

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 June 2001

relating to a proceeding pursuant to Article 82 of the EC Treaty

(COMP/E-2/36.041/PO — Michelin)

(notified under document number C(2001) 1582)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/405/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

After having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the Treaty establishing the European Community,

Whereas:

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by Regulation (EC) No 1216/1999⁽²⁾, and in particular Articles 3(1) and 15(2) thereof,

I. FACTS

A. THE UNDERTAKING

Having regard to Commission's Decision of 28 June 1999 to open proceedings in this case,

- (1) The Michelin group, with a net turnover of EUR 13,763 billion (FRF 90,28 billion) in 1999 and a world market share (all tyre types combined) of more than 18 %, is in competition with the Japanese Bridgestone group and the Goodyear/Sumitomo alliance for world leadership in the tyre field. In the Community, Michelin is by far the largest tyre maker, with a market share (approximately 32 %) almost twice as large as that of its closest competitor, Goodyear/Sumitomo. In France, it is in a commanding position, with market shares which can be estimated at [...] (*) of the total (all tyres combined).

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty⁽³⁾,

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

(*) Business secrets have been omitted from the text.

B. PROCEDURE

- (2) In May 1996 the Commission opened an own-initiative proceeding against Michelin. It had evidence suggesting that the firm was abusing its dominant position on the French market for replacement tyres for heavy vehicles by imposing on dealers unfair business conditions based *inter alia* on a complex system of fidelity rebates aimed at tying those dealers closely to it. A number of detailed requests for information were sent to Michelin, its competitors and tyre dealers and importers. An investigation under Article 14(3) of Regulation No 17 was carried out at Michelin's premises in France in June 1997. On 28 June 1999 the Commission sent a statement of objections to Michelin. A hearing of the parties (Michelin and the interested party Bandag Inc.) took place on 20 December 1999.

C. THE PRODUCT

- (3) The tyre industry comprises the manufacture of inner tubes and outer casings (or carcasses), and the renewal of the tread on worn tyre casings. This Decision concerns only the manufacture of outer casings and the renewal of the tread on worn tyre casings.

- (4) To understand what a tyre is, three main distinctions must be drawn:

1. THE DIFFERENT TYPES OF TYRE

- (5) First of all, a distinction must be made between different sorts of tyre designed for different types of vehicle:

- light tyres for cars,
- tyres for delivery vans and light commercial vehicles,
- heavy tyres for trucks and buses,
- tyres for agricultural tractors, road-building and earth-moving machinery, aircraft, etc.

- (6) Each type of tyre covers a wide range of different qualities, treads and sizes. The type of tyre chosen obviously depends first and foremost on the type of vehicle to which it is to be fitted and the purpose for which the vehicle is to be used. Car tyres and truck and bus tyres are not interchangeable. There are, moreover, major differences between the structure of demand on

the part of buyers of car tyres and that on the part of buyers of truck tyres. A large and growing part of car tyre distribution is effected through maintenance and service centres, car centres and superstores, which cover only a very small part of the truck tyre market. Truck tyres are for their part distributed mainly by specialised dealers.

- (7) These types of tyre also differ in terms of their unit price. For the most common dimensions, truck and bus tyre prices are more than five times higher than those of car tyres. There is no substitutability of supply between truck and bus tyres and the other types. According to Michelin, 'the resources employed to design and produce truck and bus tyres are radically different from those required to manufacture the other types of tyre' ⁽⁴⁾ (types of machine-tool, specific workshops, rubber compounds, requisite properties, standards to be met).

2. THE NEW TYRE

- (8) The tyre market can be divided into two sectors depending on the type of consumer that is being targeted. A clear distinction must be drawn between the two. On the one hand there is the original equipment market, and on the other the replacement market.

- (9) Original equipment tyres are sold by the tyre manufacturer direct to the vehicle producer, without passing through an intermediary. Replacement tyres, on the other hand, are sold to the final consumer primarily through a large number of specialised commercial outlets. Truck tyres are thus distributed mainly via specialised tyre dealers. The presence of these middlemen, who obtain their supplies either from the manufacturer or from wholesalers or official importers, distinguishes the replacement tyre market clearly from the original equipment tyre market.

3. THE RETREADED TYRE

- (10) Truck and bus tyres need not necessarily be new. Provided the casing is in a sound condition, used tyres may be given a new tread. In some cases it is possible to repeat the retreading process. Retreading is carried out not only by the tyre manufacturers themselves (in

⁽⁴⁾ Michelin's reply to the Article 11 letter of 3.12.1996.

France, for example, Michelin is the largest retreader of commercial vehicle tyres), but also by many firms specialising in the process.

the mould-cure/precure distinction is never mentioned as it has no impact on prices and competition. In Europe firms using the different systems compete with one another.

- (11) There are two retreading systems: mould-cure and precure.
- (12) *Mould-cure retreading* consists in applying new tread rubber to the tyre casing, which is then hot-cured in a dedicated facility. This system, by which it is possible to replace the tread, calls for mastery of new-tyre manufacturing techniques and tools and for that reason is used only by industrial enterprises. It also calls for an elaborate system for collecting casings, and involves transport constraints due to their conveyance to a central point and relatively long processing times. In 1995 mould-cure retreading accounted for 47 % of all retreading operations in western Europe⁽⁵⁾, but it is gradually losing ground to precure retreading.
- (13) *Precure retreading* consists in applying a precured tread obtained from an outside supplier to the tyre casing using a cold process. This system is used in small workshops run by specialised traders or independent retreaders. In 1995 precure retreading accounted for 53 % of all retreading operations in western Europe.
- (14) Owing to the characteristics of the techniques employed the two systems described above are generally aimed at different bodies of customers. Mould-cure retreading is aimed mainly at a body of customers made up of specialised dealers or wholesalers (who act as intermediary vis-à-vis the final consumer), whereas precure retreading is aimed mainly at a body of customers consisting principally and directly of final consumers.
- (15) Despite the differences between the two retreading systems, the products obtained are perfectly substitutable from the consumer's point of view. A tyre dealer can therefore have recourse to either system. It should be noted, moreover, that, although it requires more expensive equipment than the precure system, mould-cure retreading is not the prerogative of the tyre manufacturers and is practised by many medium-sized independent businesses. In market studies on retreading
- (16) Overall, transport firms in Europe and in France in particular currently fit new tyres and retreaded tyres in roughly equal proportions. The figures vary considerably, however, from one country to another. In Finland, for example, retreaded tyres account for 74,3 % of all tyres sold, while in Spain the corresponding figure is a mere 37,3 %.
- (17) From the point of view of the product's characteristics and the use to which it is put, in spite of the progress made by retreaders in the 1980s and 1990s appreciable differences remain between new tyres and retreads. In the minds of most users and distributors, a tyre whose tread has been renewed is associated with reduced reliability, a factor that must be taken into account. Many hauliers refuse to use such tyres on a tractor unit's steering axle and/or avoid using them for long-distance transport or the carriage of highly perishable goods. Some manufacturers, including Michelin, and most dealers still recommend, even nowadays, that some of these precautions be observed. This is one of the reasons why retreaded tyres are markedly cheaper than new tyres.
- (18) Despite yielding a comparable mileage if properly used, a retreaded tyre costs as a rule 50 % less than a new one. Only new tyres sold under 'third line' brand names stand comparison price-wise, although they are still more expensive. These are tyres of lower quality, imported for the most part from Asia or central and eastern Europe or sold under private brands (being manufactured for so-called distributor brands). Such tyres, which are generally not retreadable, enjoyed a certain amount of growth in the early 1990s when the industry as a whole was in crisis. They account for only a small proportion of all new truck and bus tyres sold on the French market [...] of total sales, according to documents found on Michelin's premises, [...] according to other manufacturers, [...] between 3 and 6 %).

⁽⁵⁾ That is, the EEA countries plus Switzerland.

D. THE TYRE MARKET

- (19) The main features of the tyre market will be analysed one by one below, and then the peculiarities of the retread market will be examined in detail. Particular attention will be paid to the market for replacement truck tyres in France because it is on that market that the conduct objected to was identified.
- (20) By and large the tyre industry is highly concentrated both globally and at the European level. In 1997 six groups (Michelin, Bridgestone, Goodyear, Continental, Sumitomo and Pirelli) with a presence in numerous countries controlled more than 72 % of world tyre sales and over 86 % of European sales.
- (21) At world level, two manufacturers, Michelin (France) and Bridgestone (Japan), which in 1997 each accounted for between 18 and 20 % of all tyres sold, were constantly vying for leadership. Goodyear (United States) followed closely with 15 % of the market. Then, some way behind, came Continental (Germany), Sumitomo/Dunlop (Japan) and Pirelli (Italy) with 8 %, 6 % and 5 % of the market respectively.
- (22) The position changed in 1999 when Goodyear and Sumitomo merged, propelling the new entity to the head of the field with a combined market share in excess of 21 %.
- (23) The market shares are not spread evenly across the world, each of the three main players, Michelin, Bridgestone and Goodyear, having a preponderant presence in its 'domestic' market.
- (24) Thus, in western Europe, the six world leaders rank in a slightly different order. Table 1 shows that the level of concentration in the European market is even higher than at world level and that the Michelin group is the clear European leader with a market share much bigger than those of Continental and Goodyear, which were in second and third places until the Goodyear/Sumitomo alliance was announced. The latter operation resulted in the new entity ranking second, still well behind Michelin, though, its combined market share still being 10 percentage points lower than Michelin's.
- (25) Apart from a few small western European producers (e.g. Vredestein (Netherlands), Nokian (Finland), Trelleborg (Sweden), Marangoni (Italy)), the other competitors include a number of south-east Asian and central and

eastern European producers who sell part of their output in western Europe. The volume of these sales is, however, not significant when compared with those of the six majors. Sales by Yokohama or Toyo thus accounted for at most 1 % of the market respectively.

Table 1: Market shares in Europe, all tyres combined (%)

Manufacturer	1993	1995
Michelin	31,9	31,4
Continental	13,9	17,1
Goodyear	13,1	13,3
Pirelli	9,2	8,6
Bridgestone	9,3	7,7
Sumitomo	9,3	7,7
Others		
Yokohama, Toyo, Vredestein + 16 others	13,3	13,5
TOTAL	100,0	100,0

Source: The Economist Intelligence Unit ⁽⁶⁾.

Table 2: Central and eastern European producers

Producer	'Tyre' turnover in 1993 (million ECU)
Matador (Slovakia)	110
Sava (Slovenia)	110
Barum (Czech Republic)	105
Stomil (Poland)	94
TC-Debica (Poland)	90
Victoria (Romania)	59
Taurus (Hungary)	50

Source: 'L'industrie du caoutchouc dans l'Union européenne', BLIC, October 1995.

⁽⁶⁾ Study entitled 'The World Tyre Industry, a new perspective to 2005', the EIU, 1997.

- (26) The structure of supply in the Community is not homogeneous but varies considerably from one Member State to another. The Michelin group's market shares vary widely in Europe, [...] in Spain, Italy and the Netherlands, [...] in France and Finland, to around [...] in Germany and the United Kingdom, for example. In France, where the manufacturer has always enjoyed a particularly high reputation, Michelin's position in terms of market share ([...] all types combined) is especially strong, much more so in fact than in the rest of the Community.
- (27) Across Europe there are some 120 tyre-manufacturing plants. Michelin, which owns 30, has more than twice as many as its nearest competitor. In France, five companies own production plants. Out of a total of 19 plants Michelin controls 11, which in terms of French production capacity represents more than 50 % of the total. Pneumatiques Kléber, which is controlled by Michelin, has another two. The remaining plants are owned as follows: Bridgestone/Firestone and Goodyear each have one plant, while Continental and Dunlop (Sumitomo) each have two. Of these 19 plants, only five produce truck tyres, four of them being Michelin-owned and the fifth being owned by Dunlop.
- (28) This horizontal concentration is accompanied by strong vertical integration. The tyre manufacturers are controlling the distribution channels more and more. This trend, which began in the United Kingdom back in the 1970s, spread to France in the early 1990s.
- (29) Over the last ten years or so cheap, low-quality new tyres known as 'third-line' brands have started to come on to the market. These tyres have nevertheless enjoyed only limited growth and account for fewer than 10 % of new replacement tyres. Originally, third-line tyres were made only by south-east Asian and central and eastern European companies. In recent years, however, the leading tyre manufacturers have also moved into this segment, often by buying up some of companies concerned. This is the case with Michelin (Taurus and Stomil), and also with Continental (Barum) and Goodyear (Debica). The aim is to satisfy demand from customers for whom price is a decisive factor when buying tyres.
- (30) From the demand point of view, the importance of the part played by specialised dealers in tyre distribution in Europe should be stressed. In 1995 specialised distributors accounted for 70 % of sales of replacement tyres for motor vehicles. Car dealers and garages came next with 18,9 % of sales, followed by supermarkets with 7,1 % and service stations with 4 %. This domination by specialised distributors is even more marked in the case of truck tyres. Sales to road hauliers are dominated overwhelmingly by the specialist trade, which is able to provide them with personalised service and advice. The choice, fitting and management of truck tyres involve numerous technical considerations.
- (31) Increasingly, manufacturers are becoming directly concerned in the distribution of tyres, notably through integrated networks and franchises. These distribution channels have greater brand-promoting potential than independent dealers. The fear that distribution will be controlled more and more by competitors is having a knock-on effect by inducing manufacturers to go further down this road.
- (32) While replacement tyre distribution is generally speaking highly fragmented, there are major differences between the markets for car tyres and truck tyres. 'Car' distribution is highly diversified and is effected mainly via auto service centres (31 %), car manufacturers' networks (26 %) and tyre specialists.
- (33) In the case of truck tyres, on the other hand, specialised dealers, be they independent or part of a network, distribute between 75 % and 85 % of tyres on the new replacement tyre market, auto service centres and supermarkets in particular being almost entirely absent from this market. The remaining 15 to 25 % are delivered either direct under public supply contracts, to the owners of large fleets or through direct purchases by truck garages and dealers. Some supplies take the form of tyre maintenance or total tyre management service ('mileage') contracts between manufacturers and independent hauliers. Michelin, in an internal document dating from 1996, states that tyre specialists account for [...] of replacement sales, the remainder being distributed via direct sales to users [...], truck dealers [...] and maintenance contracts [...].
- (34) According to the Commission's best estimates, French specialised dealers control some 2 225 sales outlets, approximately 500 of which belong to integrated networks controlled by tyre manufacturers. Michelin owns by far the largest network. The French manufacturer has created a European network called 'Euromaster', whose holding company is located in the Netherlands and

which has more than 1 200 outlets in eight countries. Although the network is controlled by Michelin, it is not exactly an in-house sales medium as Euromaster markets competing brands as well as Michelin products. The network has about 330 sales outlets in France, more than 240 of which distribute truck tyres. For its part, Sumitomo/Dunlop controls 120 sales outlets directly (via 'Vulco', formerly 'Pneu Holding'), while Bridgestone/Firestone has 26 (under the 'Gay', 'Métifiot' and 'Maxipneu' names). In terms of market share, the importance of the manufacturers' networks is even greater in that they control more than 30 % of the market for new replacement truck tyres. The market shares can be broken down as follows: [...] for Euromaster, [...] for Vulco and [...] for Bridgestone/Firestone.

