JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

27 September 2006 *

In Case T-204/03,

Haladjian Frères SA, established in Sorgues (France), represented by N. Coutrelis, lawyer,

applicant,

v

Commission of the European Communities, represented by A. Whelan and O. Beynet, acting as Agents, and D. Waelbroeck, lawyer,

defendant,

supported by

Caterpillar, Inc., established in Peoria, Illinois (United States),

* Language of the case: French.

Caterpillar Group Services SA, established in Charleroi (Belgium),

represented initially by N. Levy, Solicitor, and S. Kingston, Barrister, and subsequently by N. Levy and T. Graf, lawyer,

interveners,

APPLICATION for annulment of the Commission decision of 1 April 2003 rejecting the complaint alleging infringements of Articles 81 EC and 82 EC lodged by Haladjian Frères SA against Caterpillar, Inc.,

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

composed of R. García-Valdecasas, President, J.D. Cooke and V. Trstenjak, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 28 March 2006,

gives the following

Judgment

Facts

A — *The companies concerned*

1 The applicant, the author of the complaint, is a French undertaking which imports replacement parts for site machines and markets them in Europe and Africa. Its main sources of supply are in the European Union and the United States.

2 The company against which the complaint was lodged, Caterpillar, Inc., is a United States undertaking which produces site machines and replacement parts for those machines. In Europe and Africa those products are sold through a Swiss subsidiary, Caterpillar Overseas. In 1990 Caterpillar Overseas formed a Belgian subsidiary, Caterpillar Export Services (CES), to manage and control exports of Caterpillar replacement parts from one geographic zone to another.

B — *Administrative procedures*

1. *Procedure initiated by the Commission against Caterpillar*

3 In 1963 Caterpillar notified the standard distribution agreement for its products in Europe to the Commission. That notification was updated on a number of occasions, notably in 1983 and 1992. Before Haladjian's complaint was lodged in 1993, and from 1990, other resellers of replacement parts had lodged complaints against Caterpillar.

4 Following those complaints, the Commission on 12 May 1993 sent a statement of objections to Caterpillar ('the statement of objections'), in which Caterpillar was accused of charging a service fee for sales outside the designated territory, applying discriminatory prices and prohibiting sales to resellers where it appeared that they intended to export the products in question.

5 On 27 August 1993 Caterpillar commented on the statement of objections and denied all the infringements in question.

2. *Procedure initiated following Haladjian's complaint*

6 On 18 October 1993 the applicant submitted to the Commission an application under Article 3 of Council Regulation No 17, First Regulation implementing Articles

[81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) concerning alleged infringements of those provisions by Caterpillar ('the complaint').

7 On 25 January 1994 Caterpillar presented its observations on the complaint.

8 On 23 May 1994 Haladjian submitted its comments on those observations and also on Caterpillar's reply to the statement of objections.

9 In the context of its investigation, the Commission on 6 and 7 July 1995 carried out inspections at a number of Caterpillar's European dealers. Likewise, in September 1995, and then in February 1996, the Commission sent various requests for information to Caterpillar's European dealers, the last replies being received in April 1996.

10 Haladjian also sent the Commission a number of letters in order to communicate new documents to it. In particular, on 11 August 2000 it sent the Commission a recapitulatory note setting out all the material submitted in connection with its complaint.

11 On 19 July 2001 the Commission sent the applicant a letter pursuant to Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), informing it that it intended to reject the complaint ('the Article 6 letter').

12 On 22 October 2001 the applicant communicated to the Commission its observations on the Article 6 letter.

13 By decision of 1 April 2003, the Commission formally rejected the complaint ('the contested decision').

14 By letter of 8 May 2003, the Commission informed Caterpillar that, after analysing its reply to the statement of objections and the information subsequently gathered, it had decided to withdraw those objections and to take no further action in the matter.

Procedure and forms of order sought by the parties

15 By application lodged at the Registry of the Court of First Instance on 10 June 2003, the applicant brought the present action.

16 By letter of 2 October, supplemented on 16 October 2003, Caterpillar and Caterpillar Group Services sought leave to intervene in support of the form of order sought by the Commission.

17 By order of 5 December 2003 of the President of the Fifth Chamber of the Court of First Instance, Caterpillar and Caterpillar Group Services were granted leave to intervene in support of the form of order sought by the Commission and the request for confidential treatment was granted.

18 Caterpillar and Caterpillar Group Services ('Caterpillar') lodged a statement in intervention on 2 February 2004. On 22 and 20 April 2004 the applicant and the Commission submitted their observations on the statement in intervention.

19 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure, the Commission was requested to indicate the outcome of the procedure initiated against Caterpillar following notification of the statement of objections. By letter of 8 March 2006, registered at the Registry of the Court of First Instance on 10 March 2006, the Commission answered the Court's question.

20 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 28 March 2006.

21 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order the interveners to bear their own costs and to pay the applicant's costs relating to the intervention.

22 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

23 The interveners claim that the Court should:

— dismiss the action;

— order the applicant to pay their costs.

Law

A — *Preliminary observations on the extent of the Commission's obligations when investigating a complaint alleging infringement of Articles 81 EC and 82 EC*

24 By way of preliminary observations, the main parties explain the obligations borne by the Commission when it investigates a complaint, analyse the level of proof and of reasoning that ought to be required of the Commission in that context and discuss the extent of the Court's power of review in an action against a decision rejecting a complaint.

25 The Court observes, first of all, that the contested decision concludes, at the close of an analysis of the applicability of Article 81(1) EC and the applicability of Article 82 EC, that the evidence submitted by Haladjian during the administrative procedure, in particular in response to the Article 6 letter, '[does] not permit [the complaint] to be upheld' and, consequently, rejects the complaint. It is against that background that the complainant's rights and the Commission's obligations where it rejects a complaint alleging infringement of Articles 81 EC and 82 EC must be considered.

26 Thus, the complainant has the right to be informed of and to comment on the grounds on which the Commission proposes to reject the complaint before it adopts a decision to that effect. Regulations No 17 and No 2842/98, which are applicable in the present case, confer certain procedural rights on persons who have lodged a complaint with the Commission on the basis of Article 3 of Regulation No 17. Those rights include the rights laid down in Article 6 of Regulation No 2842/98, which provides that, where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it is to inform the complainant of its reasons and set a date by which the latter may make known its views in writing.

27 However, neither Regulation No 17 nor Regulation No 2842/98 contains express provisions relating to the action to be taken concerning the substance of a complaint and any obligations on the part of the Commission to carry out an investigation (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 72). On that point, it must be borne in mind that the Commission is under no obligation to initiate procedures to establish possible infringements of Community law (see, by analogy, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, 301) and that the rights conferred on complainants by Regulations No 17 and No 2842/98 do not include the right to obtain a final decision as to the existence or non-existence of the alleged infringement (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraphs 17 and 18).

28 It is on the basis of those principles that the case-law has recognised that, if the Commission is under no obligation to rule on the existence or non-existence of an infringement, it cannot be compelled to carry out an investigation, because such an investigation could have no purpose other than to seek evidence of the existence or non-existence of an infringement which it is not required to establish (*Automec* v *Commission*, paragraph 76). Furthermore, even when such an investigation has been carried out, no provision of secondary law gives the complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement (Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 35). The existence of the discretion recognised to the Commission in examining complaints does not depend on the more or less advanced stage of the investigation of a case (*IECC* v *Commission*, paragraph 37).

29 In that context, the Court of First Instance has held that, when the Commission decides to proceed with an investigation, it must, in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants (Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 36, and Case T-206/99 *Métropole Télévision* v *Commission* [2001] ECR II-1057, paragraph 59).

30 It is in the light of those considerations that the Court must assess whether the contested decision, which rejects the complaint, contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal in the context of the administrative procedure. In that regard, it must be borne in mind that the judicial review of Commission measures involving appraisal of complex economic matters, as is the case for allegations of infringements of Articles 81 EC and 82 EC, is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25; and *Asia Motor France and Others* v *Commission*, paragraph 33).

B — *General presentation of the 'CES system', Haladjian's complaints and the contested decision*

31 Haladjian's complaint relates to the changes which Caterpillar made to its system for the marketing of replacement parts from 1982 in order to limit parallel imports to Europe from the United States.

1. *Description of the CES system*

32 For the purposes of marketing its products, Caterpillar divided the world into different geographic zones, including the United States, the EC/EFTA area and Africa, and entrusted the marketing of its site machines and replacement parts for those machines to 181 independent dealers, which operate in 160 countries. Caterpillar's dealers in the EC/EFTA area do not have exclusive selling rights in the territory allocated to them. Thus, Caterpillar has two dealers in Italy (including Maia), two dealers in the United Kingdom (including Leverton) and a single dealer in France (Bergerat).

33 Caterpillar does not impose selling prices on its dealers. Each dealer remains free to set its prices in consideration of the purchase price, exchange rate fluctuations, marketing costs and local conditions of competition. According to the information received during the administrative procedure, the prices charged by United States dealers are lower than those charged by European dealers, which are lower than those charged by African dealers. The prices charged by European dealers also vary considerably from one country to another.

34 Until 1982, Caterpillar placed no limits on the supply of replacement parts from one geographic zone to another. Supplies within the same geographic zone (such as the EC/EFTA area) also remained completely free for resellers of replacement parts and for users of those parts. In 1982, however, Caterpillar found that a number of resellers were taking advantage of the differences in price between geographic zones to engage in significant imports from one zone to another. In Caterpillar's contention, those transfers endangered the profitability of its dealers, which had made significant investments in order to respond to the requirements of the effective and competitive distribution of site machines.

35 From 1982, Caterpillar decided to restrict sales of replacement parts from one geographic zone to another ('inter-zone sales'). Thus, by letter of 24 September 1982, Caterpillar informed its United States dealers that its replacement parts could not be sold to a reseller which would export them from the United States. Likewise, by letter of 15 December 1982, Caterpillar informed its European dealers that those parts were not to be resold to a reseller for export outside the United States or the countries of the EC/EFTA area.

36 As those instructions were not observed, Caterpillar informed its dealers worldwide, by letter of 2 February 1990, that Caterpillar Export Services (CES) was being set up to manage and control inter-zone sales ('the CES system'). Caterpillar also sent its dealers a list, which was updated at intervals, of resellers involved in inter-zone sales in order to alert them and encourage them to check the destination of the parts ordered ('the list of inter-zone sellers'). According to the contested decision, that procedure for checking the destination of replacement parts none the less remains solely within the discretion of the dealer.

37 Under the CES system, replacement parts produced by Caterpillar are sold according to the following principles.

38 First, the end-user is free to buy Caterpillar replacement parts anywhere in Europe or in other geographic zones.

39 Second, a European reseller may buy replacement parts for resale in the countries of the EC/EFTA area from any dealer in those countries. In that way, it is supposed to be able to accumulate stocks. The CES system does not apply to European resellers which buy in one country in the EC/EFTA area in order to resell in another country in that zone.

40 Third, a European reseller which obtains supplies in the United States for sale in the EC/EFTA area is still able to buy replacement parts from Caterpillar's United States dealers, but on condition that it complies with a special procedure having two essential aspects. The European seller must declare to CES the European customer on whose behalf it is buying the parts, in order to obtain a customer code. In addition, the United States dealer must declare to Caterpillar that it is placing an order for parts submitted by a European reseller for export to the EC/EFTA area. Caterpillar then invoices that dealer at a price which is more or less 10% above the price normally invoiced for parts for the United States market ('the United States dealers' price'). Caterpillar maintains that that price increase is justified by the desire to transfer part of the profit generated by that transaction to the dealer in Europe, which is responsible for providing after-sales service for the site machine concerned. However, the United States dealer remains free to charge whatever price it wishes to the European reseller.

41 The same procedure applies where the European reseller wishes to buy in Europe in order to resell in Africa.

2. *Haladjian's complaints*

42 In the complaint, which was supplemented, in particular, by the recapitulatory note of 11 August 2000, Haladjian claims that the impugned practices constitute infringements of Articles 81 EC and 82 EC. In particular, the CES system is, as such, an agreement between undertakings within the meaning of Article 81 EC and the implementing procedures, notably vis-à-vis Haladjian, are capable of restricting competition in the Community. Haladjian thus alleges that Caterpillar prohibits its dealers from making inter-zone sales — for example, exports of replacement parts from the United States to the EC/EFTA area — and also sales to resellers of replacement parts established in other countries in the EC/EFTA area ('intra-Community sales') — for example, from Italy to France.

43 As regards inter-zone sales, Haladjian contends that the limitation of its purchases of replacement parts from the United States to parts which it is actually commissioned to buy by a European customer prevents it from supplying the European market in a satisfactory manner, by depriving it of the possibility of holding sufficient stocks of replacement parts, and thus distorts competition. Haladjian also maintains that the 10% increase in the price to United States dealers where sales are intended for export constitutes a restriction of competition affecting trade between Member States.

44 As regards intra-Community sales, Haladjian maintains that Caterpillar and its European dealers prohibit any parallel imports between Member States of the Community, which adversely affects competition and affects trade.

3. *The contested decision and Haladjian's action*

45 The contested decision describes the CES system and sets out the results of the investigation carried out in order to determine whether Haladjian's allegations were

well founded, then states the Commission's reasons for considering that the evidence obtained did not permit it to act on the complaint. The Commission's legal assessment distinguishes between inter-zone sales carried out within the CES system and intra-Community sales.

