nature and object of the abusive practices and not their specific effects*
(Council Regulation No 17, Art. 15(2))
15. *Competition — Fines — More than one infringement — Imposition of a single fine — Permissible — Duty of the Commission to state specifically each individual abusive component — None*
(Council Regulation No 17, Art. 15(2))
16. *Competition — Fines — Amount — Determination thereof — Criteria — Duration of infringement — Duration, taken into account as such, irrespective of its consequences on the harm caused — Permissible*
(Council Regulation No 17, Art. 15(2))

17. *Competition — Fines — Amount — Determination thereof — Criteria — Seriousness of the infringements — Aggravating circumstances — Recidivism — Concept (Commission Communication 98/C 9/03)*
18. *Competition — Fines — Amount — Determination thereof — Criteria — Seriousness of the infringements — Aggravating circumstances — Recidivism — Similar infringements successively committed by two subsidiaries of the same parent company*
19. *Competition — Fines — Amount — Determination thereof — Criteria — Seriousness of the infringements — Aggravating circumstances — Increase in the uplifts previously applied for recidivism — Diminution of the reductions previously applied for certain mitigating circumstances — Permissible (Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)*

1. 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. It follows that not all competition on price can be regarded as legitimate and that an undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits.

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. 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.

Therefore, whilst the finding that a dominant position exists does not in

(see paras 54-55, 97)

2. 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.

That is the case with a loyalty rebate, which is granted by an undertaking in a dominant position to its customers in return for an undertaking to obtain their stock exclusively or almost exclusively from that undertaking. Even in cases where it is not discriminatory, such a rebate is designed, through the grant of financial advantages, to prevent customers from obtaining their supplies from the dominant undertaking's competitors.

(see paras 56-57, 65)

It follows that a quantity rebate system in which the rate of the discount increases according to the volume purchased from the dominant undertaking 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.

In determining whether a quantity rebate system is abusive, it is therefore 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.

3. Quantity rebate systems applied by an undertaking in a dominant position, linked solely to the volume of purchases made from that undertaking, do not generally have a foreclosure effect on the market prohibited by Article 82 EC. If increasing the quantity supplied by that undertaking results in it incurring lower costs, it is entitled to pass on that reduction to its customers in the form of a more favourable tariff.

(see paras 58-60, 62)

4. 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.

(see para. 77)

5. A quantity rebate system applied by a supplier to its customers, 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 in that it constitutes a strong incentive to obtain supplies from that supplier.

(see para. 95)

6. In the context of proceedings seeking to establish that a dominant position has been abused, the Commission must take account of the risk that the undertaking concerned might adopt retaliatory measures against its customers who collaborated in the investigation. In the light of that risk, the Commission is entitled to refrain from communicating the identity of those undertakings to the dominant undertaking, and to send it only a table reproducing, without mentioning names, the answers provided to requests for information which it had sent to them. Therefore, by preparing a non-confidential version of those answers in the context of the administrative procedure, the Commission complies both with the requirement to protect confidential information and, on the other hand, the right of the addressee of the statement of objections to have access to the whole of the file.

(see paras 124-125)

7. Documents which the Commission used against the undertaking concerned without the latter having received them during the administrative procedure must be excluded as evidence of an infringement of the competition rules. Such exclusion leads to annulment of the decision finding the infringement in

so far as it refers to a complaint which can be proved only by reference to those documents.

(see para. 129)

8. The granting of a discount by an undertaking in a dominant position does not have to be regarded as abusive within the meaning of Article 82 EC if it is based on an objective economic justification. 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 its customers may obtain the discount must be considered unfair and constitutes an abuse within the meaning of Article 82 EC. Because of the subjective assessment of the criteria giving entitlement to the discount, customers are left in a situation of uncertainty by not being able to predict with any confidence the rate of discount which they are able to receive.

(see paras 140-141)

9. Where a tyre manufacturer in a dominant market position remunerates retailers of its products for undertak-

ing, systematically, to have the carcasses of the dominant undertaking's tyres retreaded by that undertaking, it commits an abuse within the meaning of Article 82 EC. By that remuneration, the dominant undertaking uses its financial weight in the tyre market in general, and the new tyre market in particular, as a lever to ensure its being chosen as retreader by the retailers. It thereby imposes a condition with a tied sales effect, prohibited under Article 82 EC.

In that regard, it is irrelevant that such a condition complies with the relevant national law, given the primacy of Community law on the matter and the direct effectiveness of Article 82 EC.