(35) Manufacturers, including Michelin, have tried in recent years to maintain the closest possible contact with those distributors who have remained independent. To this end networks or 'clubs' have developed, formed by independent dealers to whom a manufacturer grants certain specific advantages in return for numerous commitments consisting for the most part in promoting the manufacturer's brands. These networks are sometimes called 'soft franchises'. In France, the most outstanding example is the network formed by the signatories to the 'Convention bilatérale de coopération professionnelle et d'assistance technique' (bilateral business cooperation and service assistance agreement), better known as the 'Club des amis Michelin' (Michelin Friends Club), which has 163 members and 375 sales outlets and which, according to Michelin, accounts [...] of the market for new replacement truck tyres and [...] of the retreaded tyres market. The other clubs or networks belonging to manufacturers, which are of much lesser importance, are the 'Réseau BF Partner', which reportedly has between [...] and [...] members, 'Vulcopneu +', with approximately [...] members, 'Sempérit' ([...] members) and the recently set up 'Réseau Pneu expert', introduced into France in 1997 by Continental.

(36) To counter this entry en masse by manufacturers into the distribution market, a number of independent dealers have tried to join forces. They have yet to manage, however, to get their act together sufficiently to set up truly standardised chains capable of competing successfully with the manufacturers' networks or their various 'clubs'. The investigation carried out by the Commission in 1997 revealed that the major groupings of independents are as follows: 'Arc en Ciel', which, with [...] sales outlets in France grouped together under a

rainbow sign, controls [...] of the truck tyre market; the buying association 'Seda-Point S', which, with [...] members reportedly controls [...] of the market; and PAP, whose [...] members are said to control about [...]. The last-mentioned entity is not really a group, but rather a 'trade association'. None of these groupings has so far been recognised as such by Michelin, with the result that their members cannot benefit, vis-à-vis the market leader, from the more favourable joint purchasing terms that are available. A number of regional groups are also developing such as DK ([...] sales outlets), Ayme ([...]) and Vaysse ([...]).

(37) The breakdown of the various forms of tyre distribution (all types combined) on the French market was as follows in 1996: integrated networks (manufacturers): 25,52 %; independent networks: 17 %; (independent) buying associations: 34 %; other independents: 23,48 %. Approximately 75 % of all tyre distribution in France is therefore still, formally at least, carried on independently of the manufacturers.

(38) The structure of demand varies, however, considerably from one Member State to another. While in some countries (United Kingdom, Germany) tyre distribution is highly concentrated, it is more fragmented elsewhere (Italy, Spain, Portugal). In fact, although independent specialised dealers predominate in those countries where chains (integrated networks, 'fast-fit' oil change centres) have hitherto been thin on the ground owing, among other things, to the market being considered too small, quick-service integrated chains are currently experiencing strong growth. In point of fact, although the market shares of specialised dealers and chains look set to grow further after 2000, this growth should benefit mainly the integrated chains, the independent specialised retailer being threatened in the long term with gradual exclusion from the market.

The truck tyre market in figures

(39) Generally speaking, with regard to the Community an analysis of the various statistical sources shows that aggregate sales of truck tyres, all types combined (including retreads) come to around 15,5 million units. The table below, which was found on Michelin's premises and which concerns 1995, is fairly representative and gives a good overview:

Table 3:
Truck tyre market in the Community (7)

Country	New (OE+RT) (8)	Retreaded
Denmark	[...]	[...]
Finland	[...]	[...]
Sweden	[...]	[...]
Germany	[...]	[...]
United Kingdom	[...]	[...]
Austria	[...]	[...]
Belgium	[...]	[...]
Netherlands	[...]	[...]
France (9)	[...]	[...]
Spain	[...]	[...]
Italy	[...]	[...]
Greece	[...]	[...]
Portugal	[...]	[...]
TOTAL	[...]	[...]

(40) Of these 15,5 million units, original equipment tyres account for about 14 % of the total, or 2,25 million. The overall volume of the European replacement tyre market is therefore approximately 13,3 million. Of these sales, the retread market accounts for approximately 48 %.

(41) Given the features of the French replacement truck tyre market, some figures may be given to illustrate trends.

(7) Source: Michelin, taken from the document 'Rapport sur le rechapage transmis à M. Vasdeboncœur'.

(8) Original equipment (OE) — replacement (RT).

(9) The sales figures for France are not identical to figures to be found in other tables in this Decision provided by third parties. The Commission relies first and foremost on the Michelin data.

Table 4: Number of truck tyres sold in France between 1988 and 1996 (10)

Year	Original equipment	New replacement	Retreaded
1988	437 325	1 139 065	1 085 080
1989	456 862	1 195 076	1 135 311
1990	367 238	1 192 229	1 075 392
1991	358 507	1 123 982	1 035 331
1992	295 555	1 095 589	1 036 158
1993	243 117	1 043 130	945 582
1994	314 474	1 147 306	967 740
1995 (11)	362 522	1 242 910	960 100
1996	372 807	1 068 495	911 217
Average	356 490	1 138 642	1 016 879

(42) Over the period in question, the total market for truck tyres amounted on average to 2,5 million tyres, 14,2 % of which were original equipment tyres, 45,3 % new replacement tyres and 40,5 % retreaded tyres.

(43) On the replacement market, which totals on average 2,15 million tyres, sales break down into 1,14 million new tyres and just over a million retreaded tyres. The share of retreaded tyres may therefore be put at 47,2 % on average.

Specific characteristics of the retreaded tyre market

(44) According to Michelin's estimates, nearly [...] truck tyre casings were retreaded in western Europe in 1995. The precure retread segment is growing overall while the mould-cure segment is shrinking. Thus in France in 1992 the mould-cure share came to 82 % compared with only 75 % or so today.

(10) Tyres study, 'Journal de l'Automobile' No 544 of 20.9.1996.

(11) The truck tyre sales figures do not match those given in the table provided by Michelin in paragraph 39 or in the Eurostat table in paragraph 150. The differences are due to the different sources relied upon and the different calculation methods used. This Decision relies first and foremost on the Michelin data.

(45) At Community level the structure of supply also varies considerably from one Member State to another. The two main players on the market are Bandag and Michelin, which operate in most countries albeit in different ways. Michelin uses mainly the mould-cure system and has several large retreading plants in Europe, including two in France (Clermont-Ferrand and Avalon). Bandag on the other hand has set up a network of franchisees who do procure retreading. With approximately 1 500 000 casings retreaded each year, it is estimated that Michelin holds nearly [...] of the European market, while Bandag's franchise network controls approximately [...].

(46) However, the market shares of the two competitors vary appreciably from country to country. In France especially, where Michelin and its subsidiary Pneu Laurent, which specialises in retreading, are firmly entrenched, the joint market shares of these two firms regularly exceeds [...]. Bandag's franchise network, which ranks second on the market, holds only [...].

(47) A user can procure retreaded truck tyres in a number of ways. Either he supplies his own casing to a tyre specialist, a franchisee or an industrial retreader and recovers it once it has been retreaded ('custom' retreading), or he provides a casing and at the same time buys a retreaded tyre made from another casing ('standard exchange' retreading), or else he buys a retreaded tyre outright without providing any casing at all. In France, unlike in other Member States, custom retreading is by far the most common practice (according to manufacturers' estimates it accounts for between 75 % and 90 % of all retreading operations).

(48) For this reason the business of retreading is generally considered in France to be not a sales activity but a service, or after-sales service, activity. Most hauliers calculate the cost of a truck tyre on the basis of the purchase price, the mileage obtained and the residual value of the casing should it be resold. In calculating the cost of a truck or bus tyre, several phases in its life are usually taken into account, i.e. an initial phase as a new tyre, followed by a second and sometimes a third phase as a 'reconditioned' tyre. Since the price of a reconditioned tyre is much lower than that of a new tyre, retreading reduces the total cost per kilometre of the tyre over its whole life. One practical consequence of this is that each haulier wishes to be sure that the casings used in the retreads he receives back are those of the tyres which he bought new and which, in his

opinion, he used competently during the first phase of their life. He regards casings which are in good condition as continuing to belong to him and will generally not entrust them to a retreading firm unless specific note is taken of the matrix number stamped on the sidewall of the tyre. This enables him to check whether it is his own tyres that he receives back in retread form and not other tyres with possible unknown defects.

(49) Accordingly demand for retreaded tyres or for the retreading service emanates in the final analysis from hauliers. Having said that, specialised dealer-distributors of truck tyres are in most cases charged with acting as intermediaries between the retreader and the haulier.

E. MICHELIN'S COMMERCIAL POLICY

(50) It is necessary to highlight the various aspects of the commercial policy pursued by Michelin in France from 1980 until 1998 inclusive since after 31 December 1998 the commitments submitted by Michelin to the Commission put an end to the abusive nature of that policy. The analysis will focus on each of the three aspects of which the policy consisted, namely:

1. the general price conditions for France for professional dealers ('Conditions Générales de Prix France aux Revendeurs Professionnels'), which are the backbone of Michelin's commercial policy. (For convenience, this category will include individual commercial cooperation agreements ('conventions de coopération commerciale'), which are simply an extension of the general conditions);
2. the agreement for optimum use of Michelin truck tyres ('Convention pour le Rendement Optimum des Pneumatiques Poids Lourd Michelin' — 'PRO agreement'), which may be subscribed to under certain conditions by truck tyre dealers wishing to obtain rebates or other benefits;
3. the agreement on business cooperation and assistance service ('Convention de Coopération Professionnelle et d'Assistance service' known as the 'Club des amis Michelin', or Michelin Friends Club), reserved for a limited number of dealers wishing to cooperate more closely with Michelin.

1. THE GENERAL PRICE CONDITIONS FOR FRANCE FOR PROFESSIONAL DEALERS

- (51) The general price conditions for France for professional dealers laid down, for professional dealers, among other things the conditions of sale and the prices for a large part of Michelin tyres intended for the replacement market, and in particular car, van, forklift, truck, earth-mover, agricultural and light plant tyres, and retreads.
- (52) The conditions provided for a pricing system which comprised, firstly, a 'list' price known as the 'invoicing scale' (net price invoiced, less any rebates) and, secondly, a highly complex set of rebates which, until 1997, were in most cases not paid until the last day of February of the year following the financial year concerned.
- (53) It was not until 1997, after the entry into force of a French law of 1 July 1996 prohibiting selling at a loss, that Michelin decided to overhaul its commercial policy. From that moment on, the bulk of the rebates and/or payments made before the end of February of the year following the reference period were shown on the invoice. The system existing until 1996 inclusive and that established as from 1997 will be examined in turn below.

The system of rebates from 1980 to 1996

General

- (54) Before 1997 Michelin's general conditions provided for a complex system of rebates which covered an accounting year beginning on 1 January and ending on 31 December and which for the most part were not paid until the last day of February of the calendar year following the financial year in question.
- (55) The dealer paid for new or retreaded tyres bought from Michelin at the price quoted in Michelin's official 'invoicing scale'. In most cases this amount had to be paid within '30 days of the end of the accounting month'. On the other hand, the amount of the rebates obtained was not received until the end of February of the following year, i.e. up to 13 months after the date of the relevant transaction.

The various rebates

- (56) The rebates provided for in the general conditions were divided into three categories, namely quantity rebates, rebates for the quality of the dealer's service to users ('service bonus') and rebates dependent on increases in new tyre sales ('progress bonus'). In addition, dealers exceeding for two financial years in a row a given Michelin turnover threshold were allowed to negotiate a 'commercial cooperation agreement' (known as an 'individual agreement') entitling them to further rebates.

Quantity rebates

- (57) The size of the quantity rebates depended on the turnover achieved by the dealer with Michelin products during the accounting year, all tyre types combined apart from heavy plant tyres and retreads. The conditions comprised a 'grid' showing the percentages deductible from the list price for the entire turnover achieved. In 1995 for example, these rebate percentages ranged from 7,5 % on a turnover of FRF 9 000 to 13 % on a turnover of over FRF 22 million.
- (58) The 'heavy plant tyre' and 'retreads' categories each had their own grid. In 1995 for example, the rebates ranged, in the case of retreads, from 2 % on a turnover of over FRF 7 000 to 6 % on purchases exceeding FRF 3,92 million.

- (59) It was not until 1995 and 1996 that the general conditions provided, under certain conditions, for three advances on quantity rebates, payable in May, September and December of the current financial year and corresponding, provisionally, to 5 % of the 'truck + earth-mover + forklift + light plant' turnover achieved in respect of each of the corresponding periods.