46 In the examination of the 'applicability of Article [81(1) EC] to the agreements and concerted practices concerning [inter-zone sales]', the contested decision observes that the CES system does not isolate the Community market, since it does not prohibit in fact or in law competition in the form of parts imported at prices lower than the European prices. The decision observes in that regard, first, that in the EC/EFTA area European resellers are able to obtain supplies freely and without any limitation from dealers in that zone and, second, that resellers are still able to obtain supplies from the United States within the framework of the CES system (contested decision, point 7.2, fourth paragraph).

47 Admittedly, the contested decision observes that that source of supplies is subject to the restriction that the end-users of the parts must be declared, but that obligation is not of such a kind as to constitute an appreciable restriction on trade between the United States and Europe and to affect intra-Community competition, as may be seen from the fact that imports from the United States are still possible and profitable, that the European market is therefore not partitioned and that Haladjian continues in practice to rely on that alternative source (contested decision, point 7.2, fourth paragraph, and point 7.2, conclusion, first indent).

48 Likewise, the contested decision observes that the 10% difference between prices charged to United States dealers and the prices applicable in the event of inter-zone sales is insignificant by comparison with the difference between the United States and the European prices for replacement parts and neutral as regards competition between resellers on the European market. Consequently, the effect which that price increase might have on the competition that resellers importing from the United States are capable of presenting to the official dealers in the EC/EFTA countries is minimal (contested decision, point 7.2, fourth paragraph, and point 7.2, conclusion, first indent).

49 In the examination of the 'applicability of Article [81(1) EC] to [intra-Community sales]', the contested decision states that the CES system contains no restriction on competition, regard being had to the subject-matter of the complaint. According to the decision, the CES system concerns only inter-zone sales and does not affect freedom of purchase and of sale within the EC/EFTA area. End-users and European resellers are free to buy replacement parts from any dealer approved by Caterpillar which is established in the EC/EFTA area, provided that the parts purchased by resellers are intended for the markets in the countries within that zone (contested decision, point 7.1).

50 In substance, the applicant puts forward three pleas in law in its action. The first plea alleges the existence of manifest errors of assessment of the facts and errors of law as regards the applicability of Article 81(1) EC to the CES system. The second plea alleges the existence of errors of law as regards the applicability of Article 82 EC to the CES system. The third plea alleges breach of the procedural rules and of the complainant's rights.

C — *First plea, alleging the existence of manifest errors of assessment of the facts and errors of law as regards the applicability of Article 81(1) EC*

51 The applicant claims that the contested decision is vitiated by numerous manifest errors of assessment of the facts submitted to the Commission in the context of the administrative procedure, which gave rise to errors of law affecting the assessment and the characterisation of the agreements and practices in question by reference to Article 81 EC.

1. *The complaints relating to the CES system*

52 The applicant maintains, first of all, that the contested decision wrongly refuses to find that the CES system in itself creates barriers to trade between Member States owing to the increase in the price to United States dealers applied in the event of inter-zone sales and to the fact that orders placed in the United States by European resellers are limited solely to parts which they are actually commissioned to buy by a European customer. Haladjian then sets out three specific complaints relating to the list of inter-zone resellers, the monitoring of the destination of inter-zone purchases and the delay in allocating the codes intended to identify transactions carried out in the context of the CES system ('the CES codes').

(a) The impact of the restriction on inter-zone sales

Arguments of the parties

53 The applicant claims that the global nature of the CES system and the restriction which it places on inter-zone sales cannot be dissociated from its intra-Community aspect, the effects of which must be assessed *in concreto* and not *in abstracto*. It cannot therefore be asserted that the CES system has no appreciable impact on competition in the Community in the absence of any analysis of the relevant market in the contested decision. Likewise, the consideration that imports into Europe from the United States are still possible and profitable, which makes it possible for the European market not to be partitioned (see contested decision, point 7.2, first indent, p. 25), is not a relevant ground on which to conclude that there is no restriction of competition for the purposes of Article 81 EC.

54 In that regard, the applicant asserts that the contested decision draws no consequence from the fact that the different geographic markets are strictly

partitioned, as shown by the fact that resellers are unable to purchase independently in the United States, unlike end-users, the fact that the applicant itself — the only alternative source of supply in the Community — is unable to accumulate stocks from the United States and the fact that its share of the market in France has fallen considerably. Its market share fell from 30% in 1982 to 20% in 1993 and to less than 10% in 2003, to the advantage of Bergerat, the Caterpillar dealer in France, which is far higher than the threshold of significance at which, according to the case-law, Community law becomes applicable (Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 153). That reduction is sufficient to demonstrate the existence of a restriction of competition within the meaning of Article 81 EC. In the light of the development of that market share, it is immaterial that the number of end-users on whose behalf Haladjian makes purchases in the United States within the framework of the CES system rose between 2001 and 2003. Furthermore, the entire market, and not just the complainant's situation, ought to be examined. As matters stand, for a European end-user seeking a seller capable of obtaining parts in stock rapidly, purchases in the United States made within the framework of the CES system do not constitute an effective alternative source of supply.

55 The applicant also claims that the increase in the price to United States dealers in the event of exports to Europe does not have the sole effect of making the price 10% dearer, since the price actually invoiced may be lower than the United States dealers' price, owing to the rebates which Caterpillar habitually grants to its dealers. It is apparent from a number of documents provided to the Commission by Haladjian that Caterpillar does not grant user rebates to dealers which export (see Caterpillar's letter of 2 February 1990 to the United States dealers, and its letter of 28 June 1993 to sub-dealers). The additional cost for the United States dealer, and consequently for the European reseller and its customer, may therefore be much higher than that stated in the contested decision.

56 The Commission and Caterpillar observe that imports from the United States are still possible and profitable and that Haladjian continues to be an alternative source of supply for European users. The difficulties identified by Haladjian are therefore

not capable of constituting a restriction of competition, within the meaning defined in Article 81(1) EC, notably by reference to the criteria set out in Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 25, according to which the influence of the alleged restrictions of competition on the pattern of trade between Member States must not be insignificant, but appreciable.

Findings of the Court

57 As a preliminary point, it must be observed that the CES system prohibits inter-zone sales unless they correspond with an actual request from a user which instructs a reseller as intermediary, in which case the request must be made through the CES system. In that regard, it is not disputed that a European reseller, like Haladjian, is no longer able to buy on its own behalf replacement parts produced by Caterpillar in the United States in order to accumulate stocks capable of satisfying its European customers, as might have been the case before the introduction of the CES system. Furthermore, in the event of inter-zone sales, the price to United States dealers is increased by more or less 10%, although a dealer in the United States remains free to determine the price which it intends to charge the European reseller.

58 In fact, those limitations of inter-zone sales were examined by the Commission during the administrative procedures initiated against Caterpillar following Haladjian's complaint. In that connection, Caterpillar was able to state that the real cost of acquiring a site machine was halved between the purchase price of the machine and the costs of replacement parts and maintenance. In practice, it is the sale of replacement parts rather than that of site equipment that enables dealers to meet the costs associated with setting up the distribution network. In those circumstances, Caterpillar wished to introduce a system which would enable it to take into account to a greater extent the interests of the dealers, which are faced with obligations not borne by resellers, which act as parallel importers of

replacement parts without having to bear the costs associated with the distribution of site machines. That system is in keeping with the interests of Caterpillar's customers, which have an interest in being able to take advantage of a good distribution network in order to ensure the maintenance and repair of their machines. At the hearing, Caterpillar explained that that was a decisive factor of its commercial policy and that it relied on the quality of its network in order to compete with other producers of site machines.

59 It is against that background that the situation of Haladjian and the other independent resellers must be assessed. In effect, Haladjian cannot merely claim that the advantageous situation which it enjoyed before 1982, when it was able to obtain supplies without restriction in the United States, should be maintained, since it was precisely that situation that was in danger of adversely affecting the integrity and the quality of Caterpillar's worldwide distribution network and that constitutes the reason why the CES system was introduced. On that point, it must be observed — as the contested decision points out — that Haladjian is still able to obtain supplies in the United States, provided, however, that it observes the rules of the CES system. That residual possibility of obtaining supplies is wholly relevant, in so far as it enables Caterpillar to meet the expectations of some of its customers, which wish to have a source of supply of replacement parts other than that offered by a local dealer.

60 In that regard, it is apparent from the file that Haladjian still shows a certain dynamism as regards parallel imports from the United States to the EC/EFTA area, since the total number of end-users in respect of which it is registered with CES for inter-zone sales rose by more than 20% between 2001 and 2003 and since, over that period, its purchases in the United States through the CES system increased by almost 40%. Haladjian has thus adapted to the new rules established by the CES system and, on the assumption that it is true, the assertion that Haladjian is the only remaining alternative source of supply in the Community has enabled it to expand its activities from France to other Member States.

61 As regards the argument based on the fall in its market shares in France, it must be observed that that argument does not rest on sufficiently probative data, since it is supported by a comparison between the total turnover of Bergerat, which sells products other than Caterpillar products and offers more services than Haladjian, and Haladjian's turnover and since Haladjian's initial market share in 1982 ('approximately one third of the market') was calculated on the basis of an informal estimate by Bergerat in 1979 and reported indirectly to Haladjian in a memorandum communicated by a Canadian dealer on 19 October 1981.

62 As regards the applicant's argument that the increase in Caterpillar's price to its United States dealers in the event of export to Europe does not have the sole effect of increasing by 10% the price charged to the United States dealers, since the price actually invoiced to a customer of a United States dealer may be lower than that price owing to the rebates which Caterpillar grants to the dealer, it must be observed that — as indicated in the contested decision (point 5.1, third paragraph) — Caterpillar is not involved in determining the final selling price applied by its United States dealers to inter-zone sales. In any event, the applicant has not proved its assertions that Caterpillar does not grant usage rebates to its dealers solely because the sale relates to an export, or proved that, owing to the CES system, the significant price differences between the United States and the EC/EFTA area were neutralised to the point of rendering such exports substantially less commercially advantageous, especially as the United States dealers remain free to offer rebates on their own margin. In particular, the two letters cited by the applicant on that point are not probative, since the first, Caterpillar's letter of 2 February 1990 to the United States dealers, makes no reference to the question of rebates and the second, Caterpillar's letter of 28 June 1993 to the sub-dealers, refers to retailers responsible for supplying Caterpillar's customers locally and not for making export sales.

63 It follows from the foregoing that the Commission did not make a manifest error of assessment in considering that the evidence adduced by the applicant to support the restrictive nature of the inter-zone sales was not sufficiently probative.

64 The other specific arguments put forward by the applicant are not capable of calling that conclusion in question.

(b) The complaint relating to the list of inter-zone resellers

65 The applicant maintains that, while it is true that the list of inter-zone resellers does not officially refer to resellers which engage in intra-Community trade, the fact remains that in reality resellers engaging in, or intending to engage in, intra-Community trade are necessarily on that 'blacklist'. The distinction between a European reseller, making sales from one Member State to another, and inter-zone resellers, which come within the CES system, is therefore purely theoretical and the CES system in itself incorporates an element restrictive of competition for European resellers engaging in intra-Community sales, since that list enables Caterpillar's dealers to identify those resellers solely because they are designated as inter-zone resellers.

66 The Court observes that, in asserting that all intra-Community resellers are also inter-zone resellers and on the corresponding list, the applicant does not explain how that comment makes it possible to characterise a restriction of intra-Community sales or inter-zone sales. Thus, the applicant fails to explain how that fact — on the assumption that it is true — could prevent it from obtaining supplies in the United States in the context of the CES system or could affect its ability to obtain supplies in Europe. In that regard, it follows from the contested decision that the list of inter-zone resellers serves only to inform Caterpillar's dealers that a reseller representing itself as acquiring parts for a local destination might in fact be a reseller intending to use those parts to engage in inter-zone trade in breach of the CES system.

67 It follows from the foregoing that the applicant's complaint relating to the list of inter-zone resellers must be rejected.

(c) The complaint relating to the monitoring of the destination of inter-zone sales

68 The applicant disputes the assertion in the contested decision that a European reseller included on the list of inter-zone resellers will not find it impossible to buy parts but may, at the sole discretion of the dealer, be subject to the procedure for monitoring the destination of the products purchased for sale in the EC/EFTA area (contested decision, point 5.3, second indent, fifth paragraph). In reality, according to the applicant, the alleged discretion left to the dealers constitutes an obligation imposed by Caterpillar on its dealers. As those dealers must comply with the rules of the CES system for inter-zone sales, such compliance necessarily takes the form of the actual monitoring of the destination of the replacement parts sold to European resellers on the list of inter-zone sellers. Accordingly, it is irrelevant that Haladjian did not claim to have been subjected by a European dealer to the procedure for monitoring the destination of products purchased for sale in the EC/EFTA area. In fact, if that dealer is aware that the product is destined for the EC/EFTA area, it is not required to carry out any checks under the CES system. Furthermore, since Haladjian is established in France, where prices are high, its purchases in other Member States for resale in France necessarily correspond to intra-Community sales and it makes no sense to ask it to prove that it was subjected in the Community to a procedure for monitoring the destination of the products purchased. Incidentally, the applicant observes that the letter of 11 September 1990 from Mr A. to Schmidt shows that Haladjian's imports into the ports of Le Havre and Marseilles were monitored by the French dealer, Bergerat.