(see paras 163, 166)

10. Where an undertaking in a dominant position undertakes to participate in the financial effort of the retailers of its products, demanding in return that those undertakings promote its brand, do not divert spontaneous demand for its products and carry sufficient stocks to meet that spontaneous demand immediately, it abuses its position

within the meaning of Article 82 EC. Those conditions together are aimed at eliminating competition from other manufacturers by consolidating the undertaking's dominant position on the market.

(see paras 208, 210)

Such obligations to provide information go far beyond those which may be imposed in the context of a franchise agreement under Regulation No 4087/88, and in particular Article 3(2) thereof, which, in any event, falls within the scope of Article 81(1) EC, and is therefore irrelevant when assessing the obligations to provide information imposed by a dominant undertaking on its own customers from the point of view of Article 82 EC.

11. The obligations which an undertaking in a dominant position imposes on the retailers of its products, in return for participation in their financial effort, to provide it with certain information, such as balance-sheets, statistics on turnover and services provided, and information about shareholders, and to allow it to carry out an audit of sales outlets in order to ensure that areas for progress agreed with those retailers are being complied with, constitute an abuse if they are not objectively justified.

(see paras 21, 215-217, 219)

In particular, those obligations must be regarded as abusive if they reflect the dominant undertaking's desire to supervise distribution of its products in detail, to obtain information about the market which is not public and which is of value for the carrying out of its own marketing strategy, and to increase the retailers' dependence on the dominant undertaking.

12. 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. It follows that, for the purposes of applying that article, establishing the anti-competitive object and the anti-competitive effect of abusive conduct are one and the same thing. 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. Therefore, when an undertaking actually implements prac-

tics 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.

(see paras 239, 241, 245)

13. The fact that the Commission has in the past imposed fines of a certain level and applied a certain uplift to them by reference to the duration of the infringement does not mean that it is estopped from raising that level, or that uplift, within the limits set out in Regulation No 17 and in the Commission's 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, if that is necessary in order to ensure the implementation of Community competition policy. In particular, it is permissible for the Commission to raise the level of fines in order to reinforce their deterrent effect.

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 those Guidelines.

In those circumstances, the Commission is likewise not required to state in a decision imposing a fine for breach of the competition rules the reasons why the starting amount chosen for calculating the fine was not the same as that set in an earlier decision finding the same infringement by another undertaking.

(see paras 254-255, 277)

14. For the purposes of setting the amount of the fine imposed for abuse of a dominant position, the Commission is entitled to establish the seriousness of that infringement solely by reference to its nature and object, without taking account of the specific effects of the abusive practices, the former being potentially more significant in that regard than the latter. In particular, the Commission is not required to examine the development of the relevant undertaking's market shares and selling prices.

(see paras 258-259)

15. In a decision finding several infringements of the competition rules by the same undertaking, the Commission is entitled to impose a single fine for a multiplicity of infringements, that fine dealing globally with all of the infringements over a certain period. In that regard, the Commission does not have to state specifically in the grounds of the decision how it took into account each of the abusive components complained of for the purposes of setting the fine.

(see paras 265, 267)

16. The Commission's increasing a fine for breach of the competition rules 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 those rules.

(see para. 278)

17. The concept of recidivism, which features in the 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 as an aggravating factor, must be understood as referring to cases where an undertaking has committed fresh infringements after having been penalised for similar infringements.

(see para. 284)

18. 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 independently determine their own conduct on the market, with the result that the Commission may impose a fine on the parent company for the practices of group companies, the Commission is entitled to find recidivism where one group company commits an infringement of the same type as that for which another was previously punished.

(see para. 290)

19. The fact that the Commission has applied a certain uplift to fines in the

past, when dealing with aggravating factors like recidivism, cannot prevent it from increasing that uplift, within the limits set out in Regulation No 17 and in the Commission's 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, if that is necessary in order to ensure the implementation of Community competition policy. The Commission's previous decision-making practice 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 those Guidelines, and the Commission must, for the purpose of determining the amount of the fine, ensure that its action has the necessary deterrent effect. In particular, recidivism is a circumstance which justifies a

significant increase in the basic amount of the fine, since it constitutes proof that the sanction previously imposed was not sufficiently deterrent.

Similarly, the fact that the Commission has considered in previous decisions that certain conduct constituted mitigating circumstances, as a result of which the fine was significantly reduced or the procedure closed, does not mean that it is obliged always to make the same assessment of such conduct.

(see paras 292-293, 298)