Service bonus

- (60) The service bonus was an additional incentive proposed by Michelin to the specialised dealer 'to improve his equipment and after-sales service'. In reality the degree of cooperation and the services offered to Michelin were also taken fully into account when the rates were fixed⁽¹²⁾.

⁽¹²⁾ Between the assessments 'good' and 'excellent', for example, twice as many points may be awarded in some cases.

- (61) To qualify for such a bonus, a minimum annual turnover had to be achieved with Michelin products in the course of the year. The amount ranged from FRF 160 000 in 1980 to FRF 205 000 in 1985. It then became FRF 50 000, falling to FRF 45 000 in 1995 and 1996.
- (62) The size of the bonus, which was fixed at the beginning of the year by annual agreement with the dealer in a document entitled 'Service bonus', depended on compliance with commitments entered into by the dealer in a number of areas. Each commitment corresponded to a number of points, and the exceeding of certain thresholds of points gave entitlement to a bonus corresponding to a percentage of the turnover achieved with Michelin France, all tyre types combined. This percentage ranged from 0 to 1,5 % between 1980 and 1991 and from 0 to 2,25 % between 1992 and 1996.
- (63) Between 1980 and 1995 the commitments to be complied with by dealers grew appreciably both in number (to between 10 and 13 items for which points could be awarded) and in terms of their content. Most of the criteria concerned services rendered to customers or knowledge about products. Thus the criteria enabling the size of the bonus to be increased included staff training, possession of certain machinery, vehicles and know-how, quality of facilities, etc. Some of the criteria, however, benefited mainly Michelin. Three of them may be mentioned here.
- (64) *New products service*: between 1980 and 1987 the commitment consisted in 'supplying customers with new Michelin products' and 'obtaining supplies of new products, giving the following entitlements depending on the type and dimension concerned: less than 30 %: 0 points, between 30 and 50 %: 1 point, more than 50 %: 2 points'. Between 1987 and 1990 the commitment changed. It now consisted in obtaining supplies of new products as a proportion of the regional share laid down for those products, giving the following entitlements: less than the regional share (0 points), equal to that share (1 point) or higher than that share (2 points). From 1990 onwards the commitment took the form of 'a positive contribution towards new Michelin products: knowledge and promotion of the said products: 2 points. Advertising at the point of sale: 1 point'.
- (65) *Market information*: between 1980 and 1987 the commitment consisted in providing Michelin ('the supplier'), to help it plan its production, either annually (1 point) or quarterly (2 points) with the largest possible amount of information on the behaviour of the different types of product, mileage obtained, etc. Between 1987 and 1992 Michelin also demanded under this heading 'statistics on sales broken down by product, knowledge of the local market'. From 1992 onwards the dealer had to provide relevant information concerning his statistics, his sales forecasts broken down by product (2 points) and technical data on products such as performance data, quoting stock numbers (2 points), or unquantifiable information (1 point). Some of the dealers who were consulted confirmed that they had been asked to provide sales statistics showing how Michelin compared with its competitors.
- (66) *Retreading*: between 1980 and 1987 a dealer earned points if he had a roadside assistance vehicle for trucks (1 point) and knowledge of how to sort casings (2 points). Between 1987 and 1992, if he had the necessary know-how and means of sorting Michelin casings with a view to their being retreaded or regrooved, he earned between 0 and 2 points. From 1992 onwards he earned 1 point if he promoted regrooving and 1 point if he systematically had Michelin casings retreaded by Michelin. In 1996 only the systematic carrying-out of the first retreading of Michelin tyres by Michelin was insisted upon.
- Rebates dependent on increases in new tyre sales ('progress bonus')*
- (67) This category included two bonuses, i.e. the progress bonus and the rate bonus. However, since the latter does not apply to truck tyres, it will not be discussed here.
- (68) The progress bonus was intended to reward dealers who agreed at the beginning of the year to undertake in writing to exceed a 'minimum base, fixed by common agreement, depending on past performance and future prospects' and who managed to exceed it. The base was proposed each year and was negotiated with the dealer.
- (69) To calculate the bonus Michelin used the following formula:
- $$P(\text{rebate}) = T \times \frac{C}{R} - R - B$$

- (70) In this formula 'C' is the truck tyre turnover, 'R' the actual number of tyres sold in the course of the year and 'B' the 'base' (commitment to buy in terms of number of tyres). 'T' is a rate which increased gradually depending on dealers' buying commitments in terms of number of tyres. The bonuses obtainable and the mechanism for calculating them have changed substantially in recent years.
- (71) Between 1980 and 1984 the bonus ranged from 2,5 % for a commitment to buy between 30 and 1 499 tyres to 15 % for a commitment to buy more than 8 500 tyres, with six separate steps. In 1985 the minimum bonus rate was increased to 5 %, while the number of steps was reduced to five. Between 1986 and 1994 the minimum rate was increased still further to 7,5 %, the number of steps being reduced to four, as follows: between 30 and 999 tyres: 7,5 % of the amount by which the base was exceeded; between 1 000 and 2 699 tyres: 10 % of the amount by which the base was exceeded; between 2 700 and 8 499 tyres: 12,5 % of the amount by which the base was exceeded; 8 500 or more: 15 % of the amount by which the base was exceeded, such amounts being limited to 25 % of the base.
- (72) In 1995 and 1996 the mechanism for calculating the bonus changed substantially. There were now only two steps, but more importantly, where the amount by which the base was exceeded was equal to or greater than 20 % of the base, a single bonus rate applied to the entire turnover achieved. Thus:
- between 30 and 999 tyres: 12 % of the amount by which the base was exceeded if the progress was lower than 20 % of the base and 2 % of aggregate turnover in respect of new truck tyres if the progress was equal to or greater than 20 % of the base,
 - over 1 000 tyres: 15 % of the amount by which the base was exceeded if the progress was lower than 20 % of the base and 2,5 % of aggregate turnover in respect of new truck tyres if the progress was equal to or greater than 20 % of the base.
- (73) If a dealer managed only to achieve sales equal to the 'base', he nevertheless received a bonus worth 0,5 % of all tyres bought.
- (74) To understand fully how this bonus operated, two of its aspects must be brought to the fore:
- (a) the key feature of the bonus and one of the key elements in the discussion about annual commitments was the fixing of the 'base', because it was the amount by which this was exceeded that determined the maximum amount of remuneration payable. It was therefore in the dealer's interest that the base should be set at the lowest possible level so that he might achieve it easily. It was in Michelin's interest, on the other hand, that it should be set at the highest possible level so as to maximise its incentive effect;
- (b) bonuses were agreed at the beginning of the year in the light of the dealer's situation, with the result that, if the company changed hands during the year (sale, take-over, merger, etc.), the commitments became null and void and the bonuses had to be renegotiated in the light of the new situation. Moreover, towards the end of December, a downward indexation of the base could take place. This was decided unilaterally by Michelin and could vary from one type of product to another. It was also used to calculate the reduction factors to be applied in working out the following year's bases. In exceptional circumstances, a bonus might be paid even where the base was not reached (e.g. where a tyre was in short supply, resulting in supplies drying up, or where the dealer was a member of the Friends Club).
- The specific conditions granted to signatories to 'Commercial Cooperation Agreements'**
- (75) Dealers who achieved, with Michelin France's products a turnover exceeding the maximum amount referred to in Table I provided by Michelin concerning quantity rebates (e.g. FRF 24 million between 1991 and 1994 and FRF 22 million between 1995 and 1996) could sign a commercial cooperation agreement (commonly known as an 'individual agreement') with Michelin. From 1993 onwards, if they purchased more than 1 000 truck, earthmover and/or light plant tyres, they signed two individual agreements, namely a 'car and van' agreement and an 'industrial products' agreement. These agreements did not replace the general conditions, but merely supplemented them. According to Michelin, 16 to 18 major dealers signed this type of agreement between 1993 and 1996, 11 to 13 of which were industrial products agreements.
- (76) The main commitments entered into when signing such agreements were: to provide technical information and after-sales service for Michelin products; to help launch new Michelin products; to submit monthly or quarterly purchasing and sales forecasts to Michelin; and to obtain regular supplies of Michelin products. The benefits received in return were far from negligible:
- an extension of the tables corresponding to the quantity rebates (potentially resulting in a difference of up to 2 % of turnover);

- a specific, favourable system for calculating the progress bonus.
- (77) A specific scale applied in which the bonus was sandwiched between a threshold and a ceiling. Dealers could thus generally obtain a progress bonus of 1 % (threshold) of annual turnover (truck/earthmover/light plant) simply by achieving the base, up to a maximum of 3 % if they exceeded the base by 15 % (ceiling).
- (78) By way of example, in 1996 a commitment to purchase between 1 000 and 8 999 tyres granted entitlement to a bonus ranging from 1 % (minimum) if the base was reached to 2,5 % (maximum) if it was exceeded by 15 %. A commitment to purchase more than 9 000 tyres made it possible to earn up to 3 % more in return for exceeding the base by 15 %.
- (79) From 1993 onwards an additional bonus in support of industrial products of 1 % of turnover achieved with new Michelin truck, forklift, earthmover and light plant tyres could be obtained if the truck base was reached, as could:
- additional credit (a further 10, 20 or 30 days worth),
 - payment of part of the end-of-year bonus on the first working day in January of the following year instead of on the last day of February.

The rebate system in 1997 and 1998

- (80) As of 1997 Michelin made substantial changes to its business conditions for dealers, eliminating certain abusive practices which had hitherto characterised its behaviour. Further changes were made in 1998. The reasons behind these changes, which were in any case not introduced until after the Commission had opened its investigation, lie partly in the amendment of the French legislation prohibiting selling at a loss, and partly in the extensive restructuring of the Michelin group at the end of 1996.

The new rebate system

- (81) Different, separate business conditions were laid down for each of the following five product categories: 1. car/van, 2. truck/earthmover, 3. plant/forklift, 4. agricultural tractor, 5. two-wheeler, with different conditions, within

each of these categories, for dealers entitled, by virtue of their volume of purchases (more than 2 500 tyres in the truck/earthmover/plant category), to sign an individual commercial agreement.

(a) General conditions

- (82) In the truck tyre sector, new and retreaded tyres were treated differently.

(i) As regards new truck tyres

- (83) The main changes concerned the disappearance of quantity rebates, the service bonus and the progress bonus, and the appearance of new categories, namely 'invoice rebates', the 'achieved-target bonus', 'end-of-year rebates' and a 'multiproduct rebate'.
- (84) *Invoice rebates*: invoice rebates were granted on the basis of the number of new truck/earthmover/light plant tyres purchased the previous year, the average for the two previous years or the average for the three previous years, depending on which was most favourable to the dealer, according to the following scale:

Table 5

Tyres purchased	Rebates (%)	
	1997	1998
< 30	15,00	15,00
30 to 199	16,00	18,00
200 to 999	16,50	18,50
1 000-2 499	17,00	19,00

- (85) Dealers wishing to obtain a larger invoice rebate than that due to them under the above scale had to sign a target contract drawn up in agreement with Michelin which took account of 'the dealer's potential together with forecast market trends'. The invoice rebate obtainable then corresponded to the tranche within which the commitment entered into by the dealer fell.
- (86) Such 'targets' had to be realistic and not be over- or underestimates. Michelin would therefore propose to the dealer a choice between his previous year's performance and the average of his previous two or three years'

performances, factoring-in 'forecast market growth'. In 1997 this growth was set at 1 % irrespective of the region.

- (87) Exceptionally, a different choice could be made if the dealer's buying capacity had been adversely affected (arrival of a competitor in the same area, loss of a good customer, etc.). Exceptionally also, the current year's target could be equal to the previous year's performance.
- (88) Dealers whose purchases during the course of a given year entitled them to a larger rebate than that for which they qualified that year benefited from an end-of-year correction paid at the end of February of the following year covering the difference.
- (89) Lastly, it should be pointed out that in the case of new dealers the invoice rebate was set at 15 % of turnover unless they had signed a target contract, in which case the rebate was fixed by reference to the annual target.
- (90) *Achieved-target bonus*: dealers who had signed a target contract obtained in 1997 a bonus of 2 % of their net annual invoiced turnover, paid at the end of February if the target was reached. In 1998 the bonus was set at 1,5 %.
- (91) *End-of-year rebate*: depending on the invoice rebate originally granted and the net invoiced turnover, a rebate was paid at the end of February according to the following scale:

Table 6
1997

Invoice rebate (%)	Net invoiced turnover (thousand FRF)	End-of-year rebate (%)
15		0,0
16	< 150	1,0
	> 150 and < 300	1,5
	> 300	2,0
16,5	< 600	1,5
	> 600 and < 1 200	2,0
	> 1 200	2,5
17	< 2 500	2,0
	> 2 500 and < 3 500	2,5
	> 3 500	3,0

1998

Invoice rebate (%)	Turnover based on the invoicing scale (thousand FRF)	End-of-year rebate (%)
15,00		0,00
18,00	< 120	3,75
	> 120 and < 250	4,00
	> 250	4,25
18,50	< 750	4,25
	> 750 and < 1 200	4,50
	> 1 200	4,75
19,00	< 3 000	4,75
	> 3 000 and < 3 800	5,00
	> 3 800	5,25

- (92) *'Multiproduct rebate'*: dealers whose turnover achieved through tyres, all types combined, accounted for more than 50 % of their total turnover and who achieved significant sales in at least two of the following categories: car/van, motorcycle/scooter, truck and agricultural tractor, were entitled to an end-of-year rebate on their invoiced turnover achieved through new products (excepting heavy plant) and retreaded products according to a scale ranging from 1 % to 2,20 % in 1997 and from 1,5 % to 2,70 % in 1998.

(ii) As regards retreaded truck tyres

- (93) The system was simple and comprised two rebates:

- a 5 % invoice rebate on all retreaded products,
- an end-of-year quantity rebate depending on total net turnover achieved through retreads (van, truck, earthmover, agricultural tractor, light and heavy plant), increasing progressively from 1 % (above FRF 6 500) to 4 % (above FRF 2 500 000) of total net turnover achieved through retreads, according to a 16-step grid ranging from 1 % at the bottom of the scale to 0,1 % at the top. This rebate was abolished in 1998.