69 The Court observes that the applicant's assertion that the monitoring of the destination of inter-zone sales is in reality imposed by Caterpillar and not left to the discretion of the dealer concerned cannot suffice to show that the contested decision is incorrect on that point. It follows from Caterpillar's letter of 13 December 1990, which explains the terms of the CES system to dealers in the EC/EFTA area, that it is the dealer's responsibility to determine whether the destination of the parts which it sells to a reseller in the EC/EFTA area is that zone or another geographic zone. The monitoring of the destination of the products concerned therefore remains within the discretion of the dealer, which carries out the necessary checks where it deems it necessary. In case of doubt, it is for the dealer to ask the reseller to state the destination of the parts which it is purchasing. Where the parts are resold outside

the zone concerned, the sale is subject to the CES system; where they are not, no further formalities are necessary. Where a sale is made by a dealer in the EC/EFTA area to a reseller in that zone, such a control may possibly be justified if the dealer considers that the destination of the parts might well be Africa, in which case the transaction would involve an inter-zone sale. There is therefore no document in the file on the basis of which it might be established that Caterpillar requires that its distributors systematically monitor the destination of the products sold.

70 Furthermore, the applicant's reference to the letter of 11 September 1990 from Mr A. to Schmidt, which states that Haladjian's imports from the United States into the ports of Le Havre and Marseilles are monitored by the French dealer, Bergerat, does not show that that monitoring was required by Caterpillar and by the CES system. That document must be placed in a special context, in which Bergerat and Caterpillar were attempting to identify the sources of supply of Haladjian, which continued to obtain supplies from the United States outside the CES system.

71 In any event, the applicant does not dispute the assessment in the contested decision that it did not assert, still less demonstrate, that it was subject to such a control of the destination of the replacement parts bought from a dealer in the EC/EFTA area. It cannot therefore claim on that basis that the CES system impeded intra-Community sales.

72 It follows from the foregoing that the applicant's complaint relating to the monitoring of the destination of inter-zone sales must be rejected.

(d) The complaint relating to the delay in the allocation of CES codes

73 The applicant states that Caterpillar was sometimes late in allocating CES codes to it, even though such codes were necessary for the purpose of meeting its customers'

orders from the United States. In the applicant's submission, those delays must be taken into account in assessing the anti-competitive nature of the CES system. In that regard, the applicant claims that the reasoning set out at point 5.4 of the contested decision in order to reject its allegations fails to take account of the evidence adduced during the administrative procedure. Thus, it claims, the Commission questions certain items in a table which Haladjian annexed to its observations on the Article 6 letter, such as the absence of examples establishing the truth of those items and the fact that the starting point taken into account in calculating the period for the allocation of the code is not the date on which that request was sent to CES in Belgium but the date on which the request was forwarded to the United States, when other documents show that Caterpillar itself acknowledged that the delays in question did in fact occur.

74 The Court observes that during the administrative procedure the applicant produced no document, no evidence and not even any indicium to demonstrate that the delays in allocating the CES codes which sometimes occurred after the introduction of the CES system are connected with Caterpillar's deliberate intention to make the functioning of the CES system more difficult for the applicant.

75 In effect, it follows from the correspondence exchanged between Caterpillar and Haladjian by letters of 21 and 28 May 1993 that Caterpillar informed Haladjian that the allocation of CES codes depended on a series of information necessary to fulfil the orders being obtained, which — at that time — was not all present in the order forms sent by Haladjian.

76 Likewise, following Haladjian's complaint of 7 March 2000, according to which there had been certain delays in allocating the codes in 1999 and at the beginning of 2000, Caterpillar replied, by letter of 31 March 2000, that there had never been any freeze in the allocation of the codes and that the delays were connected with the difficulties experienced by CES in contacting the persons who had instructed Haladjian to place an order in the United States and that, in order to resolve those difficulties, CES had decided to make its system more flexible by monitoring certain of those instructions at random, and no longer all instructions, as was previously the case.

77 It follows from the foregoing that the applicant's complaint relating to the delay in allocating the CES codes must be rejected.

78 Consequently, all the applicant's complaints relating to the intrinsically anti-competitive nature of the CES system must be rejected.

2. *The complaints relating to Caterpillar's letter of 15 December 1982 to its European dealers*

79 The applicant maintains that the contested decision is based, in the context of the changes made to the system for the marketing of Caterpillar's products from 1982 (point 5.2) and the examination of the applicability of Article 81(1) EC to the impugned agreements and practices within the EC/EFTA area (point 7.1), on an incorrect version of Caterpillar's letter of 15 December 1982 to its European dealers. According to the version cited in the contested decision, Caterpillar was asking its dealers in Europe not to sell replacement parts to a reseller which wished to export them outside the United States or the EC/EFTA area. However, the only version to be taken into consideration, in the applicant's submission, is the version of that letter sent to Haladjian by Leverton, one of the dealers established in the United Kingdom, which shows that the prohibition on selling outside the allocated territory concerned only the United States and not the countries of the EC/EFTA area, as incorrectly stated in the contested decision.

80 The applicant also claims that the contested decision was adopted in breach of Article 6 of Regulation No 2842/98, which provides that a complainant must have been able to make known its views on the grounds on which the Commission

proposes to reject its complaint, since the version of the letter of 15 December 1982 on which the decision relies is not the version annexed to the Article 6 letter and since the Commission did not inform the applicant what interpretation and what import it intended to ascribe to that document in the final decision (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 26 and 27).

81 The Commission, supported by Caterpillar, disputes that analysis.

82 The Court observes, first of all, that there are not two versions of the letter of 15 December 1982, as the applicant asserts, but in fact two different letters of the same date which Caterpillar sent to different addressees. In that regard, it should be noted that the content of the letter cited in the contested decision does indeed correspond with the content of the letter of 15 December 1982 which Caterpillar sent to dealers in the EC/EFTA area (Annex 46 to the application, p. 1034). The contested decision is therefore not incorrect on that point. Furthermore, as regards the letter of 15 December 1982 to which the applicant refers, that letter corresponds in reality to a letter of the same date sent by Caterpillar to dealers whose allocated territory does not consist of geographic zones in the EC/EFTA area (Annex 46 to the application, p. 1038; see also Annex 1 to the statement in intervention). The Commission was therefore not required to take that letter into consideration when examining the applicability of Article 81(1) EC to the impugned agreements and practices within the EC/EFTA area.

83 Incidentally, it should be observed that the CES system was put in place only with effect from 1990 and was introduced in order to redress the failure to comply with the instructions sent to Caterpillar's dealers in 1982. It was only from 1990, therefore, that Caterpillar was genuinely in a position to administer and monitor exports of replacement parts from one geographic zone to another. In that regard, it is apparent from the file that, by letter of 13 December 1990 to all its dealers in the Community following the refusal by the German dealer Zeppelin to sell to a Belgian reseller, Caterpillar expressly reminded those dealers that the CES system did not apply to resellers selling to users in the EC/EFTA area. That document therefore

does indeed permit the Commission to take the view that in the present case there are no written instructions from Caterpillar to its European dealers requesting them not to sell to resellers wishing to purchase in one country in the EC/EFTA area in order to resell in another country in that zone, as indicated in the contested decision, at points 6.1 and 7.1.

84 Nor can the applicant rely on a breach of Article 6 of Regulation No 2842/98, since the two letters of 15 December 1982 were sent to it in the context of the administrative procedure as documents annexed to Caterpillar's observations on the complaint of 9 February 1994 and since it commented on them in its observations on the Article 6 letter, drawing the Commission's attention to what it believed to be the correct version of the letter of 15 December 1982 to be taken into consideration in the context of the assessment of the impugned agreements and practices within the EC/EFTA area. The applicant cannot therefore criticise the Commission for having explained the content of the letter actually sent by Caterpillar to its dealers in the EC/EFTA area and for having drawn the consequences flowing from that letter.

85 It follows from the foregoing that the applicant's complaints relating to Caterpillar's letter of 15 December 1982 to its European dealers must be rejected.

3. *The complaints relating to the documents concerning Bergerat and to Bergerat's offers to Haladjian's customers*

(a) The complaint relating to Caterpillar's letter of 19 July 1990 to Bergerat

The contested decision

86 In the context of the account of the results of the inquiry into the relations between Caterpillar and its French dealer, Bergerat, the contested decision sets out at point

6.2 the content of an exchange of correspondence between those two undertakings. That correspondence consists, first, of Bergerat's letter of 10 July 1990 to Caterpillar complaining of the competitive pressure exercised on its territory by imports of replacement parts from the United States and requesting to be informed of the results of the implementation of the CES system in the United States and, second, of Caterpillar's letter in reply of 19 July 1990 to Bergerat informing it that the CES system will attain its objective when the sources of supply of resellers in replacement parts of the Caterpillar brand begin to dry up and then dry up completely. That letter of 19 July 1990 also states that the objectives of the CES system are to put an end to the resellers' activities while taking care to optimise additional sales opportunities and not to lose any important contract for original replacement parts produced by Caterpillar (contested decision, point 6.2, p. 11).

87 According to the contested decision, those documents confirm Caterpillar's policy of controlling inter-zone sales by means of the CES system and preventing such sales from being made outside that system. In support of that theory, the contested decision indicates that while Caterpillar's letter of 19 July 1990 seems to recommend a commercial policy aimed at putting an end to resellers' activities, that letter, when read in its context, is aimed in reality only at resellers' imports from the United States outside the CES system. That interpretation is borne out by the fact that the letter is in reply to Bergerat's letter of 10 July 1990, in which Bergerat had raised the problem of the strict application of the CES system for exports from the United States, and by the fact that 'there is no proof of the implementation of a policy designed to halt imports from the United States to Europe on the part of resellers' (contested decision, point 6.2, p. 12).

Arguments of the parties

88 The applicant observes that it follows expressly from Caterpillar's letter of 19 July 1990 to Bergerat that the aim of the CES system is to dry up completely the resellers' sources of supply of original parts produced by Caterpillar in the United States. The

contested decision is therefore incorrect where it states that that document does not reveal any attempts to isolate the EC/EFTA area from other geographic zones. In order to reach that conclusion, the decision states that the letter of 19 July 1990 refers only to resellers' activities carried out 'outside the CES system'. In the applicant's submission, that interpretation runs counter both to the text of that letter and to the scheme of the CES system, which rests on the idea that resellers are not entitled to engage in inter-zone trade, which only end-users are entitled to do. The applicant maintains that the resellers affected by the export ban mentioned in the letter of 19 July 1990 are in fact all resellers, and not only resellers operating outside the CES system.

89 The Commission, supported by Caterpillar, claims that those criticisms ignore the actual wording of the letter of 19 July 1990, which seeks to ensure that all parties, and in particular resellers, comply with the CES system, which enables Haladjian to order from the United States on behalf of its customers.

Findings of the Court

90 The Court finds that the applicant's complaints in respect of the interpretation of the content of the letter of 19 July 1990 set out in the contested decision do not permit that interpretation to be called in question. The contested decision is correct to observe that the reference to 'stopping resellers' activities' in Caterpillar Overseas' letter of 19 July 1990, which, in itself, might indicate that Caterpillar intended to eliminate the resellers, must necessarily be read in its context, that is to say, in the light of Bergerat's letter of 10 July 1990, in which Bergerat had raised the problem of the strict application of the CES system to exports from the United States. In that context, the 'resellers' activities' which Caterpillar wished to stop may well be interpreted as being those which the CES system is intended to limit, namely imports into Europe from the United States by resellers not using the CES system. It

is those sources of supply that the CES system is intended to stop and not the sources which, in the context of the CES system, allow a European reseller to obtain supplies from the United States if it is acting on behalf of a European user, as the applicant attempts to establish without further evidence.

91 It follows from the foregoing that the applicant's complaint in respect of the letter of 19 July 1990 from Caterpillar to Bergerat must be rejected.

(b) The complaints relating to the supplies made by Bergerat to Haladjian's customers

The contested decision

92 In the context of the assessment of the applicability of Article 81(1) EC to the impugned agreements and practices within the countries of the EC/EFTA area, the contested decision observes that during the administrative procedure Haladjian submitted a number of documents relating to trade offers made in June 1993 by the French dealer Bergerat to certain of Haladjian's customers. Haladjian maintains that those offers contain 'clauses restrictive of competition, since they propose special rebates for increased sales', that is to say, quantitative rebates and 'other proposals, such as price freezing for two years'. The contested decision states, on the contrary, that 'the fact that Bergerat attempted, by means of the information passing through the CES system, to ascertain the names of Haladjian's customers and to make a determined effort to win them over does not constitute a restriction of competition' (contested decision, point 7.1(b), p. 21, first paragraph).