(b) *Commercial agreements*

- (94) Dealers who had signed an individual agreement benefited from similar conditions and from an extension of the scales depending on the quantities purchased.

- (95) For new truck tyres, invoice rebates and end-of-year rebates were accordingly increased to:

Table 7

Invoice rebates

Quantity	Rebate (%)	
	1997	1998
2 500-9 999	17,50	19,50
> 10 000	18,00	20,00

1997 end-of-year rebates

Invoice rebate (%)	Net turnover (thousand FRF)	End-of-year rebate (%)
17,50	< 9 000	2,50
	> 9 000 and < 18 000	3,00
	> 18 000	3,50
18,00	< 40 000	4,00
	> 40 000	4,50

1998 end-of-year rebates

Invoice rebate (%)	Turnover based on the invoicing scale (thousand FRF)	End-of-year rebate (%)
19,50	< 7 500	5,25
	> 7 500 and < 10 000	5,50
	> 10 000	5,75
20,00	< 48 000	5,75
	> 48 000	6,00

- (96) As regards retreaded tyres, the invoice rebate was increased to 6 % and the end-of-year rebate was increased, in 1997, to 6 %. In addition, in 1998, dealers who had signed an agreement were entitled to an end-of-year rebate of 1 % (based on the invoicing scale) if they sold between 2 500 and 10 000 retreaded tyres and of 1,5 % if they sold more than 10 000.

2. THE PRO AGREEMENT (AGREEMENT FOR OPTIMUM USE OF MICHELIN TRUCK TYRES)

- (97) Intended only for dealers purchasing new truck tyres

from Michelin France, the agreement for optimum use of Michelin truck tyres, which was introduced in 1993, enabled dealers to obtain further rebates. To this end a dealer had to enter into a number of obligations:

- sign with Michelin a truck progress bonus commitment for the current year,
- present to Michelin for custom retreading and standard exchange retreading Michelin truck tyres which have reached the legal tread wear limit.

- (98) In return, for every truck casing considered retreadable by Michelin, the dealer received FRF 45, 65 or 120 depending on the type of tyre concerned. If the casings had been regrooved and then reused, the dealer received an additional FRF 15, 25 or 40. A dealer could therefore earn a maximum rebate of FRF 160, which in percentage terms was considerable (15 % according to Bandag; Michelin puts it at between [...] and [...], i.e. at a level similar to that of the service bonus and the progress bonus taken together in the light of the price invoiced to the dealer by Michelin for a retreaded tyre). Finally, the importance of this bonus is highlighted by the fact that it accounted, in 1994, [...] of all truck tyre rebates (source: Michelin).

- (99) It is the presence of certain supplementary conditions that sets the agreement apart with respect to its scope:

- the maximum bonus that could be earned depended on how well the dealer performed in terms of new Michelin tyres, i.e. the number of truck tyres bought from Michelin in the course of the previous year. Thus, the maximum number of PRO bonuses was limited by the number of new truck tyres bought the previous year. In 1997, however, the amount of the bonuses granted was no longer limited by the number of tyres bought the previous year, but by the number of tyres which the dealer had undertaken to buy in the course of the current year in his 1997 target contract,
- the bonus was calculated by sales outlet (by dealer as from 1997), a correction being made at the end of the year,
- the bonus was paid in the form of a credit towards the dealer's purchases of Michelin truck tyres, being deducted from the following month's bill.

(100) In 1998 the PRO agreement was abolished and replaced by a clause in the general conditions entitled 'Retreading quality service'. On this basis a dealer could earn bonuses for every casing sent to Michelin for retreading, without any commitments or ceilings.

3. THE BILATERAL BUSINESS COOPERATION AND SERVICE ASSISTANCE AGREEMENT (THE MICHELIN FRIENDS CLUB)

(101) In return for signing a bilateral business cooperation and service assistance agreement and entering into numerous commitments, some dealers can obtain additional financial benefits from Michelin. The body of signatories form what is known in the trade as the Michelin Friends Club.

(102) The club, which was created in 1990, grouped together more than 295 sales outlets as early as the end of 1991. In April 1997 more than 163 tyre specialists representing 375 sales outlets and upwards of 20 % of the new and retreaded truck tyre market were parties to the agreement. The importance of the agreement to Michelin France is due to the fact that the club members distribute in France, by themselves, as many tyres as the integrated networks taken as a whole, all brands combined, and some 30 % of all Michelin truck tyres.

Features of the Club

Rationale

(103) Three factors make up the club's backbone: 1. state of mind/professionalism, 2. mutual trust between Michelin and the club and 3. Michelin volumes and 'temperature'. Michelin is prepared to lend its support, including its financial support, to club members to help them become better-performing and more professional, but in return members must 'play the game' and cooperate with Michelin, which involves among other things guaranteeing the manufacturer a certain level in terms of Michelin volumes and 'temperature' (market share).

Michelin's Contribution

(104) Michelin participates in the dealer's financial effort notably by contributing towards investment and training and by making a financial contribution amounting to 0,75 % of annual Michelin Service turnover. This contribution, linked as it is to service turnover, is

conditional on attainment of a specific target, which is agreed with the customer at the beginning of the year. One dealer asserts that the target was fixed in terms of purchasing commitments. The sums involved are very substantial. In 1993, for example, they accounted for 0,9 % of the total turnover of dealers belonging to the club, that is to say 2,8 % of their gross profit margin and/or 24,9 % of their current result before tax, i.e. a quarter of the profits of dealers belonging to the club.

(105) Michelin also grants other benefits which are harder to quantify but whose importance is far from negligible:

- transfer of know-how in many areas,
- priority access to training courses (in fact 50 % of courses at Michelin's training centre are provided for club members),
- offering of contracts concerning new business activities as a matter of priority to specialists (subcontracting of fleet tyre business, breakdown chain, for example),
- transmission of data on market trends,
- exclusive distribution of BF Goodrich car tyres.

(106) The package helps to ensure that dealers are more comfortably off (club members had an average profitability in 1995 of 3,9 %, which was higher than the average profitability of specialised dealers).

Members' Commitments

(107) The quid pro quos demanded by Michelin in return for admission to the club are considerable. In particular, Michelin has the right to oversee the specialist's business and to ask him:

1. to communicate to it, each year, balance sheets and profit and loss accounts (with a breakdown of income and expenditure) and statistics on turnover and services provided. Forward estimates and spending and financing plans must also be transmitted if necessary. The dealer must also let Michelin know the identity of all direct or indirect shareholders in the company and keep it informed of any event likely to affect control by the company owning the business premises and/or its strategic plans. On the basis of this information Michelin carries out individual financial analyses of club members and holds meetings with them, proposing solutions to any problems encountered. This enables Michelin to produce statistics and tables

incorporating the consolidated balance sheets of club members;

2. to permit Michelin to carry out an analysis of his sales outlet(s) in a number of areas: staff qualifications and competence; quality of service and sales promotion; and sales facilities. This analysis will make it possible to work out an annual progress commitment in one or more of these areas and any steps proposed and agreed jointly. On the carrying-out of this commitment will depend the annual payment of a bonus proportionate to the turnover in respect of services;
3. to promote the Michelin brand and its new products; display in his sales outlet(s) the advertising material provided (including neon signs and/or a pole with a flag) and the standard product information; and take part in advertising campaigns;
4. 'not to divert customer demand away from Michelin products; Michelin reserves the right to monitor compliance with this clause'. This commitment appeared word for word in the original agreements and was not formally abolished until 1996. In fact, this clause is the very core of the agreement and amounts to an unwritten undertaking to remain faithful to Michelin products in 'temperature' terms as far as both the car tyre and the truck tyre range are concerned.

Michelin makes access to the club conditional on compliance by the dealer with a certain Michelin 'temperature': in an internal document concerning the club⁽¹³⁾ it is stated in connection with the customer's partnership or market share that: [...] Michelin clearly uses this condition as a lever in its business negotiations, as can be seen from numerous documents found in the course of the investigation;

5. to carry a sufficient stock of Michelin products to meet any customer demand immediately;
6. to communicate to Michelin his sales statistics and forecasts, tyre type by tyre type and for all brands, together with trends in Michelin market shares;

7. to have the first retreading of truck, earthmover and van casings carried out by Michelin France. This obligation was contained in an initial version dating from 1991. In a subsequent version dating from 1993 it was removed in respect of vans. According to Michelin, failure to carry out this commitment was never and would never have been penalised. The clause was abolished with effect from October 1995.

Mention should be made, however, of the case of one dealer who wished to deal actively with competing retreaders and who complained of having been threatened with exclusion from the club;

8. to play an active part in programmes aimed at enhancing sales outlets, increasing truck tyre sales and improving knowledge of farming issues and in vocational training schemes and, where appropriate, play a part in the truck breakdown chain and other services rendered to hauliers to the best of his abilities.

- (108) In the event of the specialist failing to fulfil his commitments, Michelin may cancel the agreement without compensation. In that event, the specialist must return to Michelin any manuals, documents and copies entrusted to him under the agreement. In an initial version of the agreement dating from early 1990 the dealer was also required to pay back to Michelin, over five years and in equal instalments, all sums received by way of financial assistance. From 1992 onwards this obligation becomes more ambiguous, the dealer losing only 'any entitlement to the consideration provided for in Articles 1 to 7'.

II. LEGAL ASSESSMENT

A. RELEVANT MARKETS

1. PRODUCT MARKETS

- (109) Producers and dealers, when consulted by way of requests for information from the Commission, were unanimous in confirming that the market in tyres for trucks and buses is quite distinct from the market in tyres for other types of vehicle. They also confirmed the differences between the original equipment market and the replacement market. These aspects will thus not be analysed in detail (see above paragraphs 3 to 48).

⁽¹³⁾ Document [...].

- (110) However, the question arises as to whether the market in new replacement tyres for trucks forms a relevant market in itself (thus excluding retreaded tyres) or whether retreads should be included with new tyres in a single relevant market in replacement tyres. In the latter case, there would be a significant competitive relationship between the two types of tyre.
- (111) In its Decision 81/969/EEC (Case IV/29.491 *Nederlandse Banden-Industrie Michelin*, hereinafter 'NBIM decision')⁽¹⁴⁾, the Commission defined the relevant market as the market in new replacement tyres for trucks and buses. The Court subsequently confirmed the Commission's conclusion that the new tyre market was not subject to competition from retreads to an extent sufficient significantly to alter competitive conditions and Michelin's dominant position on the market. This analysis is still valid, as confirmed by Michelin during the investigation (in reply to requests for information from the Commission).
- (112) Since the NBIM decision was confined to the new tyre market, neither the Commission nor the Court of Justice had the opportunity to deliver an opinion on the relevance or otherwise of the retread market, which is necessary in this case. Following identical arguments to those put forward in support of the definition of the relevant market as the market for new tyres, it is clear that the retread market is likewise not subject to competition from new tyres to an extent likely to alter the competitive conditions prevalent on it. The markets in new tyres and retreads thus constitute two distinct relevant markets. The main reasons for this conclusion are:
- (113) First, there is a marked difference in the price of new and retreaded tyres, which reflects the significant differences between the two products. The vast majority of new tyres are marketed at a price well above that of retreads, the average unit price of which is equivalent to around 50 % of the price of a new casing. This difference results not only from their different features, but also, since custom retreading is the most widespread practice, from the fact that the value of the carcass is not included in the invoice for the service, a fact which highlights the very different ways in which the two markets operate, as will be shown below.
- (114) Second, the respective structures of supply and demand for the two products are far from identical. On the supply side, producers of new tyres are generally quite distinct from retreaders, Michelin being the only company to have a strong position on both market segments. On the demand side, the customers of new tyre manufacturers are mainly specialised dealers, while the customers of retreaders are mainly transport firms, which use specialised dealers merely as intermediaries. In the vast majority of cases, retreading prolongs the use of a new tyre by its original owner. The retreader thus acts as a skilled service provider, who does not necessarily have any link with the tyre sales sector. The involvement of a dealer is usual, but not essential.
- (115) Third, and most importantly, the retread market constitutes a secondary 'after-sales' service market in relation to the market for new tyres. New tyres do not therefore constitute a valid substitute for retreads. Since retreading is performed precisely in order to prolong the life of a tyre so as to postpone the purchase of a new one, there cannot be real competition between retreading and the purchase of a new tyre. The fact that in France more than 80 % of transport firms have recourse only to custom retreading, rather than purchasing a retreaded tyre which they had not previously owned, shows the extent to which the retread market is complementary to and thus distinct from the new tyre market. This is all the more true given that one of the main features of the truck tyre market is that, unlike purchasers in the passenger car category, transport firms systematically take account of the cost price per kilometre. Retreading is part of a strategy for reducing the cost price of the tyre, which in practice rules out the possibility of effective competition between retreading and the purchase of a new tyre at the same stage in the life of the casing.
- (116) Lastly, analysis of their specific characteristics and their uses by final consumers shows that new tyres and retreads are not really substitutable. Hauliers systematically avoid fitting retreaded tyres to the front of their tractor units (steer tyres) or to trucks carrying dangerous

⁽¹⁴⁾ OJ L 353, 9.12.1981, p. 33.

goods. These practices arise less from strict security considerations (while most specialised dealers recognise that retreads are less reliable, they agree that high-quality retreading reduces the risk virtually to zero) than from the desire, given the spread of just-in-time approaches, to avoid any incident on the journey that might delay delivery. The situation that prevailed in 1981 has thus not changed significantly.

- (117) Likewise, retreaders and dealers in retreaded tyres do not consider retreads to form a real alternative to new tyres, but see them as complementary in that, first to carry out their business activity, they depend on a regular supply of new tyres that cannot, or at least can only inadequately, be replaced by a supply of retreads, and that second, retreads are a secondary product compared with original equipment tyres or used replacement tyres, which constitute essential 'raw material' for retreading.
- (118) This leads to the conclusion that the markets in new replacement truck tyres and truck retreads are quite distinct. In this Decision, it will thus be examined whether Michelin has a dominant position on both these reference markets.

2. GEOGRAPHIC MARKETS

- (119) The relevant geographic market comprises the area in which the undertaking concerned is involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The market in new replacement tyres

market. Its assessment took account of the limited extent of parallel imports, the organisation of sales subsidiaries along national lines and the fact that Michelin took account only of national purchases in calculating its rebates. This analysis was deemed to be correct by the Court of Justice in its judgment in Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* (hereinafter 'NBIM judgment')⁽¹⁵⁾, in paragraph 26: 'In practice dealers established in the Netherlands obtain their supplies only from suppliers operating in the Netherlands. The Commission was therefore right to take the view that the competition facing Michelin NV is mainly on the Netherlands market and that it is at that level that the objective conditions of competition are alike for traders'.

- (121) Michelin now asserts that the market has become international. In support of this argument, it cites the fact that 'the structure of competition on the replacement tyre market is worldwide: the main players (...) compete on a world scale'. Michelin also stresses that the group was reorganised in 1996 into European product lines (TOUs)⁽¹⁶⁾, that standard European legislation now exists and that 'the international nature of the tyre market has been confirmed in recent years by the large-scale importation of tyres from Asia and eastern Europe'.
- (122) The unquestionable intensification of trade over the last decade certainly made a re-examination of the geographic dimension of competition on the relevant product market necessary. Following this re-examination, the Commission considers that, despite the arguments put forward by Michelin, competition conditions are not homogeneous at European level and that conditions on the French market are appreciably different from those that prevail on the other markets of the Community.
- (123) The argument that the largest international tyre producers compete in numerous countries and across the European Union in no way means that it can be

(120) In its NBIM decision, the Commission concluded that the market in replacement tyres for trucks was a national

⁽¹⁵⁾ [1983] ECR 3461.

⁽¹⁶⁾ Tactical Operational Units.

supposed that the relevant geographic market is the world market. This situation is perfectly compatible with the existence of conditions of competition that are appreciably different in each of the relevant countries. This was already the situation in the tyre industry at the time, when the Court of Justice found that the Dutch new replacement tyre market was a national market.

(124) What matters in this case is to assess the real capacity of dealers to obtain supplies from outside their national territory and the similarities or differences in the supply structure.

Purchases from national subsidiaries and limited extent of parallel imports

(125) During its enquiry, by way of requests for information, the Commission found that in 1997 the large manufacturers all organised the distribution and sales of their tyres along national lines. The situation has thus not changed since the NBIM decision. Michelin itself acknowledges that it 'carries on its business on the various national replacement markets via commercially independent companies established in accordance with the applicable national law. (...) [...]'. All the manufacturers also confirm that national dealers obtain supplies almost exclusively from the national trading subsidiaries. Michelin itself confirms that although they could obtain supplies from sources other than the national subsidiary, 'dealers, at least as regards their regular supplies, generally use the Michelin company established in their country'.

(126) It should be noted that, in its NBIM judgment, the Court found that the mere fact that dealers obtained supplies almost systematically from the national subsidiary gave rise to the conclusion that the market was national. On the basis of the observation that 'the commercial policy of the various subsidiaries of the groups competing at the European or even the world level is generally adapted to the specific conditions existing on each national market', the Court concluded that 'the Commission was therefore right to take the view that the competition facing Michelin NV (was) mainly on the Netherlands market'. This situation has not changed and is valid for France today.

(127) The data collected also show that parallel imports are extremely limited despite the major price differential between the various national markets within the Community. One of the largest tyre importers (Vandenban) also states, in a press article supplied by Michelin, 'that 98 % of its business is in tyres for passenger cars, truck tyres being covered by the manufacturers, with the remaining 2 % accounted for by a breakdown service for loyal customers'.

(128) There are several reasons for this, which are:

1. *Economic:*

even if dealers can theoretically obtain supplies from a foreign Michelin subsidiary, they have no economic interest in doing so since they would pay the listed price and the purchases would not be taken into account by Michelin for the calculation of the rebates;

2. *Historical:*

in France, wholesaling (a distribution system which is conducive to parallel imports) is very under-developed. It is virtually non-existent on the market for truck tyres. There are marked differences as regards supply to retailers ('sell-in') between the countries where, owing to the absence of wholesaling, the dealers are in direct contact with the manufacturers (e.g. France, Italy) and the countries where wholesale distribution is very strong (the Netherlands, Germany);

3. *Technical:*

the technical factor is probably the most decisive. Dealers absolutely require regular and secure supply across the range. These conditions cannot be guaranteed by recourse to parallel importers. This situation is all the less surprising in that reselling tyres to hauliers is a very technical business that requires the dealer not only to possess technical knowledge, but also to follow closely a number of guidelines issued by the manufacturer, especially when the tyres, as is generally the case with Michelin tyres, will be regrooved and retreaded. It

makes sense for dealers to obtain supplies exclusively from national subsidiaries of the manufacturers, which at the same time provide them with documentation and advice on fitting and monitoring the tyres.

- (129) Furthermore, while it is true that dealers do make import purchases, they do so sporadically and in very small quantities: these purchases complement national supply, but are not in any circumstances substitutable for it. This point was a touchstone for the definition of the geographic market in Commission Decision 88/518/EEC (Case IV/30.178 Napier Brown/British Sugar⁽¹⁷⁾).
- (130) Thus, the limited extent of parallel imports and the large-scale purchasing from the national subsidiaries are evidence that the geographic market is confined to French territory within the meaning of the NBIM judgment.
- (131) Moreover, differences in the structure of supply in the various Member States and major price differences are factors that also point to the existence of separate national markets and in particular of a relevant market confined to France.

Differences in the structure of supply

- (132) It should be noted in this connection that the market shares of each of the large manufacturers vary considerably from country to country. Table 8 below gives market shares for Michelin:

Table 8: Michelin's shares of the markets in new replacement truck tyres in western Europe (%)

Country	1993	1994	1995
Germany	[...]	[...]	[...]
Austria	[...]	[...]	[...]
Belgium	[...]	[...]	[...]
Denmark	[...]	[...]	[...]
Spain	[...]	[...]	[...]
Finland	[...]	[...]	[...]

Country	1993	1994	1995
France	[...]	[...]	[...]
Greece	[...]	[...]	[...]
Italy	[...]	[...]	[...]
Norway	[...]	[...]	[...]
Netherlands	[...]	[...]	[...]
Portugal	[...]	[...]	[...]
United Kingdom	[...]	[...]	[...]
Sweden	[...]	[...]	[...]
Switzerland	[...]	[...]	[...]
Total EU	[...]	[...]	[...]
Total EEA	[...]	[...]	[...]

Source: Michelin⁽¹⁸⁾.

- (133) Such national variations are hardly compatible with the theory of a European market characterised by homogeneous competition. While such differences may depend on how long a firm has been established on the market and/or on national traditions still affecting consumer behaviour, the existence of such phenomena, if confirmed, would support the hypothesis that the market in replacement tyres for trucks and buses in the Community is still divided along national lines.

Appreciable price differences

- (134) The major differences in tyre prices throughout the reference period, according to the country where they

(17) OJ L 284, 19.10.1988, p. 41.

(18) Reply to request for information of 3.12.1996.

are sold, supports the hypothesis that the relevant geographic market is a national one. Michelin provided a series of tables that highlight the significant price differences within the Community. Thus, if we compare

the price in six Member States of one of the tyres with the highest sales in one of the most popular dimensions (Michelin 315/80 R 22.5 XZA), we obtain the following table:

Table 9

Listed invoice prices, France = 100 (%)						
Year ⁽¹⁹⁾	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date in question)
Source: Michelin.

(135) The table shows that in 1993, compared with the French market, listed invoice prices were lower [...] and [...], but significantly higher [...] and especially [...]. It is remarkable that, for the same product, the difference can be as high as [...], as in the case of [...] and [...]. Although these differences have since narrowed, they are still significant. Compared with the French market, the listed prices in 1996 were lower [...] and [...]

higher [...] and [...]. There is still a [...] difference between the countries with the highest and lowest prices for the tyre, in this case [...].

(136) If we use as a reference the listed prices after deduction of the invoice rebates, we obtain the following table, which shows that significant differences remain:

Table 10

Prices after deduction of the invoice rebates, France = 100 (%)						
Year	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date in question)
Source: Michelin.

(137) Lastly, a comparison of the net prices charged by Michelin after deduction of the maximum rebates gives the following figures:

⁽¹⁹⁾ The data relate to 1 January of each year considered (idem for the following tables).

Table 11

Net prices after deduction of the maximum rebates, ⁽²⁰⁾ France = 100 (%)						
Year	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date in question)

Source: Michelin.

(138) We see that from 1994 in particular the price was regularly and significantly higher [...] than in the other reference countries. For example, in 1994 the price of the tyre was some [...] lower [...].

(139) Significant variations are evident, even if these figures should be treated with caution. It is extremely difficult to draw precise comparisons. Apart from the fact that currency fluctuations can blur interpretation, the price lists almost never correspond to the price actually paid and the rebates vary according to the specific circumstances of each dealer. In this connection, it is essential to note that the 'post-invoice' rebates are proportionally much higher in France than in countries such as the Netherlands, Germany or the United Kingdom. The fact that the above figures take account of the maximum post-invoice rebates, which are largely theoretical in the case of France, since few dealers can benefit from them in full, clearly has the effect of underestimating French prices in relation to these countries.

(140) Although these factors are strong indications of the existence of a national market in new replacement tyres in France, a number of objections were raised by Michelin.

(141) First, the extent of intra-Community tyre flows is evidence that the market is Community-wide:

Michelin thus argues in its reply to the statement of objections that 'more than [...] of the total number of new replacement truck tyres sold on the French market are not manufactured in France'. However, the flows described by Michelin reflect the organisation of production on a European scale, which in no way rules out the existence of national markets. It is the sales conditions which in this case determine the size of the market, and the flows described by Michelin are flows between tyre manufacturing plants, including Michelin's own plants to a large degree, and they are thus outside the market. Parallel imports, on the other hand, are much more limited.

(142) Secondly, hauliers could very easily purchase their tyres abroad:

according to Michelin, despite the fact that the manufacturer-distributor relationship is on a national scale, final customers, i.e. haulage fleets, could easily break free of this compartmentalisation by buying directly from specialised dealers in the countries with the lowest prices. This scenario does not correspond to reality. Given the logistical difficulties of such a strategy and the time pressures on hauliers, it seems unlikely that truck fleets would themselves obtain supplies abroad, especially since managing the tyres of a fleet requires technical knowledge and strict monitoring such as would rule out this kind of practice.

⁽²⁰⁾ It should be borne in mind that these prices take account of the maximum rebates (which will be given only rarely) and that they can in any event not be known until the end of a financial year.

(143) It must be borne in mind that for a transport firm, especially when it has a large fleet, tyre management is a highly technical matter, involving assessment of the

extent to which the tyre is worn and of the right time to intervene, the practice of rotating tyres to even out wear and tear and prolong their useful lives, etc. It follows that for haulage professionals, the purchase of tyres is difficult to dissociate from the service provided at the same time by the dealer. Moreover, since action on the tyres must be taken at specific times, it is difficult to see how a haulier could seriously plan to obtain supplies abroad and store the tyres purchased in this way.

(144) A number of factors argue against the hypothesis put forward by Michelin:

(i) *technical monitoring*: many facts contained in the file reveal that constant technical monitoring of the tyre fleet is vital [...]. While it is true that 20 to 25 % of journeys in Europe are made with empty trailers, it is unrealistic (given the need for regular technical monitoring of the tyres and for storage) for hauliers to obtain supplies abroad item by item;

(ii) *language problems*: since most haulage firms are micro-enterprises (see below), the linguistic obstacles to intra-Community trade are not inconsiderable, especially since tyre dealing would be secondary to the transport business and thus without a specific budget (e.g. training in foreign languages and in negotiating in them);

(iii) *targeted commercial policies*: the development of fixed-mileage contracts also undermines this hypothesis;

(iv) *the structure of the road transport sector*: this tends, in France, to demonstrate that, in any event, only a very small proportion of hauliers could afford to adopt such an approach.

(145) According to the report by the group of wise men on road haulage in the single market (1994), in 1990, of 37 037 road haulage firms in France, 81,6 % had 1 to 5

vehicles, 5,6 % had 6 to 10 vehicles and only 12,8 % had 11 vehicles or more. The proportion of small businesses had increased by comparison with 1985.

(146) The same report states that most road haulage business is done on local markets. Even in the countries where distances are the greatest (Italy), 50 % of freight is carried for distances of less than 50 km, according to the report.

(147) An investigation by the Commission confirmed that fleet policies with specific services and prices, targeting firms with a large number of vehicles, are operated by most of the large tyre manufacturers. The latter state that this policy (and thus also the associated services) is restricted to France. It is therefore clear that even if certain haulage firms were tempted to make their purchases abroad, this targeted marketing policy [...] would prevent them from doing so. In fact, the possibility of this sub-market forming a relevant market cannot be ruled out, given the price and distribution characteristics specific to it. However, for the purposes of this Decision, the matter has no favourable or unfavourable consequences for Michelin and will thus not be considered further.

(148) Thirdly, Michelin states that the international nature of the tyre market has established itself in recent years with large-scale imports of tyres from Asia and eastern Europe.

(149) There are two main reasons for refuting this argument.

(150) First, the imports mentioned by Michelin almost exclusively involve 'third line' tyres⁽²¹⁾, which compete only to a very limited extent with the products that make up the core of Michelin's business. Second, these products account for significantly less than 20 % of replacement casings sold in Europe. Figures obtained from Eurostat indicate that imports from outside the EU in 1996 represented only 6,2 % of sales of new truck tyres on the French market (broken down as follows: central and eastern Europe: 2 %; South East Asia including Japan: 3,3 %).