Arguments of the parties

93 The applicant maintains that the contested decision is incorrect in that it refers to Bergerat's offers to its customers without finding fault with the fact that Bergerat is able to benefit from the 'information passing through the CES system'. The Commission thus seems to accept that the CES system allows dealers to obtain information about the resellers' activities. In fact, the applicant emphasises that the documents submitted during the administrative procedure show that Bergerat had the names of Haladjian's customers on 14 April 1993, that is to say, the very day after Haladjian informed Caterpillar that it intended to act on behalf of those customers in the context of the CES system. Furthermore, the Commission fails to take account of the fact that a Bergerat representative visited its customers, accompanied by a Caterpillar representative, which demonstrates the collusion between those undertakings. The applicant further claims that it follows from a letter of 21 September 1999 from Caterpillar to a Greek reseller that the CES system implies, in itself, that the Caterpillar dealer of the place of destination is aware of the existence of each new purchaser using the CES system and also of the identity of its customers. Accordingly, the Commission ought to have found that all transmissions to Bergerat of sensitive information on Haladjian's activities constituted concerted practices prohibited under Article 81 EC having the aim of restricting or even eliminating Haladjian's presence on the market as a competitor.

94 The applicant further maintains that the contested decision is incorrect in that it characterises the discounts offered by Bergerat to its customers as 'quantitative discounts' not constituting a restriction of competition. Those discounts are not proportionate to the quantities purchased but depend on increased purchases and they are not therefore quantitative discounts (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461). Likewise, the contested decision does not take account of the offer to freeze prices for two years proposed by Bergerat. In view of the context of those discounts, which were targeted at Haladjian's customers which had just manifested their desire to retain an alternative source of supply in the United States

by instructing Haladjian to act as an intermediary — and when Haladjian, Bergerat's only competitor on the French market, was strictly limited as regards its capacity for action —, it is therefore clear that the objective of those price offers was to restrict competition on the market in question by eliminating Haladjian.

95 The Commission contends that there is no ground for the assertion that Bergerat's offers were not lawful or that they were the result of information obtained in the context of the CES system, since Haladjian's customers might also be customers of Bergerat. Nor has Haladjian adduced evidence that the CES system necessarily entailed the transmission of data on customers which instructed a reseller to purchase on their behalf.

96 Caterpillar, for its part, states that it is the policy of CES not to provide dealers with the names of end-users which import into their territory.

Findings of the Court

97 Haladjian's allegation that its competitor, the French dealer Bergerat, made use of the information which Haladjian had communicated to Caterpillar — namely, the names of the customers which had instructed it to purchase replacement parts from United States dealers through the CES system — in order to approach its customers and encourage them to buy from Bergerat rather than from Haladjian might be capable of characterising an infringement of Article 81(1) EC if it were supported by sufficient evidence to be able to satisfy the legal conditions set out in that provision. It is in that context, that is to say, in the light of the evidence in the file, that it is necessary to analyse the assertion — a brief assertion, it is true — in the contested decision that 'the fact that Bergerat attempts, through the information passing through the CES system, to ascertain the names of Haladjian's customers and to make a determined effort to win them over does not constitute a restriction of competition'.

98 As regards the documents concerning Bergerat to which the applicant refers, examination of them establishes only that a representative of that undertaking visited one of the customers which instructed Haladjian in the context of the CES system, accompanied by a representative of Caterpillar (fax of 14 April 1993 from Bergerat to [B.], Annex 32 to the application, p. 766), and that, following that visit, the customer received from Bergerat a trade offer containing 'a supplementary discount of 10% on increased purchases of replacement parts, not for export, made between 1 July and 31 December 1993' and a freeze on the prices of replacement parts for 1993 and 1994 (letter of 30 June 1993 from Bergerat to [B.], Annex 32 to the application, p. 768). Those documents also state that the same commitments were given by Bergerat to another customer of Haladjian following visits by Bergerat to that undertaking (letter of 30 June 1993 from Bergerat to [G.], Annex 32 to the application, p. 772).

99 On the other hand, those documents do not suffice to establish that Bergerat received the names of Haladjian's customers through the CES system. In that regard, it should be noted that, in answer to a question on that point at the hearing, the applicant informed the Court that the CES document dated 25 May 1993 (Annex 32 to the application, p. 767), which contains the names of certain customers on whose behalf it acts in the United States in the context of the CES system — and in particular the names of the two customers mentioned above which received a trade offer from Bergerat —, was a document sent to it by Caterpillar, but that it was unable to establish that that document had also been sent to Bergerat or that Bergerat had been made aware of it through Caterpillar. It must be taken into account, moreover, that any customer of Haladjian for replacement parts produced by Caterpillar is necessarily a customer of Caterpillar, having bought the site machine to which those parts correspond. It is therefore explicable that a Caterpillar representative should visit the users of site machines in order to enquire about their replacement part requirements. Consequently, Bergerat's approaches to Haladjian's customers, sometimes in the presence of a Caterpillar representative, may be considered to be a commercial approach by Bergerat to all of its customers that purchase Caterpillar brand materials, which may also be customers of Haladjian, without there being any implication of a restriction of competition for the purpose of Article 81 EC.

100 Likewise, as regards Caterpillar's letter of 21 September 1999 to a Greek reseller, its content contradicts the applicant's assertion. That letter, which sets out the principles of the CES system, expressly states that, in that context, a European reseller may obtain supplies from any dealer approved by Caterpillar and makes clear that if the reseller chooses to obtain supplies from CES in Belgium, CES will then ask the dealer of the place of destination of the product for permission to act on its behalf. That request does not, however, mean that CES will communicate to that dealer the identity of the customer on whose behalf the reseller is acting.

101 There is thus no document to support the applicant's assertion that Bergerat — or any other dealer in the EC/EFTA area — is able to have access, through the CES system, to the names of the customers which have instructed Haladjian in connection with inter-zone sales.

102 Furthermore, as regards the applicant's complaints relating to the incorrect nature of the contested decision in that it failed to examine the discounts and price-freezing offers proposed by Bergerat to two of the applicant's customers, when those trade offers had the object of eliminating Haladjian from the market in question, it must be pointed out that those allegations, which concern infringements of Article 82 EC and not of Article 81 EC, did not have to be examined by the Commission in the context of its examination of Haladjian's complaint, which was directed at Caterpillar and not at Bergerat. In that regard, the applicant has failed to show the slightest collusion between Caterpillar and Bergerat in respect of those trade offers.

103 It follows from the foregoing that the applicant's complaints relating to the offers made by Bergerat to Haladjian's customers must be rejected.

4. *The complaints relating to the documents concerning Leverton*

(a) The contested decision

104 As regards the documents concerning Leverton, one of Caterpillar's United Kingdom dealers, which were produced by Haladjian in order to demonstrate that that dealer offered prohibitive prices to it, the contested decision states at point 6.4 that the rate offered to Haladjian by Leverton in its letter of 21 April 1993 corresponded to the price offered to users in the United Kingdom. Accordingly, the decision concludes that if that rate is prohibitive for Haladjian, it is also prohibitive for United Kingdom users.

(b) Arguments of the parties

105 The applicant claims that on that point the contested decision fails to mention that Leverton announced in 1983 that it would have to cease deliveries to Haladjian and to state that Leverton's offer made at the national rate on 21 April 1993 is the same as that made at the same time by Maia to Haladjian, at Caterpillar's instigation. Furthermore, the assertion that 'if that rate is prohibitive for Haladjian, it is also prohibitive for [United Kingdom] users' is incorrect, since the size of the orders placed by resellers for the purposes of intra-Community trade allowed them to obtain prices calculated by reference to the 'Consumer price' (also called 'international rate' by Maia) before the CES system was introduced and since those prices were lower than the national rates applied by European dealers on their respective territories.

106 The Commission, supported by Caterpillar, disputes that analysis.

(c) Findings of the Court

107 The Court finds that none of the applicant's arguments permits a finding of a manifest error of assessment on the part of the Commission.

108 As regards the omission of Leverton's refusal to sell to Haladjian in March 1983, examination of the document in question (Annex 5 to the application, p. 380) establishes only that Leverton suspended orders from Haladjian pending discussions on the implementation of the recently introduced system for marketing Caterpillar products. In any event, that document predates the setting-up of the CES system.

109 As regards the omission in the contested decision of the offer made by Maia to Haladjian at the same time, that offer is examined by the decision where it examines the documents relating to Maia. That examination did not therefore have to be repeated when the documents relating to Leverton were being examined. Furthermore, Maia's offer refers to the Italian rate and not to the rate in force in the United Kingdom and includes a discount of 10%. Its terms are therefore not identical to those in Leverton's offer. Nor does the applicant explain how those offers may constitute proof of collusion against it between Caterpillar and its United Kingdom and Italian dealers.

110 As regards the applicant's criticism of the assertion in the contested decision that 'if that rate [in force in the United Kingdom] is prohibitive for Haladjian, it is also prohibitive for [United Kingdom] users', which relies on the allegation that the size of orders submitted by resellers for intra-Community sales enabled them to obtain prices lower than the national rates before the introduction of the CES system, it is sufficient to observe that those criticisms have no impact on the contested decision. The contested decision states that the dealer remains free to determine the price

offered to the reseller, which can thus offer the national price or any other price which it deems appropriate. In that regard, the applicant does not show how the price offered by Leverton in the present case was discriminatory vis-à-vis the applicant.

111 It follows from the foregoing that the applicant's complaints relating to the documents concerning Leverton must be rejected.

5. *The complaints relating to the documents concerning Maia*

112 The applicant claims that the contested decision distorts the content of the documents concerning Maia which were communicated during the administrative procedure. Rather than analyse those documents as illustrating what a reseller must do to counter the de facto prohibition on parallel imports within the Community, the decision uses them to explain and justify Caterpillar's practices.

(a) The documents concerning the Maia/ICBO/Schmidt network

The contested decision (point 6.3 and point 7.1(c))

113 According to the contested decision, the documents concerning Maia which Haladjian produced during the administrative procedure show that Maia had set up a parallel distribution network which supplied Haladjian outside the CES system. The relevant documents are set out at point 6.3 of the contested decision. They

consist of the anonymous letter received by Caterpillar in February 1990, informing it that the Italian company ICBO — whose shareholders are Mr A., a Maia official, and the United States company Schmidt — was buying replacement parts from Maia on behalf of Schmidt, which sold them to Haladjian; the fax of 13 February 1990 from Mr A. to Schmidt, informing it that Caterpillar required an explanation of Maia's sales to ICBO; and the letter of 21 September 1990 from Mr A. to Schmidt informing it of Caterpillar's visit and of Maia's answer as regards sales to ICBO.

114 The letter of 21 September 1990, which is reproduced in the contested decision, is worded as follows:

'... We received a visit from [representatives of Caterpillar France and Italy]. This is what they told us. In France, there is a very strong competitor (Haladjian, as indicated on the list of resellers!), which, in the past, received many containers from the United States ... The containers no longer come, but Haladjian none the less continues to do good business. Who/what is the new source? [Bergerat] heard in Marseilles certain rumours about the traffic in CAT original parts from Italy "run" by the Italian Mafia ... We replied as we did last time. We know ICBO; they sell used equipment to African countries ... Very politely, the Caterpillar representatives said that they believed us, but that we must be very careful because eventually their reaction might be (cancellation of the contract) ... My undertaking is now very concerned. I think that we need to discuss this matter in person because the situation is becoming more and more dangerous ...' (contested decision, point 6.3, fourth paragraph).

115 According to the contested decision, those documents make it possible to establish the context of the order which Haladjian placed with Maia in 1993 (contested decision, point 6.3, p. 15, second paragraph). The following facts, in particular, are recited. First, Maia, an official Caterpillar dealer, used ICBO as a parallel network to

its official network in order to trade in replacement parts to non-European countries, in circumvention of the CES system and in breach of its distribution agreement. Second, ICBO and Schmidt obtained parts from Maia at prices other than the Italian price by pretending that the parts were to be sent to the United States. In reality, those parts were intended for Haladjian for its commercial activities in Africa and, perhaps, at least according to Haladjian's claims, in France. Third, Maia's sales to Haladjian, through the intermediary of ICBO and Schmidt, were presented to Caterpillar as sales of used parts for Africa. Fourth, in 1993, when Caterpillar was made aware of Maia's unlawful parallel activity, Maia decided to put an end to its participation in the network involving ICBO, Schmidt and Haladjian. In that regard, although Mr A. wrote to Schmidt informing it that he had been ordered by his managing director to avoid contacts with Haladjian, that seems to have applied only to their clandestine trading activities.

116 The contested decision states that Haladjian does not dispute that context. In particular, Haladjian does not prove what country the parts which Maia supplied through the intermediary of ICBO and Schmidt were intended for. Likewise, the contested decision observes that Haladjian does not demonstrate either that it attempted, before placing an order with Maia on 24 February 1993 ('the order of 24 February 1993'), to purchase parts directly from Maia for the French market or for another market in the EC/EFTA area, or that Maia refused to supply those parts, or that — in the event of a dispute over prices in such a case — Caterpillar intervened in respect of the price (contested decision, point 6.3, pp. 16 and 17).

Arguments of the parties

117 The applicant claims that the three documents concerning Maia for 1990 clearly reveal that the supplies which Haladjian obtained in Italy and destined for France were subject to restrictions on the part of Caterpillar and certain of its dealers, contrary to the recommendations of the CES system and to what is indicated in the contested decision.

118 As regards the anonymous letter sent to Caterpillar in February 1990, the applicant observes that that document expressly states that the goods purchased by ICBO in Italy, through the intermediary of Schmidt, are delivered to Marseilles and then collected and cleared through customs by Haladjian. That statement, which is not to be found in the contested decision, does indeed show that the purchases which Haladjian made through ICBO and Schmidt were intended for France and not for Africa.