⁽²¹⁾ It should be noted that Michelin has taken control of certain third line brands (Taurus and Stomil) to keep up with the phenomenon.

Table 12: Commercial flows of new truck tyres in 1996

Country	Sales	Imports SE Asia and Japan		Imports central and eastern Europe		Imports World excluding the EU15	
		Import	% sales	Import	% sales	Import	% sales
France	2 806 000 ⁽²²⁾	92 881	3,3	57 120	2,0	174 395	6,2
Belgium-Luxemburg	434 000	32 914	7,6	5 427	1,3	58 191	13,4
Netherlands	341 000	206 406	60,5	42 748	12,5	311 731	91,4
Germany	4 095 000	350 563	8,6	114 696	2,8	549 568	13,4
Italy	2 342 000	48 567	2,0	144 182	6,2	310 175	13,2
United Kingdom	2 655 000	222 138	8,4	94 826	3,6	381 211	14,3
Ireland	171 000	70 862	41,4	5 324	3,1	186 744	?
Denmark	215 000	48 623	22,6	10 130	4,7	62 182	28,9
Greece	262 000	79 882	30,5	22 214	8,5	178 722	68,2
Portugal	304 000	20 132	6,6	5 754	1,9	46 036	15,1
Spain	1 352 000	124 711	9,2	28 851	2,1	187 742	13,9
Sweden	338 000	77 652	23,0	7 487	2,2	96 456	28,5
Finland	210 000	14 625	7,0	5 089	2,4	19 809	9,4
Austria	411 000	3 670	0,9	55 514	13,5	65 147	15,8
Total EU	15 936 000	1 393 626	8,7	599 362	3,8	2 628 109	16,5

Source: Eurostat.

(151) Secondly, it can be noted that the French market is by far the least exposed to penetration by third line tyres (taking as a reference a Community average of 16,5 % and a Member State like the Netherlands with a penetration rate of 91,4 %), a factor which further strengthens the particularly closed nature of the French market.

(152) In conclusion, it is clear that none of the arguments put forward by Michelin to support its theory are convincing.

⁽²²⁾ Eurostat's figures are quite different from the data supplied by Michelin. Doubtless, the customs data used here take account of extra-market flows (importance of ports on the French market and thus of transit).

In the specific context of this case, it is still justified to define the relevant geographic market for new replacement truck tyres as the French domestic market.

The market in retreaded tyres

(153) The retread market is manifestly a national market, especially in the case of France.

(154) In the first place, most manufacturers consulted by the Commission by way of requests for information stated that the retreaded tyre market was national. Michelin

itself confirmed in its reply to the Commission that the retread market was national, since it was a market for the provision of services, and thus a local market. Since the retread market is a market for the provision of services, and services by definition cannot be stocked, it is a local market and therefore at most of national dimension. Even in the case of mould-cure retreading, where retreaders have mould-cure plants in only a few countries, worn casings are managed on a national scale, as indicated by Michelin.

(155) Other factors also support this observation.

(a) *The structure of supply is heterogeneous within the Community*

(156) Marked differences, reflecting the very different market shares of the manufacturers, are a feature of the Community landscape. The French market is distinguished in particular by the clearly dominant presence of Michelin, which in 1995 had a market share of almost [...], while Bandag, its nearest competitor, had a share of less than [...] of the same market. In the other countries of western Europe, on the other hand, competitive relationships with other market players are different, sometimes to the detriment of Michelin, as illustrated by the following table:

Table 13: Market shares of the two main players on the market for retreading tyres in western Europe in 1995 (%)

	Michelin group	Franchised Bandag dealers
Germany	[...]	[...]
Austria	[...]	[...]
Belgium	[...]	[...]
Denmark	[...]	[...]
Spain	[...]	[...]
Finland	[...]	[...]
France	[...]	[...]
Greece	[...]	[...]
Italy	[...]	[...]

	Michelin group	Franchised Bandag dealers
Norway	[...]	[...]
Netherlands	[...]	[...]
Portugal	[...]	[...]
United Kingdom	[...]	[...]
Sweden	[...]	[...]
Switzerland	[...]	[...]

Source: Michelin.

(b) *The differences affecting the structure of demand within the Community help to set the French market apart*

(157) The differences in the structure of demand on the retreading markets within the Community are marked. The predominance of mould-cure retreading and custom retreading in France help to set the French market apart. The mould-cure method implies the use of industrial retreading plants, constraints connected to the transport of the carcasses, long processing times and especially an elaborate system for collecting the carcasses. In these circumstances, the presence of an intermediary (usually the specialised dealer) between the retreader and the transport firm is virtually indispensable. In countries where precure retreading is widespread, on the other hand, the specialised dealer or the retreader do the retreading themselves, so that retreaders and transport firms are in direct contact with one another.

(c) *There are major price differences between the Member States*

(158) There are major differences in the prices charged in the various countries, whether the Commission takes into account the price lists provided by Michelin or the post-rebate prices, a situation which reflects the lack of homogeneity in competitive conditions in Europe. This is illustrated by a comparison of the price of a very popular retread (Michelin 385/65 R 22.5 XZA) sold to dealers in six countries.

Table 14

Listed invoice prices, France = 100 (%)						
Year ⁽²³⁾	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date given in the table)

Source: Michelin.

(159) Price differences by comparison with the French market are considerable, both in 1993 and in 1996. In 1993 prices were lower [...], but much higher [...] and especially [...]. There was a difference of almost [...] in the price for the same tyre [...]. In 1996, the difference

in the price of a retread [...] was [...].

(160) If the Commission considers the price of the same tyre after deduction of the invoice rebates, the table comes out as follows:

Table 15

Prices after deduction of the invoice rebates, France = 100 (%)						
Year	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date given in the table)

Source: Michelin.

(161) Lastly, if account is taken of the final net price after the full rebate:

Table 16

Net prices after deduction of the maximum rebates, France = 100 (%)						
Year	France	Spain	Italy	Germany	Netherlands	United Kingdom
1993	[...]	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]	[...]

(FRF, at the exchange rate on the date given in the table)

Source: Michelin.

⁽²³⁾ On 1 January of the relevant year.

(162) Here too, the final cost price paid by dealers is certainly lower depending on the rebates and/or benefits to which they are entitled, which vary considerably from one Member State to another, and on the commitments which dealers decide they are prepared to make. For example the 'PRO' premium ('Agreement for optimum use of Michelin truck tyres') exists in France and Spain, but not in Germany or the United Kingdom.

(163) Michelin itself is aware of the price differences at European level since it considers that [...] (statement by a Michelin working group on retreading made in a document obtained during the inspection visits).

(164) A comparative analysis of repurchase prices for Michelin carcasses per country also shows considerable price variations. The following data were taken from tables found on Michelin's premises; they are for a type of tyre that is commonly used for retreading:

Table 17: Variations in the repurchase price for carcasses in Europe

	315/80 R 22.5 6.12.95	365/80 R 20 3.5.96
Average price:	[...]	[...]
France	[...]	[...]
Germany	[...]	[...]
Spain	[...]	[...]
Italy	[...]	[...]
United Kingdom	[...]	[...]
Belgium	[...]	[...]
Netherlands	[...]	[...]
Austria	[...]	[...]
Denmark	[...]	[...]
Greece	[...]	[...]
Sweden	[...]	[...]

Source: Michelin.

Limited purchases made outside France by specialised dealers

(165) Despite these price differences, it is extremely rare for specialised dealers to make purchases outside France for two technical and two commercial reasons:

(166) Two technical reasons:

- since retreading in France is mostly custom retreading, time constraints mean that retreading units close to the customers are used, so that dealers will rarely send the carcasses abroad,

- since the price of a retread is lower than the price of a new tyre, the cost of transporting carcasses represents a higher proportion of the final cost of a retread than of a new replacement tyre. This cost could prove to be a major obstacle to intra-Community trade.

(167) Two commercial reasons:

- carcass collection by mould-cure retreaders, including Michelin, is essentially organised on a national scale,

- commercial terms and the rebate system set in place by Michelin are strong incentives to specialised dealers to send carcasses for retreading to the national Michelin subsidiary. If dealers want to maximise their rebates, it is in their interest not to diversify their purchases and to have their carcasses retreaded by the same retreader.

(168) The relevant geographic market for truck retreads will therefore be considered to be the French market.

(169) Given the size of the French market in the products at issue, it is a substantial part of the common market within the meaning of Article 82 of the EC Treaty.

Conclusion on the relevant markets

(170) The replacement tyre for trucks and buses comprises two relevant product markets, one being the market in

new replacement tyres and the other, the market in retreads.

- (171) For each of the two relevant product markets, the relevant geographic market was found to be the French market, in view of the absence of homogeneous competitive and commercial conditions on the national markets and the limited tyre purchases made outside France by dealers.

B. MICHELIN'S DOMINANT POSITION

- (172) In its judgment in Case 85/76 Hoffmann-La Roche v Commission⁽²⁴⁾ the Court of Justice defined a dominant position as a 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. According to the Court, 'the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares'⁽²⁵⁾.

- (173) The successive analysis of three types of criterion leads to the conclusion that Michelin has a dominant position on the relevant markets. First, a number of structural indications, the most important of which is Michelin's market share, point to this conclusion. Second, an analysis of Michelin's behaviour on the relevant markets brings to light certain attitudes and practices which are typical of a company in a dominant position. The assessment is confirmed, lastly, by the position of economic dependence in which specialised dealers find themselves vis-à-vis Michelin, a necessary trading partner.

1. STRUCTURAL INDICATIONS OF THE DOMINANT POSITION

- (174) Since the Hoffmann-La Roche judgment, the Court

has considered that very large market shares are in themselves evidence of a dominant position⁽²⁶⁾. In the same judgment it found that if, for example, a firm had a market share of 86 % (vitamin B 2) or even 75 % (vitamin B 6 '95 % even when reduced by 20 %), it ranked as being in a dominant position. In 1991, in its judgment in Case C-62/86 AKZO Chemie BV v Commission⁽²⁷⁾, the Court ruled that a market share of 50 % was in itself, save in exceptional circumstances, evidence of the existence of a dominant position. The Court stated: 'With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50 % such as that found to exist in this case'⁽²⁸⁾.

- (175) All the analyses combine to show that Michelin's share of the two relevant markets has exceeded this threshold consistently for more than twenty years.

The market in new replacement tyres

- (176) The SNCP (Syndicat National du Caoutchouc et des Plastiques — National Rubber and Plastics Union) calculated that Michelin had a 58,9 % share of the market in new replacement tyres in 1995. Marketline Ltd, a specialist in the sector, gave 55 % as Michelin's market share in one of its publications. Michelin argued that its market share was no more than [...]. Its competitors estimate its market share at somewhere between 51 % and 65 %. Internal graphs and tables from Michelin's commercial policy division found during the 1997 inspection visits show a stable market share of between [...]. Whatever the accuracy of each of these analyses, they all show that Michelin had a market share of more than [...] ⁽²⁹⁾ throughout the reference period, and knowing that Michelin itself acknowledges a market share of [...] for the beginning of the 1980s, it can be supposed that Michelin has held a dominant position on the French market in new replacement tyres for the last twenty years and that its market share has remained at a high level since the beginning of the decade.

⁽²⁴⁾ [1979] ECR 461, at paragraph 38.

⁽²⁵⁾ Loc. cit., paragraph 39.

⁽²⁶⁾ Loc. cit., paragraph 56, for example.

⁽²⁷⁾ [1991] ECR I-3359.

⁽²⁸⁾ Loc. cit., paragraph 60.

⁽²⁹⁾ In its reply to the request for information of 3 December 1996, in a table reproduced at paragraph 132 of this Decision, Michelin considers that it had a market share of only [...] in 1993, but this statement contradicts the documents found on Michelin's premises.

Table 18: Estimated market shares of the manufacturers on the French market in new replacement tyres for trucks (%)

	Marketline estimates		Michelin estimates (1995)
	(1995)	(1996)	
Michelin	55,0	51,0	[...]
Dunlop	9,0	9,0	[...]
Goodyear	6,5	7,0	[...]
Bridgesone/Firestone	12,5	9,0	[...]
Continental/Uniroyal	5,0	6,5	[...]
Pirelli	3,0	3,0	[...]
Others (including third line)	9,0	14,5	[...]
TOTAL	100,0	100,0	[...]

(177) The following table contains data found in the manufacturer's commercial policy division during the inspection visit:

Table 19: Estimated market share held by Michelin on the market in new replacement tyres for trucks in six European countries (%)

	1993	1994	1995	1996
France	[...]	[...]	[...]	[...]
Germany	[...]	[...]	[...]	[...]
Spain	[...]	[...]	[...]	[...]
United Kingdom and Ireland	[...]	[...]	[...]	[...]
Italy	[...]	[...]	[...]	[...]
Belgium	[...]	[...]	[...]	[...]
Total 6 countries	[...]	[...]	[...]	[...]

Source: Michelin.

(178) In any event, all the manufacturers and studies consulted unanimously affirm that Michelin has a market share five to six times greater than its closest competitor, Dunlop, which controls barely [...] of the market.

The market in retreads

(179) According to Michelin itself, Michelin and its subsidiary Pneu Laurent held market shares above or equal [...] without interruption from 1985 to 1996 [...]. Their most serious competitors were the Bandag dealers (present only on the precure retreading market) with at most [...] of the market during the period (and considerably less at the beginning of the period), followed by the Dunlop-SEIA-Pneu Holding, with a combined share of [...], then Goodyear at [...] and Continental at [...]. At the beginning of the reference period, Michelin claims to have even reached a market share of [...].