119 As regards the fax of 13 February 1990 from Mr A. to Schmidt, the applicant observes that it does not merely state that Maia was going to meet Caterpillar in order to provide an explanation for the sales to ICBO. In that fax, Mr A. also requested Schmidt's opinion of an ad hoc scenario relating to a specific sale to Africa in 1986. When read in conjunction with the anonymous letter, that fax establishes that Maia distorted the facts explained to Caterpillar, alleging that sales were made for Africa — and therefore in breach of the CES system, which prohibits a dealer from selling to a reseller which exports outside the zone —, instead of recognising that sales were made from Italy to France, as is apparent from the anonymous letter. Since sales from Italy to France are fully authorised — according to both Caterpillar and the Commission — the applicant finds it difficult to understand why sales from Italy to France, including those made through an intermediary like ICBO, should be the subject of an anonymous denunciation, followed by 'explanations' to Caterpillar.

120 As regards Mr A.'s letter of 21 September 1990 to Schmidt relating to the visit to Maia of representatives of Caterpillar in France and in Italy, the applicant maintains that where that letter envisages Haladjian's situation it states that in the past Haladjian received several containers from the United States via the ports of Le Havre and Marseilles, 'where [Bergerat] has informers'. The references to Bergerat at that place in the letter, and at other places, show that Caterpillar was acting in close collusion with its French dealer and demonstrate Bergerat's role in monitoring Haladjian and in the action taken by Caterpillar to discourage Maia from supplying Haladjian. That letter should also be compared with Bergerat's letter of 10 July 1990 to Caterpillar, which reminds all the interveners to comply with the rules of the game.

121 Furthermore, the applicant criticises the contested decision in that it asserts that the sales made through ICBO served to circumvent the CES system by allowing sales to Africa. That assertion is based solely on the fax of 13 February 1990, in which Mr A. informed Schmidt that he was going to report to Caterpillar in order to cover his tracks in respect of supplies made to Haladjian in Marseilles. That explanation is a pure facade which does not correspond with the facts in issue here. The contested decision takes account of that, in so far as it states that, no matter what interpretation is to be given to that letter, the fact remains that Haladjian has never proved that Maia's sales through ICBO were intended in whole or in part for France (see contested decision, point 6.3, p. 17). Thus, as the Commission is unable to prove its assertion, it considers that it is for Haladjian to prove the contrary. Apart from being manifestly incorrect in the light of the abovementioned documents, which clearly establish that those sales were intended for France and not for Africa, that accusation also constitutes a breach of the rights of the complainant, which, for the first time in the contested decision, is alleged not to have adduced evidence on that point, when it was not asked to do so during a procedure lasting 10 years. Furthermore, the Commission cannot express doubts as to the final destination of the parts ordered from Maia through ICBO and Schmidt, since the major part of Haladjian's sales are in France.

122 The Commission disputes the applicant's argument that those documents demonstrate that Maia attempted to conceal from Caterpillar not a breach of the CES system — owing to undeclared exports to Africa — but a breach of an unwritten rule that did not allow Maia to sell to a European reseller which bought parts intended for the EC/EFTA area. The applicant takes as its starting point the existence of restrictions which must be concealed, but adduces evidence of such restrictions, even though it was in a position to demonstrate the real destination of the parts bought from Maia through ICBO.

Findings of the Court

123 In substance, the applicant disputes the assessment in the contested decision that the documents concerning Maia for the period preceding the order placed on 24 February 1993 do not establish the existence of restrictions on intra-Community trade as regards European resellers. In that regard, the applicant does not deny having made use of the Maia/ICBO/Schmidt network in order to obtain supplies in Italy, but claims that the supplies thus obtained were intended solely for intra-Community sales — from Italy to France —, for the sole purpose of circumventing what it claims to be the practical impossibility of making such sales owing to the conduct of Caterpillar and its dealers, notably Bergerat.

124 However, the contested decision rejects that theory on the ground that there is no document on which to establish the existence of such a prohibition on intra-Community sales. In particular, the decision observes that Haladjian does not prove that the replacement parts obtained in Italy through ICBO did in fact have France as their final destination. According to the contested decision, the starting point of the applicant's theory is therefore not established. The contested decision likewise observes that, even on the assumption that the final destination of the replacement parts was indeed France, that does not prove that Caterpillar prohibited its European dealers from selling replacement parts to Haladjian (see contested decision, point 6.3, p. 16, third paragraph).

125 It is therefore necessary to examine the relevant material in the file in order to determine whether the Commission made a manifest error of assessment in deciding, on the ground of insufficient evidence, to reject the applicant's claims that the final destination of the parts purchased from Maia through ICBO and Schmidt was France and that it was impossible in practice for it to obtain supplies directly from Maia owing to an alleged agreement or concerted practice between Caterpillar and its European dealers.

126 As a preliminary observation, it must be noted that the documents on which the applicant relies have very limited probative force owing to their nature and their background. Thus, the first document concerning the activities of the Maia/ICBO/Schmidt network in 1990 is an anonymous letter sent to Caterpillar in February 1990. The other two documents cited by the applicant, namely the fax of 13 February 1990 from Mr A. to Schmidt and the letter of 21 September 1990 from Mr A. to Schmidt, come within a context in which Caterpillar was wondering, following the anonymous letter, whether its Italian dealer was acting in good faith and in accordance with the terms of the distribution agreement.

127 Examination of those three documents provides the following items of information. First, the anonymous letter sent to Caterpillar in February 1990 indicates that the parts sold to Schmidt by ICBO were delivered to a warehouse in Marseilles, where they were 'collected and cleared through customs by Haladjian'. Second, the fax of 13 February 1990 from Mr A. to Schmidt mentions a sale of replacement parts by Maia to ICBO in 1986 for ITL 120 million for use by Italian entrepreneurs in Cameroon and Gabon. Third, the letter of 21 September 1990 from Mr A. to Schmidt states, first of all, that on the occasion of a visit to Maia by Caterpillar representatives, Caterpillar informed Maia that it was aware that Haladjian had received a number of containers of replacement parts from the United States at Le Havre and Marseilles, that the containers were no longer arriving, but that Haladjian's sales had not fallen, and that Caterpillar was therefore wondering what Haladjian's new source of supply might be. The letter then sets out Maia's reply, which had already been given to Caterpillar and from which it is apparent that Maia was aware — to a limited extent — that ICBO was selling used replacement parts for use in a number of African countries.

128 It is apparent on reading those three documents that the assessment in the contested decision that the documents communicated by Haladjian did not make it possible to establish the final destination of the parts acquired in Italy by Haladjian is therefore not manifestly incorrect. In fact, the information, emerging from an anonymous letter, that the parts purchased by Haladjian from Maia through ICBO and Schmidt were delivered and cleared through customs in Marseilles, which gives the impression that the parts exported to the United States, where Schmidt was, were then re-exported to France, where they were cleared through customs, must be

compared with the information given to Caterpillar by Maia, which refers to sales in Africa. Certain documents therefore give the impression that certain parts might actually have Africa as their final destination. Accordingly, in the absence of evidence from Haladjian as to the actual destination of the parts purchased from Maia, through ICBO and Schmidt, the Commission cannot be criticised for having taken the view in the contested decision that there was nothing to prove that the final destination of those parts was indeed France.

129 Furthermore, and no matter what the final destination of the parts in question, the documents cited in the contested decision and criticised by the applicant do not establish that intra-Community sales were not possible on account of Caterpillar. It must be held, in that regard, that the applicant has failed to establish the slightest agreement or the slightest concerted practice between Caterpillar and its European dealers in application of which the applicant was unable to buy in Italy in order to sell in France, which is central to its argument in the present action.

130 Nor can the applicant claim that its rights as a complainant were breached because it was not given the opportunity during the administrative procedure to adduce evidence of the final destination of the parts purchased from Maia through ICBO and Schmidt, since it was the applicant itself that alleged in its observations on the Article 6 letter that the destination of the parts was France, but without adducing evidence on that occasion. The applicant cannot therefore criticise the Commission for rejecting that allegation on the ground of insufficient evidence.

131 It follows from the foregoing that the applicant's complaints relating to the documents concerning the Maia/ICBO/Schmidt network of which Haladjian made use in order to obtain its supplies before the order of 24 February 1993 must be rejected.

(b) The documents concerning the order of 24 February 1993

The contested decision

132 The contested decision also examines a second series of documents concerning the order of 24 February 1993 and the way in which it was treated by Maia and incidentally by Caterpillar. The relevant documents are as follows.

133 By letter of 24 February 1993, Haladjian wrote to Maia informing it that it had been authorised by a number of French users, whose letters were attached as an annex, to buy replacement parts produced by Caterpillar, that it had discussed the content of those letters with Caterpillar, which had informed it that it was necessary to place the order with a dealer, and that, in consequence, it was interested in purchasing replacement parts at the Consumer price in United States dollars ('dollars') (contested decision, point 6.3, fifth paragraph).

134 Following a reminder from Haladjian dated 30 March 1993, Maia sent a fax to Caterpillar on 31 March 1993 seeking information on how to proceed and also contacted Caterpillar by telephone. According to a Maia internal memorandum of 20 April 1993, Caterpillar replied that Maia should reply to Haladjian and that, if Maia was agreeable, it could propose a price at the Italian rate (contested decision, point 6.3, seventh paragraph).

135 According to the contested decision, the order of 24 February 1993 is unusual. First, Haladjian explains that it was authorised by certain French customers to purchase parts produced by Caterpillar; in fact, such authorisation is not necessary where a reseller purchases parts in one country in the EC/EFTA area in order to send them to another country in that zone. Second, Haladjian states that it discussed those letters of authorisation with a member of Caterpillar's management, whereas a reseller involved in intra-Community trade is not required to discuss the matter

with anyone before placing an order. Third, the order of 24 February 1993 requests prices not in the local currency, but based on the Consumer price in dollars. In fact, each dealer applies a sales price list in its own currency and not in dollars (contested decision, point 6.3).

136 In that regard, the contested decision observes, first, that Haladjian did not demonstrate that it had previously obtained prices expressed in dollars from Maia or from other European dealers for products intended for France or for another country in the EC/EFTA area; second, that Haladjian never adduced evidence that Maia applied that alleged international price in dollars when dealing with other Community customers and that — as a consequence — the refusal to apply that price to Haladjian constituted discrimination; and, third, that Haladjian did not demonstrate that it obtained, without Caterpillar's intervention, a lower price than that offered by Maia in its letter of 8 April 1993. By its tenor, the order of 24 February 1993 therefore constitutes a reaction to the fact that Maia decided to cease supplying Haladjian in circumvention of the CES system and seeks to allow Haladjian to obtain evidence in support of the complaint (contested decision, point 6.3 and point 7.1(c)).

137 Furthermore, the contested decision (point 6.3, sixth paragraph) refers to the letter of 30 March 1993 from Mr A. to Schmidt, after the order of 24 February 1993. That letter states:

'[T]he first news from Caterpillar [is] not good. Monday afternoon my managing director called me to say: He received a phone call from Geneva advising to avoid the supplying to H.F. Avignon; officially this cannot be done, therefore we will answer and offer the Italian price list (this means Consumer price in $ times two!! on the average); we will receive in short the final reply from Caterpillar ...'

138 By letter of 8 April 1993, Maia offered Haladjian a price according to the Italian price list with a rebate of 10%. By letter of 22 April 1993, Haladjian rejected that offer and asked for the Consumer price in dollars, as had been offered to other Community customers of Maia, with a rebate. Haladjian informed Maia that, failing that, it intended to lodge a complaint with the Commission in respect of a discriminatory pricing practice. According to the Maia internal memorandum of 20 April 1993, referred to above, Maia informed Caterpillar and Bergerat of Haladjian's reaction (contested decision, point 6.3, eighth and ninth paragraphs).

139 According to a Maia internal memorandum of 30 April 1993, Haladjian approached Maia because it was in a position to blackmail Maia since, first, Maia had in the past applied the international price list for Community customers (according to the contested decision, that memorandum restates here the content of Haladjian's letter to Maia of 22 April 1993 referred to in the previous paragraph, which refers to the Consumer price in dollars); second, Maia did not observe the rules of the CES system for sales outside the Community; third, Haladjian was in a position to prove the existence of sales by Maia to Haladjian via ICBO; and, fourth, a number of Caterpillar managers were aware of Maia's parallel activities, which they had thus far covered (contested decision, point 6.3, 10th paragraph, and footnote 10).

140 As the order of 24 February 1993 describes discussions with Caterpillar, and taking into account Maia's fear that its distribution agreement would be cancelled because it had circumvented the CES system, the contested decision observes that 'it is not strange' that Maia asked Caterpillar to explain how it was to deal with that order. On that point, the contested decision observes that Caterpillar stated in response to that request that Maia was to reply to Haladjian and that, if Maia was agreeable, it could offer a price in accordance with the Italian price list. That, according to the contested decision, was merely a 'suggestion'. That suggestion was followed by Maia — in complete autonomy, according to the contested decision — on 8 April 1993, since it offered Haladjian a price based on the Italian price list with a rebate of 10% — the same as that obtained by one of Maia's largest customers. Accordingly, the contested decision concludes that those consultations between Maia and Caterpillar do not constitute collusion designed to prevent or render more difficult parallel trade between Member States within the meaning of Article 81 EC. The contested

decision further observes that, as the abovementioned documents to not reveal a restriction of competition within the meaning of Article 81 EC, the pressure which Bergerat is alleged to have exerted on Caterpillar to monitor imports into France does not constitute a restriction of competition either (contested decision, point 6.3, p. 17, and point 7.1(c)).