Table 20: Estimated market shares of the French market in truck retreads (%)

	1994	1995	1996
Michelin	[...]	[...]	[...]
Escoffier (Bandag dealer)	[...]	[...]	[...]
SOCAP (Bandag dealer)	[...]	[...]	[...]
Various (Bandag dealers)	[...]	[...]	[...]
Total Bandag	[...]	[...]	[...]
ABR	[...]	[...]	[...]
Soreval	[...]	[...]	[...]
Firestone France Pneus	[...]	[...]	[...]
Goodyear	[...]	[...]	[...]
TOTAL	[...]	[...]	[...]

Source: Michelin.

(180) There can therefore be scarcely any doubt that Michelin is in a dominant position on the retread market, given that very high market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. Furthermore, this position of dominance is long-standing and is therefore incontestable.

2. OTHER EVIDENCE OF MICHELIN'S DOMINANT POSITION

(181) A number of features of Michelin's business actively explain why it is so powerful on the relevant markets.

(182) Michelin's technical lead is undeniable. It launched the radial tyre in 1948 and is still the world's leading manufacturer of radial tyres today. Although the original patents for the radial tyre expired some years ago and licences have been granted to other manufacturers since 1956, Michelin still has particular expertise in the field. In addition, it has been carrying out extensive research for a number of years on the 'green tyre', which is being marketed under the name 'Energy'.

(183) This indisputable technological lead is the result primarily of the major investments Michelin has been able to make out of its extensive financial resources. It has consistently pursued an active policy of research and innovation. Its research and technological development (RTD) budget runs to [...] of its turnover, which is well above those of its largest competitors. The RTD budgets of Goodyear, Bridgestone/Firestone, Continental, Pirelli and Dunlop are [...],[...],[...],[...] and [...] respectively⁽³⁰⁾.

(184) The Michelin brand is in a position to offer a wide range of different tyre products such that an ever increasing number of customer groups is reached. In France, the range is wider than that offered by other manufacturers and its quality and reputation are indisputable.

(185) Lastly, the spontaneous demand shown by large transport firms is evidence that French transport firms still have a preference for Michelin products. There are several reasons for this: the considerable lead Michelin had in the past, the brand's position on the original equipment market, the effectiveness of the sales force on the ground and the retreadability rate of the carcasses, which is often higher for Michelin tyres than for other brands. Distributors consider the rate of spontaneous demand to be high in France. Michelin estimates that it represents [...].

Michelin's strong presence on adjacent markets

(186) Michelin's strong presence on adjacent markets acts to its advantage on the replacement and retread markets. The barrier to competitors' entering the relevant markets is far from being negligible.

(187) On the market in new replacement tyres, Michelin has a dual advantage over its competitors. First, its very strong position on the market in original equipment truck tyres cannot but be beneficial. It is the preferred supplier of the French heavy vehicle manufacturer and market leader, Renault.

Table 21: Shares of the European market in original equipment truck tyres (%)

	1990	1991	1992	1993	1994	1995	1996
Michelin	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Continental	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Goodyear	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Bridgestone	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Pirelli	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Dunlop	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Others	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Michelin.

⁽³⁰⁾ According to European Tyre Report 1996, European Rubber Journal, September 1996.

- (188) Michelin has a [...] share of the European market, which is four times that of its nearest competitor and nearly six times that of the next in line. This undeniably puts Michelin in a very advantageous position, since there is no doubt that users tend, even if only to a limited extent, to remain loyal to the brand of tyre originally fitted on their vehicles.
- (189) Second, Michelin has a strong presence on all the new replacement tyre markets, which is not true of the other manufacturers, as illustrated in the table below:

Table 22: Market shares held by Michelin and its main competitors on various tyre markets in France in 1995

Market Manufacturers	Passenger car (OE+RT)	Motorbike	Plant (RT)	Agricultural vehicles (driven wheels)
Michelin	[...]	[...]	[...]	[...]
Bridgestone	[...]	[...]	[...]	[...]
Continental	[...]	[...]	[...]	[...]
Goodyear	[...]	[...]	[...]	[...]
Dunlop	[...]	[...]	[...]	[...]
Pirelli	[...]	[...]	[...]	[...]

Source: Michelin.

- (190) On the retread market, Michelin has the major advantage of being the only manufacturer to have a strong position on this market and on the new tyre market. In France, Michelin has a share of some [...] of the retread market, well ahead of its nearest competitor, the network of Bandag franchisees, which is itself independent of the other manufacturers. Michelin is therefore the only manufacturer able to offer large-scale 'in-house' retreading of its own casings. This situation is of considerable relevance when it comes to analysing the manufacturer's market power. Michelin bases its entire communication on the fact that its tyres are designed from the outset to have four lives. This means that, although they cost more than competitors' tyres at the time of purchase, the cost price per kilometre of Michelin tyres is very competitive. This sales argument, based essentially on the promotion of retreading by the manufacturer downstream, helps to increase Michelin's market power.

Michelin's omnipresent commercial and technical service on the ground

- (191) Michelin has close on fifty logistics platforms and local centres in France, to which are attached several hundred technico-commercial representatives that ensure who Michelin is well represented among dealers.
- (192) Although Michelin's competitors also have sales forces, they are far less numerous and significantly less structured. Michelin's sales force in the heavy-vehicle sector comprises more than [...] agents⁽³¹⁾, whereas none of its competing manufacturers has sales teams of more than forty people. Michelin can therefore defend its market position extremely well, knowing that its competitors are not in a position to campaign so intensively among final consumers. Furthermore, [...].

Michelin's leading position in French distribution channels

- (193) In the highly fragmented truck tyre distribution sector, Michelin has a very strong position, as was made evident in the previous section. Via its integrated distribution network Euromaster, Michelin directly controls some [...] sales outlets of the 2 225 on French territory. This figure represents [...] of sales outlets, but [...] of all sales outlets that belong to manufacturers' integrated networks. While Dunlop controls [...] sales outlets, three times less than Michelin, Bridgestone/Firestone controls only [...], and the other manufacturers, none at all.
- (194) The same situation applies to the 'clubs', arrangements for closer partnerships with certain specialised dealers set in place by the manufacturers. With a total of [...] members covering [...] sales outlets, the 'Michelin Friends Club' represents a very large majority of all sales outlets belonging to a 'club'. If the Euromaster sales outlets are added to the Club members, this comes to roughly a third of sales outlets in France.

⁽³¹⁾ Michelin commercial strategy document.

(195) The market power Michelin derives from this more or less direct control of distribution is illustrated by a comparison of the manufacturers' market shares of each of the various distribution channels. This table was found on Michelin's premises and applies to all of Europe; it can be deduced from two principal arguments that the situation is at least the same, if not more advantageous, on the French market:

- Michelin's position on all tyre markets is stronger in France than in the other Member States,
- for historical reasons, Euromaster and the 'Club' are more developed on the French market than elsewhere in Europe.

Table 23: Comparison of Michelin's shares of the replacement truck tyre market by distribution channel in Europe in 1994 (%)

Distribution channel	Number of sales outlets	Michelin's market share
Euromaster	[...]	[...]
Continental network	[...]	[...]
Dunlop network	[...]	[...]
Goodyear network	[...]	[...]
Pirelli network	[...]	[...]
Bridgestone network	[...]	[...]
Other networks	[...]	[...]
Total for competitors' networks	[...]	[...]
Total for controlled networks	[...]	[...]
Michelin Club	[...]	[...]
Total independent specialised dealers	[...]	[...]
Total specialised dealers	[...]	[...]
Other channels	[...]	[...]
Direct consumer sales	[...]	[...]
TOTAL	[...]	[...]

Source: Michelin.

position. The possession of very large market shares and significant comparative advantages, combined with the weakness of its competitors, place Michelin in a position of power which allow it to behave independently in a manner typical of a firm in a dominant position.

Michelin's behaviour is strong evidence of its dominant position

(197) A detailed analysis of a number of aspects of Michelin's conduct provides further support in so far as necessary for the conclusion, based on observation of the structural aspects of the market, that a dominant position exists.

The practice of offering loyalty rebates and a net price differential compared with competitors

(198) The business practice of granting a wide range of loyalty rebates that are paid very late is also a clear indication of Michelin's dominant position. The fact that dealers until at least 1997 were prepared to sell Michelin tyres at a loss in the expectation of rebates that were finally paid in February of the following year is evidence of the manufacturer's market power.

(199) This practice will be examined in more detail later from the point of view of its being such as to constitute an abuse in itself. However, it is appropriate to mention it here as evidence of the dominant position. In its judgment in Case 27/76 United Brands v Commission the Court stressed the need, in order to determine whether a company is in a dominant position, to analyse the competitive situation on the relevant market, specifying that 'in doing so it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses' ⁽³²⁾.

3. THE SPECIALISED DEALERS' DEPENDENCE ON MICHELIN MAKES THE LATTER AN UNAVOIDABLE PARTNER

(200) Lastly, a third important indication of Michelin's dominant position is the fact that the specialised dealers manifestly appear to be placed despite themselves in a situation of dependence that makes Michelin an unavoidable partner.

(196) All these aspects of the structural analysis of the relevant markets suffice to show that Michelin is in a dominant

⁽³²⁾ [1978] ECR 207, at paragraphs 67 and 68.

- (201) The resentment towards Euromaster expressed plainly by independent specialised dealers ⁽³³⁾, who nevertheless would not consider doing without Michelin, is clear evidence of the fact that no dealer concerned about its credibility can eliminate Michelin tyres from its sales outlet. A dealer that did not sell new Michelin tyres or did not send its carcasses for retreading to Michelin or Pneu Laurent (Michelin's subsidiary) would run the risk of weakening its commercial credibility.
- (202) The need for traders to include in their range a product which is subject to heavy demand, as is the case here, necessarily establishes a relationship of dependence which makes the supplier in question an unavoidable partner. It should be pointed out in this connection that this situation was identified by the Court in its 1983 NBIM judgment as a fact that legitimately helped to establish Michelin's dominant position on the Netherlands market. The Court stated at the time that 'a dealer established in the Netherlands normally cannot afford not to sell Michelin tyres' ⁽³⁴⁾.
- (203) Most specialised dealers sell not only heavy-duty tyres for trucks, but also a wide range of other types of tyre, especially tyres for passenger cars and vans, as well as offering 'after-sales' tyre services. However, in recent years the specialised dealers have lost a large proportion of the passenger car tyre market to other distribution channels (car centres, superstores, car manufacturers' networks, etc.). This means that the truck tyre business is taking up an increasing share of their turnover (according to the magazine *Achat automobile actualité*, it represents around 60 % of their turnover) and is becoming crucial to their survival.
- (204) It is clear that specialised dealers are placed despite themselves in a situation of economic dependence that makes Michelin an unavoidable partner. It is very unlikely that dealers can ignore Michelin without endangering their credibility and their business. Given the brand's market shares and the rate of spontaneous demand (between 50 % and 70 % in France, according to the requests for information sent by the Commission to the specialised dealers), it is a fact that a dealer cannot reasonably decide not to work with Michelin. This evidence corresponds to the position taken by the Court in the NBIM case.
- (205) Added to this is the fact that, in general, following the way opened by Michelin, manufacturers are involved more and more directly in distribution, either via the development of direct contacts with final users, or via their vertical integration in dealers' networks. If we add to this the appearance of new distribution networks (especially the networks of truck tyre manufacturers), we find that independent specialised dealers are losing their share of the market in distributing truck tyres, which was their traditional 'strong point'.
- (206) These three facts make competition between dealers very keen and margins small (in 1995, for example, the average operating margin of French specialised dealers was 3,7 % of their turnover). Under this pressure, independent dealers are constrained to obtain the best terms possible when purchasing Michelin products, especially as regards truck tyres. In order to preserve the competitive edge on which their survival probably depends, dealers do not hesitate to take part in the majority of 'programmes' and 'agreements' that they are offered, if as a result they can benefit from rebates or other additional economic advantages. Very slight variations in the rebate rates can prove to be essential to the dealers, who will do their best to make the most of them.
- (207) In its reply to the statement of objections, Michelin rejects the argument that it is a necessary partner on the grounds that only 17 % of the dealers questioned supported that point of view and of [...] dealers on the Michelin lists, [...] had not bought tyres from Michelin. One can reply to this, first, that, given the fact that 'Club' dealers were in a majority of those questioned, the spontaneous declaration rate of 17 % is very high, being well over the ratio of independent dealers, and second, that the spontaneous demand rate for Michelin products of 50 % to 70 % is sufficiently convincing. Moreover, Michelin seems to forget that only [...] dealers deal in truck tyres and that it is not at all relevant to give figures for the entire tyre sector (in this case [...] dealers, including supermarkets) here.
- (208) All the evidence outlined above helps to establish beyond doubt that Michelin is in a dominant position on the French markets in new replacement and retreaded tyres for heavy vehicles.

⁽³³⁾ See, for example, a dealer's reply, and the reply by dealers to question 20 of the Article 11 letter of 27 October 1997.

⁽³⁴⁾ Loc. cit. (see footnote 15), at paragraph 56.