Arguments of the parties

141 In the first place, the applicant disputes the way in which the contested decision assesses the content of certain documents concerning Maia for 1993.

142 It criticises, first of all, the assessment in the contested decision that the order of 24 February 1993 was unusual. First, it observes that the contested decision fails to point out that the order forms part of the framework of the discussions which Haladjian was at the same time having with Caterpillar concerning the application to it of the CES system and refers to the exchange of letters between Caterpillar and itself on 30 March and 13 April 1993. Second, the applicant claims that the decision proceeds from the principle that there is no restriction of intra-Community trade and that, consequently, it is unusual to make a request to Maia in respect of the French market by reference to the prior agreement of Caterpillar. Although such a comment may be justified in theory, the applicant maintains, however, that the documents relating to Maia show in reality that intra-Community trade is restricted. Thus, the reaction of Maia, which lost no time in consulting Caterpillar concerning Haladjian's order, illustrates that it is impossible to engage in intra-Community trade freely and openly. In that regard, the applicant states that, while the reference in the order of 24 February 1993 to contacts between Haladjian and Caterpillar might, at the most, explain why Maia should contact Caterpillar in order to seek clarification, that reference did not provide reason for Maia to request instructions from Caterpillar. Third, the applicant maintains that the contested decision fails to understand the structure of the prices of intra-Community trade where it considers that Haladjian's request to obtain prices calculated by reference to the Consumer price in dollars was 'unusual'. In fact, it is by reference to that price (also called the 'international price list' in the Maia internal memorandum of 30 April 1993), and not by reference to the exaggeratedly high national prices, that purchases by resellers were normally made until Caterpillar objected.

143 Next, the applicant maintains that the Maia internal memorandum of 20 April 1993, which was sent to Caterpillar on 23 April, cannot be reduced to the two elements cited in the contested decision, namely that Caterpillar encouraged Maia to reply to Haladjian suggesting that it follow the Italian price list and that Maia informed Bergerat of Haladjian's reaction to that price offer. The memorandum also states that Caterpillar had initially advised Maia to gain time before replying to Haladjian, that Maia wished to know whether the other Italian reseller had received the same request, in order possibly to give the same reply, that Caterpillar's 'counsel' did not confine themselves to suggesting that Maia offer Haladjian the Italian price list, since Caterpillar looked closely at the conditions of sale and suggested that it ask for the models and numbers of the French customers' machines, that Maia again sought to gain time when, on 16 April 1993, Haladjian requested that it communicate the Italian price list and that Maia informed Bergerat not simply of 'Haladjian's reaction', as the contested decision incorrectly states, but also of the way in which Maia had acted towards Haladjian.

144 Last, the applicant maintains that the contested decision ought to have taken account of the explanation provided in Mr A.'s letter of 30 March 1993 to Schmidt, which shows that Caterpillar 'advised' Maia to avoid supplying 'HF Avignon' (that is to say, Haladjian), because 'officially this [could] not be done', that Maia was therefore going to offer the Italian price list to Haladjian and that Maia was awaiting Caterpillar's final answer on that point.

145 In the second place, the applicant criticises the reasons put forward in the contested decision in support of the fact that the prices offered by Maia were offered in complete independence and that Maia's consultations with Caterpillar did not constitute collusion for the purposes of Article 81 EC, namely the assessment that Haladjian's requests to Maia had no purpose other than to blackmail Maia and the assessment that the tenor of the exchanges between Maia and Caterpillar were to be explained by the fact that the purchases made through ICBO and Schmidt were intended for Africa.

146 As regards the alleged blackmail, that explanation, according to the applicant, is inconsistent with the chronology of the events, since the order of 24 February 1993 predated the announcement of the cessation of commercial relations with Maia via an intermediary made in Mr A.'s letter of 30 March 1993 to Schmidt. Likewise, the order predated by two months Haladjian's threat to refer the matter to the Community authorities, which was made in its letter of 22 April 1993 following Maia's refusal to grant it the same prices as those offered to other Community purchasers in a comparable situation.

147 Furthermore, directly connected with the error made in respect of the 1990 documents, the contested decision again asserts that the transactions conducted through ICBO were intended for Africa, in circumvention of the CES system, and that Haladjian did not prove the contrary. In fact, the question of Maia's sales to Haladjian through ICBO is quite separate from the question of the order of 24 February 1993, seeking to purchase directly and openly from Maia in the context of the system set up by Caterpillar. Accordingly, the interpretation of the order of 24 February 1993 in the light of the business relations between Maia and Haladjian necessarily leads to a complete failure to understand the situation. Whatever the assessment that may be made of the relations with ICBO, whether or not they are recognised as evidence of obstacles to intra-Community trade, those relations in any event have no impact on the assessment to be made of the direct evidence of the collusion between Maia and Caterpillar concerning the reply to be given to Haladjian's order.

148 In the third place, the applicant maintains that the contested decision is incorrect where it states that the applicant did not prove the price discrimination in respect of which it criticised Maia in its letter of 22 April 1993. Thus, it is sufficient to refer to Mr A.'s letter of 30 March 1993 to Schmidt to establish the openly and knowingly discriminatory objective of those prices. Likewise, the contested decision cannot, without contradicting itself, dispute that Maia applied the international price list to other Community customers, since that fact is mentioned in the same decision on two occasions, where it refers to the Maia internal memorandum of 30 April 1993 (point 6.3, p. 14, penultimate paragraph, p. 15, final indent), although footnote 10 to

the contested decision states that the reference to the international price list in the Maia internal memorandum is not an 'admission' by Maia but merely reproduces the content of Haladjian's letter of 22 April 1993.

149 Such an interpretation is incorrect, since, even on the assumption that the author of the internal memorandum of 30 April 1993 is merely citing Haladjian's letter of 22 April 1993, the fact none the less remains that the memorandum states that that fact is established, that Haladjian can prove it and that the fact that Caterpillar might learn of it was a matter of concern. That memorandum thus demonstrates not only that the discrimination of which Haladjian is a victim is real, but also that Maia was afraid that Caterpillar might learn that it was selling at competitive prices to other Member States (*'avrà certamente "material" che puo "inchiodarci e avvalorare la sua affermazione dell'ultima lettera" (noi vendiamo usando il listino Internazionale a clienti EEC)'*).

150 The applicant further observes that, in May 1994, it became aware of offers made by Maia to a United Kingdom user ('C.') at much more advantageous prices than those offered to the applicant by Maia — the differences varying, depending on the parts, between 90 and 160%. At that time, Haladjian also received an offer from an Italian reseller ('M.'), which obtained supplies from Maia and was in a position to offer Haladjian prices lower than those which Haladjian was able to obtain directly from Maia.

151 In the fourth place, the applicant claims that it follows from the foregoing that the Commission made an error of law by not finding the existence of concerted practices between Caterpillar and Maia. The Commission's reasoning rests on the unusual nature of the order of 24 February 1993 and on the fact that Haladjian did not prove that that order had been preceded by other similar orders. In fact, according to the applicant, it is irrelevant, for the purpose of determining whether there are restrictions of competition in the event of an intra-Community order, to refer to the subjective reasons underlying the transaction or to the existence or otherwise of previous similar transactions.

152 The Commission disputes the applicant's argument, observing that it follows from the contested decision that the contacts between Caterpillar and Maia following the order of 24 February 1993 do not establish the existence of an alleged unwritten rule prohibiting exports to resellers within the EC/EFTA area, but may be explained by the particular context in which the order was placed. Furthermore, there is nothing to prove that Maia did not freely determine the selling price for such a transaction, including the rebate of 10% granted to Haladjian. The Commission also questions the sufficiently probative nature of the documents relating to the offers which Maia made to C. and the offer made to Haladjian by M.

153 Caterpillar further emphasises that Maia acted unilaterally when it decided to contact Caterpillar and Bergerat and that its reply was simply to propose that Haladjian be treated in the same way as other purchasers of replacement parts, that is to say, using the list of retail sales prices.

Findings of the Court

154 None of the applicant's arguments serves to characterise a manifest error of assessment on the part of the Commission. In the present case, the applicant merely criticises the content of the various documents cited and analysed by the Commission concerning the treatment of the order of 24 February 1993 and fails to adduce evidence of such a kind as to call in question the conclusions reached in the contested decision on that point, namely, first, the finding that the collusion between Maia and Caterpillar in respect of the treatment of that order does not constitute a restriction of competition within the meaning of Article 81 EC and, second, the finding that the that the price offer made by Maia to Haladjian — the Italian national price list with a rebate of 10% — was made entirely independently, in spite of Caterpillar's suggestion that it offer the Italian national price list.

155 In effect, according to the contested decision, the collusion between Maia and Caterpillar concerning the reply to be given to Haladjian's order, which is apparent in particular from the Maia internal memorandum of 20 April 1993 sent to Caterpillar on 23 April 1993, may be explained by the context within which the order was placed and the fact that the order stated that discussions had been held between Haladjian and Caterpillar concerning certain aspects of the order, namely the letters of authorisation from Haladjian's customers.

156 It must be borne in mind that, in the past, Maia's sales to Haladjian were made through a network involving ICBO in Italy and Schmidt in the United States. Furthermore, following the investigation carried out by Caterpillar, Maia had decided to put an end to that channel of supply in order to avoid cancellation of its distribution agreement, which Caterpillar had threatened (see the letter of 30 March 1993 from Mr A. to Schmidt, Annex 29 to the application). In those conditions, the contested decision is not manifestly incorrect in that it attributes to Maia's wish not to lose the advantage of its distribution agreement the fact that Maia asked Caterpillar how it must proceed in response to the order of 24 February 1993. That conduct is also explained by the content of the order, which referred to contacts with Caterpillar and purchase authorisations signed by French users, whereas such contacts and such authorisations are not required in the case of intra-Community sales from Italy to France. Maia could therefore properly find it necessary to contact Caterpillar to find out more on that point.

157 Consequently, the contested decision displays no manifest error of assessment in that it reaches the conclusion that the collusion between Maia and Caterpillar was justified by specific reasons which fail to establish to the requisite legal standard the existence of an obstacle to intra-Community sales to resellers.

158 As regards the autonomous nature of the offer proposed by Maia — namely, the Italian national price list with a rebate of 10% — the contested decision is not manifestly incorrect in that it states that while that offer was suggested at least in part by Caterpillar, which proposed that Maia should reply to Haladjian on the basis of the Italian national price list, it was made in complete autonomy, as may be seen from the indication 'if we were agreed', which is to be found in the Maia internal memorandum of 20 April 1993, which relates what was said by telephone to Maia by a Caterpillar representative concerning Haladjian's order. Furthermore, the rebate of 10% was offered on Maia's own initiative. That rebate thus illustrates the general principle, as set out in the contested decision, that the dealer is free to offer whatever price it wishes to resellers. In application of the CES system, the dealer must merely ensure that the applicable rules are observed in the event of inter-zone sales, which does not appear to be the case here, in view of the fact that the order of 24 February 1993 relied on letters of authorisation sent by French users.

159 In consequence, the contested decision displays no manifest error of assessment in that it reaches the conclusion that Maia's offer to Haladjian was made in complete autonomy by that dealer and that it did not have the effect of impeding intra-Community sales to resellers.

160 Furthermore, and in spite of its allegations to that effect, the applicant has still not demonstrated that Maia's offer was discriminatory vis-à-vis it or more generally restrictive of competition. In particular, the Commission could not make a finding to that effect in the light of the evidence before it, namely the reference to the international price list in Mr A.'s letter of 30 March 1993 to Schmidt (the 'Consumer price in dollars') and in the Maia internal memorandum of 30 April 1993, since the transaction in question did not come within the CES system and since it was carried out, in any event, without any intervention by Caterpillar being demonstrated on that point.

161 As regards the offers made by Maia to a United Kingdom user, C., on 26 January and 21 February 1994, at prices which were much more advantageous than those offered

to Haladjian by Maia on 8 April 1993, it must be observed that those offers were made in Italian lire and not in dollars and that they were made 10 and 12 months respectively after the offer made to Haladjian by Maia, and at a time when the Italian lira was subject to significant currency fluctuations. In the absence of evidence on which it might be established that an order placed by Haladjian at that time would have been treated differently from that placed by the United Kingdom user, the Commission therefore did not make a manifest error of assessment by stating that Haladjian had not demonstrated having suffered price discrimination on the part of Maia and, in any event, that that discrimination would be attributable to Caterpillar.

162 Likewise, as regards the offer made to Haladjian by an Italian reseller, M., which obtained supplies from Maia and was in a position to offer Haladjian prices lower than those which Haladjian was able to obtain directly from Maia, it should also be observed that that offer is not in itself sufficiently probative to establish the price discrimination alleged by the applicant. There is nothing in that offer, made in dollars, to indicate that the Italian reseller bought the parts from Maia, as the applicant claims. Accordingly, since there can be no valid comparison with Maia's offer to Haladjian, the Commission did not make a manifest error of assessment when it stated that Haladjian had not demonstrated that it had been subject to price discrimination on the part of Maia and, in any event, that that discrimination was attributable to Caterpillar.

163 Furthermore, the applicant's criticisms against the alleged blackmailing of Maia are not relevant, since the threat to bring the matter before the Commission on the ground of discriminatory pricing is clear from Haladjian's letter of 22 April 1993 refusing Maia's offer and requesting to benefit from the Consumer price in dollars. In that regard, the chronology of the events, on which the applicant relied in order to refute the existence of such blackmail, contradicts its allegations, since it was the applicant itself, in its letter of 22 April 1993, that threatened to refer the matter to the Community authorities in order to mark its dissatisfaction with the price list conditions offered by Maia on 8 April 1993. Likewise, the applicant's argument in respect of the sales in Africa is irrelevant, since it has no impact on the reasoning set out in the contested decision concerning Haladjian's order and Maia's response.

164 It follows from the foregoing that the applicant's complaints in respect of the documents concerning the order of 24 February 1993 must be rejected.

6. *Conclusion*

165 It follows from all of the foregoing that the applicant has not adduced evidence of such a kind as to call in question the findings in the contested decision concerning the applicability of Article 81 EC.

166 In particular, as regards the finding relating to the impact of the CES system on sales within the EC/EFTA area, none of the evidence adduced by the applicant calls in question the conclusion which the Commission reached following its examination of the complaint, namely that 'no restriction of competition tending to prevent or make more difficult trade in replacement parts within that zone has been proved' (contested decision, point 7.1, p. 22, third paragraph).

167 Likewise, as regards the finding relating to the impact of the CES system on inter-zone sales between the United States and the EC/EFTA area, none of the evidence adduced by the applicant is capable of calling in question the conclusion reached by the Commission at the close of the administrative procedure that the CES system does not isolate the Community market by prohibiting competition in replacement parts imported from the United States at lower prices than the European prices and that it also does not affect intra-Community trade in such replacement parts (contested decision, point 7.2, first and second indents). In that regard, it must be observed that, in order to justify the application of the competition rules to an agreement concerning products purchased in the United States for sale in the Community, that agreement must, on the basis of a range of elements of fact and of law, make it possible to envisage with a sufficient degree of probability that it is capable of having a more than insignificant influence on competition in the

Community and on trade between Member States (see, to that effect, *Javico*, paragraphs 16 and 18). The mere fact that conduct produces certain effects, no matter what they may be, on the Community economy does not in itself constitute a sufficiently close link to be able to found Community competence. In order to be capable of being taken into account, that effect must be substantial, that is to say, appreciable and not negligible.

168 Consequently, the first plea in law must be rejected.

D — *Second plea, relating to the reasoning followed in the contested decision concerning the applicability of Article 82 EC*

1. *The content of the complaint*

169 The applicant maintains that the contested decision is incorrect where it states at point 8 that the complaint did not claim that there had been an infringement of Article 82 EC.

170 The Court observes that, as regards the allegation of an infringement of Article 82 EC, the complaint merely indicated in its final part that Caterpillar's conduct 'could be regarded as an abuse of a dominant position prohibited by Article [82] EC' and that Haladjian was at the Commission's disposal to help it to characterise the relevant market, the dominant position of Caterpillar and the abuse of that dominant position should the Commission consider it necessary to investigate that

point. It should further be emphasised that, in its observations on the Article 6 letter, the applicant acknowledged on that point that, while it was true that it had not provided further details of its allegations concerning an infringement of Article 82 EC in its complaint, that was because it was — and remained — convinced that the conduct forming the subject-matter of its complaint against Caterpillar was prohibited by Article 81 EC. Accordingly, in the absence of any indication in the complaint of how Caterpillar's conduct might be understood to constitute an abuse of a dominant position, the applicant is wrong to criticise the contested decision for stating that its complaint did not claim that there had been an infringement of Article 82 EC.

2. *The allegations in the recapitulatory note of 11 August 2000*

171 The contested decision observes, at point 8, that it was only in the recapitulatory note of 11 August 2000 that Haladjian referred expressly, but generally and without adducing evidence, to allegations relating to the infringements of Article 82 EC, which were limited to listing certain abusive practices mentioned in that provision. However, even accepting that Caterpillar enjoyed a dominant position on the replacement parts market, those complaints are rejected by the contested decision.

(a) The alleged imposition of unfair trading prices

172 As regards the first allegation of an infringement of Article 82 EC, relating to the imposition of unfair trading prices, the contested decision observes that such an allegation cannot be upheld, since Caterpillar does not impose prices and since its dealers are free to propose to resellers and users the prices which they intend to apply (contested decision, point 8, second paragraph).

173 The applicant asserts that that assessment is incorrect, in view of the pressure brought to bear by Caterpillar on Maia in 1993. Furthermore, the essential question here is whether the fact that Caterpillar increased by 10 points the sales price to United States dealers of replacement parts intended for export to Europe and did not allow a European reseller which obtains supplies in the United States to obtain quantity rebates constitutes an unfair price. In that regard, the applicant asserts that, even on the assumption that a surcharge may be applied in order to 'compensate' the European dealer to whose territory the products are exported, the penalisation of the United States dealer which exports to Europe goes far beyond that objective. Nor does the contested decision take account of the information communicated by the applicant during the administrative procedure concerning the discrimination suffered by a European user which purchases in the United States, directly or through a European reseller, paying in dollars at the market price, by comparison with European dealers which purchase in Belgium in European currencies at a price which necessarily implies a dollar rate below its real rate. That aid granted by Caterpillar to its European dealers distorts the market by allowing them to deal with imports from the United States.

174 The Court observes, first of all and generally, that the allegations of an infringement of Article 82 EC, first made by the applicant in the recapitulatory note of 11 August 2000, are confined to asserting that Caterpillar imposed unfavourable and discriminatory selling conditions on Haladjian and the other European resellers and that, consequently, '[Caterpillar's] conduct constituted an abuse of a dominant position within the meaning of Article 82 EC, shown in particular by the imposition of unfair trading prices, the limiting of markets to the prejudice of consumers and the application of dissimilar conditions to equivalent transactions with other trading parties, all of which are infringements expressly provided for in Article 82 EC'. In doing so, the applicant merely invokes the formal existence of infringements of Article 82 EC, without supporting that allegation by arguments specific to the present case and without adducing the slightest evidence to substantiate such an allegation.

175 As regards Haladjian's first allegation, it must be observed that the applicant does not dispute that Caterpillar allowed its dealers, in particular the United States dealers, complete freedom to determine the resale prices of replacement parts to their customers, such as Haladjian. Here the applicant is merely repeating arguments which have already been answered or assertions which are not accompanied by sufficient evidence.

176 Thus, as regards the pressure that Caterpillar is alleged to have brought to bear on Maia in 1993, examination of the contacts between those undertakings in respect of the order of 24 February 1993, which was carried out in the context of the first plea, shows that the Commission did not make a manifest error of assessment when it stated that those contacts were to be explained by the particular context in which that order was placed (see paragraphs 155 and 156 above). For the same reasons, those contacts do not establish to the requisite standard the existence of what Haladjian alleges to be unfair trading prices. The same applies to the possibility for European resellers to obtain quantitative rebates from Caterpillar's United States dealers, a question which was examined in the context of the first plea and which does not permit the identification of the existence of any restriction of competition in the present case (see paragraph 62 above).

177 Furthermore, the applicant's assertion that the 10% increase in the price charged by Caterpillar to its United States dealers which ordered replacement parts for export to the EC/EFTA area goes beyond the specific needs of the CES system is not supported by any evidence as to the disproportionate or unwarranted nature of that measure. Such an assertion cannot therefore suffice to call in question the objective reasons for the difference in price charged by Caterpillar to its United States dealers in respect of export sales mentioned in the contested decision, namely, in essence, the need to preserve the quality and integrity of its European distribution network.

178 Likewise, the data relating to the development of prices charged in France by Bergerat and obtained in the United States by Haladjian between 1992 and 2000, which were communicated during the administrative procedure as an annex to the recapitulatory note of 11 August 2000 and put forward by the applicant as evidence of the fact that it suffers discrimination by comparison with Caterpillar's European dealers, in that it must pay for its purchases in the United States in dollars, whereas the European dealers are able to buy in Europe from Caterpillar Overseas and pay in a European currency indexed to a dollar rate which is advantageous to them, cannot suffice to call in question the finding in the contested decision relating to the alleged imposition of unfair trading prices. In fact, those differences in price established by Haladjian may be perfectly explained, first, by the appreciation of the dollar against European currencies during the period 1992 to 2000 and, second, by the specific needs of Caterpillar's distribution network, since Caterpillar may decide, on the basis of its commercial policy, to ensure that its European dealers do not suffer the full impact of the effects associated with the fluctuation of the money markets. Furthermore, and above all, the European resellers' situation cannot be assimilated to that of Caterpillar's European dealers, since resellers are not bound by the contractual obligations to which dealers are subject.

179 In consequence, the applicant has failed to establish the existence of a manifest error of assessment on the part of the Commission as regards the examination of its allegation relating to the existence of an infringement of Article 82 EC owing to the imposition by Caterpillar of unfair trading prices.

(b) The alleged limitation of markets to the prejudice of consumers

180 As regards the second allegation of an infringement of Article 82 EC, relating to the limitation of markets to the prejudice of consumers, the contested decision states that that assertion is unfounded, since users are able to obtain supplies without

constraint throughout the world and resellers are able to obtain supplies in other geographic zones by indicating the identity of the users in the geographic zone of destination of the parts ordered (contested decision, point 8, second paragraph).

181 The applicant criticises that finding, emphasising that it fails to take into account the severity and rigidity of the CES system, which requires information in excess of what is necessary. Likewise, the fact that a European reseller is unable to obtain stocks in the United States, where replacement parts are cheapest, even on behalf of the declared user, has the effect of limiting European users' possibilities of obtaining supplies. The applicant relies, in that regard, on statements made in January and February 1993 by two of its customers which expressed the wish that it could hold significant stocks of replacement parts.

182 The Court observes that it follows from an examination of the arguments submitted in the context of the first plea that none of those arguments permits the conclusion that the orders placed by European users which use Haladjian as agent in the context of the CES system were not satisfied (see paragraphs 74 to 77 above). The markets are therefore not limited to the detriment of users, as the applicant claims.

183 In addition, it is also necessary to take into consideration the fact that the perfectly lawful desire of European users to be able to take advantage of parts purchased in the United States, where they are cheapest, must be measured against the yardstick of the marketing policy — accepted by the Commission — pursued by Caterpillar, which wishes to limit such inter-zone sales in order to favour its European dealers, which, in order to be present on the spot and offer the full range of services which Caterpillar wishes them to provide, must bear costs which are not borne by the European resellers which obtain supplies in the United States on behalf of European users. The arguments put forward by the applicant therefore do not alter that situation, which strikes a balance between the interests of the various parties concerned, in spite of the wish expressed by two of Haladjian's customers which

would like to be able to maximise their possibilities of supply but without taking into account the specific interests of Caterpillar and its distribution network.

184 Consequently, the applicant has failed to establish the existence of a manifest error of assessment on the part of the Commission as regards the examination of its allegation relating to an infringement of Article 82 EC owing to the limitation of markets by Caterpillar to the prejudice of consumers.

(c) The alleged application of dissimilar conditions to equivalent transactions with other trading parties

185 As regards the third allegation of an infringement of Article 82 EC, relating to the application of dissimilar conditions to equivalent transactions with other trading parties, the contested decision finds that the complainant adduces no evidence demonstrating that it suffers discrimination by comparison with other resellers. On the contrary, the CES system is found to treat all European resellers in the same way (contested decision, point 8, second paragraph).

186 The applicant claims that the relevant question here is not that of discrimination which it has sustained by comparison with other European resellers but that of the discrimination which it suffers by comparison with other European purchasers — dealers, resellers and users — for comparable volumes. Accordingly, the fact that the CES system accepts European resellers, like Haladjian, only on condition that they act as agents for end-users amounts to imposing on them conditions which are not objectively justified and the sole purpose of which is to reduce the possibilities of obtaining alternative supplies.

187 The Court observes that, here again, the applicant cannot claim the same commercial treatment as that granted by Caterpillar to its European dealers, since

those dealers are bound by contractual obligations to which Haladjian is not subject. That category of purchasers is therefore distinguished from resellers and users, which are not bound by such obligations.

188 Consequently, the applicant has failed to establish the existence of a manifest error of assessment on the part of the Commission as regards the examination of its allegation relating to the existence of an infringement of Article 82 EC owing to the application of dissimilar conditions to equivalent transactions with other trading parties.

3. *The applicant's other complaints*

189 The applicant criticises the contested decision in that it wholly ignores Caterpillar's other practices, which form part of a policy of systematic exclusion towards the applicant, since it is the only Europe-based competitor of its European dealers. Those practices, which for the most part are perpetrated by Caterpillar with Bergerat, consist in the monitoring of its supplies, in 'leaks' from the CES system which allow Bergerat to entice its customers away, in the return of the 'credit profit' to Bergerat, which enables that undertaking to know the amount of purchases made in the United States by Haladjian on behalf of its French customers, in the manoeuvres designed to discredit Haladjian's activities and the activities of resellers in general, by giving the impression that the quality and authenticity of the parts which they sell are not guaranteed.

190 The Court observes that those complaints, and in particular the complaints concerning the actions imputable to Bergerat, were not raised by the applicant during the administrative procedure as allegations of an infringement of Article 82 EC. The contested decision cannot therefore be criticised for not having examined them from that aspect.

4. *Conclusion*

191 It follows from the foregoing that the arguments submitted by the applicant in respect of the reasoning followed by the contested decision as regards the applicability of Article 82 EC do not call in question the assessments of the elements of fact and of law made in that context by the Commission. Consequently, the second plea in law must be rejected.

E — *Third plea, alleging breach of the rules of procedure*

1. *The complaint in respect of the unreasonable duration of the procedure*

192 The applicant states that the administrative procedure, from the lodging of the complaint until the decision rejecting it, lasted almost 10 years and maintains that such a period is not reasonable. In effect, the investigation was too long, since seven years elapsed between the lodging of the complaint in October 1993 and September 2000, when the Commission's services informed the applicant orally that they intended to take no action on the complaint. Likewise, the applicant was required to take many steps after October 2000, including bringing an action for failure to act, in order to obtain the Article 6 letter and the final decision. Furthermore, the unreasonable duration of the administrative procedure affected the content of the file, as the applicant was thereby deprived of the opportunity to gather further evidence concerning prices while the CES system was being implemented.

193 The Court observes, first of all, that where the contested decision is a decision rejecting a complaint, the excessive amount of time it may have taken to deal with a complaint cannot, as a rule, affect the actual content of the final decision adopted by the Commission. It cannot, save in exceptional circumstances, alter the substantive matters which, according to the case, determine whether or not the existence of an infringement of the competition rules is established or give the Commission good reason not to conduct an investigation (order in Case C-39/00 P *SGA* v *Commission*

[2000] ECR I-11201, paragraph 44). The length of time taken to investigate the complaint is not, as a rule, prejudicial to the complainant when the complaint is rejected.

194 Furthermore, in the present case, the applicant does not demonstrate in a relevant manner how the substantive elements taken into account in the contested decision might have been affected or altered by the duration of the administrative procedure.

195 Besides, it must be observed that the observance by the Commission of a reasonable time when adopting decisions following administrative procedures in the matter of competition policy constitutes an application of the principle of sound administration (see, as regards the rejection of complaints, Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraphs 37 and 38). Whether or not the duration of an administrative procedure of that kind is reasonable must be determined in relation to the particular circumstances of the case and, in particular, its context, the various procedural stages to be gone through by the Commission, the complexity of the case and its importance for the various parties involved (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57).

196 In the present case, the duration of the procedure may be explained by the complexity of the facts, which call in question the worldwide and European marketing policy of a large undertaking, and by the need to examine the numerous allegations and documentary annexes submitted by the applicant. Thus, in addition to the complaint, lodged on 18 October 1993, which was submitted in the context of a procedure previously initiated by the Commission against Caterpillar after the Commission had sent Caterpillar a statement of objections on 12 May 1993, the applicant sent the Commission a number of letters, in April and May 1994, in August 1995, in May and August 1997, in November and December 1997 and in August 2000, in order to communicate new matters or to comment on the state of the procedure. Likewise, following the Article 6 letter sent to the applicant on 19 July 1991, the applicant communicated voluminous observations on 22 October

2001, which the Commission had to examine before it adopted the contested decision on 1 April 2003.

197 Consequently, the complaint relating to the unreasonable duration of the administrative procedure must be rejected.

2. *The complaints alleging lack of diligence and lack of impartiality in the examination of the complaint and failure to state reasons for the contested decision*

198 The applicant maintains that the Commission failed to demonstrate diligence and impartiality by rejecting its complaint without even examining the situation on the relevant market, although it had information on that point, namely a table annexed to the complaint, which shows the extent to which Haladjian's sales fell between 1989 and 1992 and which was updated in 1999, and also data relating to the products sold and prices charged by various dealers in Europe and the United States, which were communicated by Haladjian or dealers. Furthermore, the applicant claims that the Commission was required to explain in the contested decision its reasons for rejecting the complaint, when for seven years it had indicated to the applicant that it would not. In that regard, the applicant states that the Commission had informed it by letter of 13 April 1995 that certain items in the file were of 'particular importance' or that a letter of 15 June 1999 from Mr Van Miert, then Member of the Commission responsible for competition, gave the applicant the impression that a statement of objections would be sent to Caterpillar.

199 The Court recalls that the Commission, in stating the reasons for the decision which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive

importance in the context of the decision (Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 131).

200 In that regard, concerning the allegation that the Commission did not examine the situation on the relevant market, it must be borne in mind that the contested decision, at point 4, defines the market in question, in respect of all the products concerned, that is to say, site machinery and replacement parts, and the geographic dimension of the market. Furthermore, the contested decision clearly sets out the facts and the legal considerations justifying the rejection of the complaint so far as the alleged infringements of Articles 81 EC and 82 EC were concerned. The Commission cannot therefore be criticised for not having referred either in the administrative procedure or in the contested decision to documents which the applicant has not shown to be essential.

201 It should further be noted that the Commission's letter of 13 April 1995 merely asked the applicant which of the documents in the file which were of particular importance might be confidential vis-à-vis Caterpillar and, as such, could not be communicated to that undertaking. Likewise, the letter sent to the applicant on 15 June 1999 by the Member of the Commission, Mr Van Miert, merely stated that, 'following the recent judgment in *Javico*, [his] services [were] in the process of concluding the consultation procedures prior to sending a new statement of objections' and that the complainant must however agree 'that it was impossible for [Mr Van Miert], at [that] stage, to prejudge the outcome of that consultation'. Those documents therefore do not make it possible to establish that, for seven years, the Commission gave the applicant the impression that it had decided to impose a sanction on Caterpillar under Articles 81 EC and 82 EC rather than reject the complaint and that the documents did not have to be examined in the context of the final decision.

202 Consequently, the complaints alleging lack of diligence and lack of impartiality in the examination of the complaint and failure to state reasons for the contested decision must be rejected.

3. *The complaint alleging breach of Article 6 of Regulation No 2842/98*

203 The applicant maintains that the Commission breached Article 6 of Regulation No 2842/98, which provides that where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it is to inform the complainant of its reasons and set a date by which the complainant may make known its views in writing. In the present case, the Commission did not give the applicant an opportunity to make known its views on the reasons for which the Commission proposed to reject its complaint. Thus, the contested decision criticises the applicant for not having adduced certain evidence, in particular as regards the reality of the purchases from Maia at the Consumer price in dollars before 14 February 1993 or the fact that the orders placed with Maia were intended for France and not for Africa, without giving it the opportunity to discuss those questions in its observations on the Article 6 letter.

204 However, the Court observes that the Article 6 letter stated that, after analysing the various documents obtained in the context of the administrative procedure, the Commission had reached the conclusion that, 'as matters [stood,] the evidence gathered [did] not enable it to take action on [the] request'. As regards, more particularly, the documents relating to Maia, the Article 6 letter states the following:

'ICBO and Schmidt obtain parts from Maia at prices ("Consumer price" in dollars or "international price list" in dollars) other than — and apparently lower than — those at the Italian price list [by] representing that those parts are to be sent to the United States, to which, owing to the much lower prices than those charged in Europe, exports at the current European prices are normally not profitable. Those parts are in reality intended for Haladjian ... for its commercial activities in Africa and in France.'

205 It was in response to that account of the reasoning which the Commission intended to follow that Haladjian, without providing any evidence in that regard, claimed that the replacement parts bought through ICBO and Schmidt were intended for France and that Maia did not dare to provide Haladjian openly because of Caterpillar's threat to cancel its agreement. Accordingly, the applicant cannot be surprised that the contested decision points out in response to those observations that Haladjian has never proved that it was able to benefit from the international price list with Maia and that it had also not proved that the sales through ICBO and Schmidt had France and not Africa as their final destination.

206 Consequently, the complaint alleging breach of Article 6 of Regulation No 2842/98 must be rejected.

4. *The complaints alleging breach of the right of access to the file*

207 The applicant recalls that, by letter of 23 October 2001, it requested the Hearing Officer for a copy of two documents referred to in the Article 6 letter, namely information on prices provided by some of Caterpillar's European dealers (see the Article 6 letter, point 5.1) and certain documents from Leverton in the Commission's possession (see the Article 6 letter, point 7.1(d)). By letter of 10 December 2001, the Hearing Officer replied that the data relating to Caterpillar's pricing practices with its various dealers were confidential data, while pointing out that, as the proposed rejection of the complaint was not based on specific price levels, it was not essential that the applicant should know what was in those documents. The Hearing Officer also stated that the Leverton document which was not communicated to the applicant prohibited Leverton from using its United States subsidiary to obtain supplies outside the CES system. The Hearing Officer concluded that the document was not relevant to the rejection of the complaint.

208 However, the applicant claims that, contrary to the Hearing Officer's assertion, a document relating to the way in which Caterpillar applies the CES system to the United States subsidiary of a European dealer was wholly relevant for the purpose of dealing with the case, in so far as it made it possible to analyse the effects of the CES system on competition in the Community. The applicant further states that the Article 6 letter sets out certain data on the prices charged by Caterpillar to its dealers, whereas no consideration on that point is to be found in the contested decision. Such information is none the less relevant for the purpose of determining the content of Caterpillar's pricing policy towards its dealers. Thus, it is appropriate to ascertain whether there is a correlation between the targeted discounts which Bergerat proposed to a number of Haladjian's customers in 1993 and the prices which Caterpillar charged to that dealer during that period or, more generally, whether the prices charged by Caterpillar to its dealers are significantly different from the prices to United States dealers and, if so, for what reasons.

209 Furthermore, the applicant observes that the contested decision fails to take into account the fact that an employee of Maia acknowledged in the context of the administrative procedure that Caterpillar would cancel rebates if it sold to Haladjian.

210 For all of those reasons, the applicant requests the Court to take all appropriate measures to ascertain that the Commission's file does not contain any items that were not taken into account or that were incorrectly analysed by the Commission, in order to ascertain whether the decision is genuinely based on accurate facts and whether it contains any manifest errors of assessment in addition to those on which the applicant has been able to shed light. In formulating that request, the applicant is aware that, as complainant, it does not have as extensive a right of access to the file as the undertakings involved. Nor does it claim the right to know business secrets. For that reason, it suggests that the Court should have the file, or at least any document which it may deem appropriate, communicated directly to it, taking into account the need to remove any uncertainty in the interest of resolving the dispute.

211 The Court observes that the arguments put forward by the applicant in the context of the complaint alleging breach of the right of access to the file do not call in question the Hearing Officer's finding that the content of the documents in issue was confidential vis-à-vis the applicant for reasons associated with business secrecy. Accordingly, there can have been no breach in this case of the right of access to the file.

212 Furthermore, when criticising the Hearing Officer's finding that it was not essential that the applicant should know what was in the documents in order to understand the reasons why its complaint was rejected, the applicant merely indicates, purely hypothetically and prospectively, what interest the Commission might have in examining Caterpillar's pricing policy vis-à-vis its dealers. In that regard, it should be borne in mind that, following a complaint alleging infringement of Articles 81 EC and 82 EC, the Commission is not required to initiate a proceeding seeking to establish those infringements, but only to examine carefully the elements of fact and of law brought to its notice by the complainant with a view to determining whether those elements reveal conduct of such a kind as to distort competition within the common market and affect trade between the Member States (see paragraphs 26 to 28 above). The Commission cannot therefore be criticised for not having described in detail in the contested decision Caterpillar's pricing policy vis-à-vis its dealers, since the decision explains to the requisite legal standard the reasons why Haladjian's allegations of infringements of Articles 81 EC and 82 EC must be rejected.

213 The Court therefore does not deem it necessary to adopt measures of investigation and order the Commission to produce all the documents material to the outcome of the dispute in response to the applicant's request to that effect.

214 Finally, it must be observed that the applicant cannot refer for the first time at the stage of the judicial procedure to the fact that, according to it, at a meeting of the cabinet of the Member of the Commission, Mr Van Miert, on 29 June 1998 one of those present stated that, 'on the occasion of an investigation, a member of Maia's staff acknowledged [in writing] that if Caterpillar knew that it sold to Haladjian, its rebates [would be] cancelled' as a ground for annulment of the contested decision. Even on the assumption that that fact were true, which is not apparent from the file, it would not suffice to call the contested decision in question, since the decision states that Caterpillar had threatened Maia before February 1993 that it would cancel Maia's distribution agreement should it transpire that it was circumventing the rules of the CES system by making inter-zone sales without complying with the relevant rules. The comment of the Maia official described above might therefore perfectly well come within the framework of the Caterpillar's threat to cancel Maia's agreement if it continued to sell to the ICBO/Schmidt channel, which had been denounced in the anonymous letter of February 1990.

215 Consequently, the complaints alleging breach of Article 6 of Regulation No 2842/98 must be rejected.

216 It follows from the foregoing that the third plea in law must be rejected in its entirety.

217 Accordingly, the application must be dismissed in its entirety.

Costs

218 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. As the applicant has been unsuccessful and the Commission has requested that the applicant be ordered to pay the costs, the latter must be ordered to bear its own costs and to pay those incurred by the Commission and by the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

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

García-Valdecasas Cooke Trstenjak

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon R. García-Valdecasas

Registrar President

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