C. THE ABUSIVE NATURE OF MICHELIN'S
COMMERCIAL POLICY

- (209) An abuse of a dominant position was defined by the Court of Justice in its Hoffmann-La Roche judgment as 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' ⁽³⁵⁾.
- (210) Abuse of a dominant position may thus involve practices which have as their object or which may have as their effect the elimination of competitors, or behaviour which an undertaking could not adopt without compromising its own interest on a competitive market or on a market where it did not have a dominant position.
- (211) The Court of Justice has indicated the limits of this concept, notably by stating in the United Brands judgment ⁽³⁶⁾ that 'although it is true that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it'.
- (212) This is exactly what has occurred in the case in point. Michelin, which has long held a dominant position in France, sought to exercise its influence in such a way as to ensure that it maintained its hold on the market. The last few decades have seen the arrival of competitors to Michelin which, having gradually caught up with it, are now able to market products which are competitive in terms of quality and price. In France, its traditional stronghold, Michelin has had to take action in order to maintain its dominant position. The action it took was not based on the methods which condition normal competition.
- (213) Since at least the beginning of the 1980s and up to and including 1998, Michelin pursued a commercial and pricing policy in France with regard to resellers which was based on a complex system of rebates, discounts and/or various financial benefits whose main objective was to tie resellers to it and to maintain its market shares, which must be regarded as an abuse within the meaning of Article 82.
- (214) Michelin's abusive commercial policy on the two relevant product markets (i.e. on both the market for new replacement tyres and the market for retreads) as regards specialist dealers consisted of three components over the relevant period: the 'General price conditions for France for professional dealers' (for convenience, the individual 'Commercial cooperation agreements' will be included in this category, since they are merely an extension of the general conditions), the 'Agreement for the optimum use of Michelin truck tyres' (PRO Agreement), and the 'Business cooperation and service assistance agreement' (known as the Michelin Friends Club).
1. GENERAL PRICE CONDITIONS FOR FRANCE FOR PROFESSIONAL DEALERS
- (215) These conditions allowed dealers to benefit from quantity rebates, service bonuses and progress bonuses and, possibly, to sign commercial agreements with Michelin.
- (a) **Quantity rebates**
- (216) Quantity rebates took the form of an annual rebate as a percentage of total turnover (trucks, cars and vans) achieved with Michelin France. To be eligible, the dealer had to achieve the turnover thresholds provided for in the rebate grids. In the first Michelin case (NBIM judgment, referred to above), and consistently in more recent cases, the Court of Justice has ruled against the granting of quantity rebates by an undertaking in a dominant position where the rebates exceed a reasonable period of three months (as is the case here) on the grounds that such a practice is not in line with normal competition based on prices. Merely buying a small additional quantity of Michelin products made the dealer eligible for a rebate on the whole of the turnover achieved with Michelin and this was greater than the fair marginal or linear return on the additional purchase, which clearly creates a strong buying incentive effect. In

⁽³⁵⁾ Loc cit. (see footnote 24), at paragraph 91.

⁽³⁶⁾ See footnote 32.

the Court's view, a rebate can only correspond to the economies of scale achieved by the firm as a result of the additional purchases which consumers are induced to make.

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

Unfair practice

(218) Given the intensity of competition and the low level of margins in the sector (about 3,7 % according to the Commission's investigation), dealers were obliged to resell at a loss pending the payment of the rebates. The price paid to Michelin was generally higher than the price charged by the dealer to final consumers. The dealer thus initially sold 'at a loss'. It was only when he was paid the various 'bonuses' and premiums that the reseller recovered his costs and re-established his profit margin.

(219) The unfairness of the rebate system was thus the cumulative result of several factors.

(220) Firstly, and contrary to what Michelin argues in its reply to the statement of objections, the dealers could not know with certainty the final purchasing price of Michelin tyres. Since the rebates applied to all of the Michelin turnover and were calculated only about one year after the start of the first purchases, it was not possible for the dealers to know, before the very last orders had been placed, what the real unit purchase price of the tyres would be, which placed them in a situation of uncertainty and insecurity, prompting them to minimise their risks by purchasing mainly from Michelin.

(221) If nevertheless a dealer wished to diversify by purchasing from other suppliers, it would have been difficult for

him to base his choice on objective figures, since the overall uncertainty as to the final price of Michelin tyres made any serious comparison with competitors' prices impossible.

(222) Secondly, as has just been noted, dealers were obliged, up to 1995 at least⁽³⁷⁾, to resell Michelin tyres at a loss, their profit margin on them being re-established only when the rebates were paid. The precarious situation in which this placed the dealers was clearly unfair and is a measure of the extent to which Michelin abused its position as a necessary business partner. If there were undistorted competition between suppliers, it is difficult to see how dealers would of their own accord have opted to place themselves in such an unfavourable position in business terms.

(223) Thirdly, in view of the fact that the rebates were paid extremely late, dealers were forced to enter into quantitative commitments to Michelin (in connection with the progress bonus) before they had even received the quantity rebates for the previous year. This was unfair not only because the dealers were placed in a weak psychological position during negotiations, but also because, during the negotiations, they were not able to base themselves on a reliable estimate of their cost prices and thus to determine their business strategy freely. Most of the competitors granted the bulk of their rebates immediately.

(224) Fourthly, the resellers had to accept cash flow losses since they were reselling at a loss during the period between their purchase of Michelin tyres and the payment of the rebates, which placed an undue financial burden on them.

(225) In its reply to the statement of objections, Michelin rejects the third and fourth points, arguing that 'except in the case of a new dealer ... the system of annual quantity rebates works as if the supplier were providing the dealer at the start of the year with a large sum which the reseller could use as he saw fit'. This argument confirms the fact that the system produced effects involving loss-making resales and cash flow losses, at least in cases where the dealer was in his first year of business, but especially (a fact which Michelin also forgets) in cases where the dealer had stopped purchasing Michelin products and then began to purchase them again or in cases where sales in year n+1 did not exceed

⁽³⁷⁾ As from 1996, Michelin offered to spread rebate payments.

those in year *n*. The Commission cannot agree with Michelin's view that a sum paid with a time lag of up to 13 months can be regarded as 'a large sum of money made available to a dealer'.

Loyalty-inducing effects

- (226) In view of the long reference period (one year), resellers were under increasing pressure to purchase from Michelin. Once again, the low level of profit margins was a strong incentive to earn an additional rebate, even if small, since it would at all events directly boost the firm's profit margin.
- (227) A detailed analysis of the quantity rebates introduced by Michelin shows that this system of rebates, similar to that ruled against by the Court of Justice in 1983, has as its object and effect the tying of dealers to Michelin and that 'in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply' and thus 'to bar competitors from access to the market' ⁽³⁸⁾.
- (228) Up until the end 1996, most of the rebates or refunds were established on the basis of the calendar year of invoicing. Most of the bonuses (in particular, quantity rebates and progress premiums) were granted on the basis of the quantities sold during the previous year. Any system under which rebates are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the foreseeable loss for the entire period.
- (229) Since it was essential, for the dealer's very survival in certain cases, to receive as large as possible an amount of quantity rebates (these being the only means of restoring the dealer's profit margin) and in view of the extremely long period over which Michelin recorded orders, a dealer could not take the risk at any given moment of diversifying his range to any significant extent at Michelin's expense since this could have jeopardised his ability to reach the rebate threshold and could thus have had a major effect on the overall cost price of the Michelin tyres purchased over the year. This loyalty-inducing effect applied both to new tyres and to retreads.
- (230) As far as new tyres are concerned, in 1995, for example, the rate of rebate varied each time the turnover threshold was crossed, ranging from 1 % at the bottom of the scale to 0,05 % at the top of the scale. Thus, for example, a dealer achieving a turnover of FRF 9 000 with Michelin received a rebate of 7,50 %, whereas if he achieved FRF15 000, the rebate rose to 8,50 %. A factor which considerably increased the pressure was that a final extra order of truck tyres allowing the higher scale to be reached affected the dealer's profit margin on sales of new Michelin tyres in all categories (except retreads and tyres for heavy plant). Finally, here again, it was relatively easy, particularly at the lower end of the scale, to move up the steps of the scale, since there were a lot of them (47 in 1995). It should also be noted that, at the top of the scale, it was in the dealer's interest to go beyond the maximum figure stipulated, since this allowed him to sign a 'commercial agreement' with Michelin, with all the advantages which this involved.
- (231) In its reply to the statement of objections, Michelin merely observes on this point that, in the examples mentioned above, '1 % of FRF 15 000 is only FRF 150, [...] a very modest sum'. However, for a dealer earning on average a margin of only 3,7 %, an additional 1 % rebate on the whole of his Michelin purchases is clearly quite substantial.
- (232) The fact, with regard to new tyres, that the quantity rebates are calculated by reference to the whole of the turnover in all categories of Michelin tyre might suggest, at first sight, that there was an escape route for avoiding the loyalty-inducing effect on the truck tyre market. A dealer wishing to achieve a given additional rebate level without placing an additional truck-tyre order could have opted to purchase instead more Michelin car tyres. In fact, however, this assumption does not stand up to closer analysis.

⁽³⁸⁾ NBIM judgment, referred to above (see footnote 15), at paragraph 73.

- (233) Firstly, given the unit cost differences between a car tyre and a truck tyre, any such attempt to offset purchases would have required the dealer to purchase a significantly larger quantity of car tyres to achieve the same turnover. Secondly, since car tyres are already included in the calculation of quantity rebates, only an additional purchase of car tyres (over and above the dealer's 'usual' purchases) would have been sufficient, for the purpose of obtaining a given rebate, to offset the lack of any additional truck tyre order. However, each dealer has his own customer base structure, and it would be unrealistic to believe that a dealer could significantly (at least in the short term) alter the proportions of his tyre sales accounted for by car tyres and by truck tyres. In other words, a dealer could not suddenly decide to sell more car tyres than truck tyres, since the markets are quite distinct.
- (234) Consequently, turnover-offsetting by means of car tyre sales was not a realistic means of escape for the reseller. At all events, even if such a means of escape existed, it would have only a very limited impact, and it would certainly not allow the conclusion to be drawn that the application of quantity rebates to the whole of the turnover in Michelin products did not have a loyalty-inducing effect on the market for truck tyres.
- (235) It should be noted additionally that Michelin states in its reply to the statement of objections ⁽³⁹⁾ that 'at the start of the year, Michelin drew up with each dealer a table giving an estimate, by product category, of the rebates to which the dealer was entitled for the current year'. It was thus evident that, although contractually the rebates applied to the turnover in respect of all categories, this was not the case in practice, as Michelin's own comments make clear.
- (236) The loyalty-inducing effect made itself felt even more clearly in the case of retreads, since this category had its own table of rebates: the variations in the rate of the rebate resulting from a final order for retreads during a year affected the dealer's profit margin in respect of the total amount of retread sales for the whole of the year. There was no escape route here: consequently, small variations could put appreciable pressure on resellers, and, in this instance, the variations were not inconsiderable. In 1995, for example, the variations in the rate of quantity rebates when turnover thresholds were crossed ranged from 2 % at the bottom of the scale to 0,1% at the top of the scale. Thus, a dealer achieving a turnover of less than FRF 7 000 with Michelin received no rebate.
- A rebate of 2 % was granted as from FRF 7 000, 3 % as from FRF 7 400 and 3,5 % as from FRF 8 000. In 1995 and 1996, for example, there were 18 steps in the scale, which made it fairly easy, particularly at the bottom of the scale, to move up to higher steps. This again was an incentive to achieve additional purchases.
- (237) It should be noted in this respect that, in the earlier Michelin case (NBIM judgment), the Court took the view that a variation of 0,2 % to 0,4 % could place the dealer under sufficient pressure to induce him to make all or a substantial part of his purchases from the dominant undertaking, especially at the end of the period.
- (238) In its reply to the statement of objections, Michelin also argues that, in the earlier Michelin judgment, the Court regarded the lack of transparency in the system of rebates as a crucial factor in determining that Michelin NV's commercial policy constituted an abuse, and that this meant that the French company's commercial policy did not constitute an abuse on the grounds that 'the rebates which had been challenged were not loyalty rebates prohibited under Community case law'.
- (239) The Commission believes that Michelin's analysis is mistaken, since the Court does not regard the lack of transparency in rebates as an essential condition for an abuse to have been committed. It should also be stressed that the lack of transparency is not one of the Commission's objections with regard to the system of quantity rebates. What the Commission is challenging in the system of quantity rebates is the uncertainty in which the dealer is placed with regard to the reference framework used (the final total amount of sales of Michelin products over one year), which was an unfair practice and created a loyalty-inducing effect. It is important to note, however, that the Commission considers that the 'General conditions of sale' taken as a whole do constitute a non-transparent system since, as explained below, the service bonus and the progress bonus involve the earning of points and the definition of 'bases' which rest not on objective, but on subjective factors.
- Market-partitioning effect (and foreclosing effect)

⁽³⁹⁾ Statement of objections, p. 122. Note: the underlining of the phrase 'by product category' has been added by the Commission.

- (240) The rebates applied only to purchases made from Michelin France and thus discouraged purchases made abroad or from importers. Conversely, the high level of prices in France, before rebates, discouraged purchases in France from abroad.

- (241) The foreclosure effect was particularly noteworthy with regard to competitors: thanks to its market shares, Michelin was able to absorb the cost of these rebates, while its competitors were unable to do likewise and therefore had to either accept a lower level of profitability or give up the idea of increasing their sales volume.
- (242) The market-partitioning effect brought about by the method of calculating the rebates is clear. Since only purchases made from Michelin France could be taken into account, the dealer was obliged to purchase essentially through this distribution channel, which seriously restricted his scope for obtaining Michelin tyre supplies from the group's foreign subsidiaries and thus allowed the manufacturer to exercise tight control over the market.
- (243) A dealer could in theory have chosen to make all his purchases in another European country and thus to benefit from the conditions in that country. However, he would have had to bear the transport costs involved in any such decision and in particular to forgo the technical assistance provided by Michelin France, which is crucial in such a trade-specific market as the truck tyre market, where ongoing customer service and the ability to provide technical advice are major factors in the dealer's appeal to customers.
- (244) Dealers could also consider obtaining their supplies from importers, as was indeed the case with a small part of the market. However, there are limits to such supplies, since importers are not always able to guarantee them, particularly for the whole range of tyres which a dealer needs. Importers generally market only the most common tyre sizes. For the other sizes, dealers necessarily had to obtain their supplies from Michelin. However, Michelin granted most of the bonuses on the whole range of categories and, at all events, did not do so by reference to the type of tyre. In order to remain competitive, the importer would have had to offset not only the cost of transport, but also the dealer's loss of bonuses on the whole range of Michelin tyres, including those not bought from the importer.
- (245) Dealers in other European countries could obtain supplies in France only with great difficulty, a factor which in addition was discriminatory. In the first place, the rebate system meant that the prices for sale to the public and/or the prices less invoice rebates were higher than those charged in the countries in which there is no rebate system. Tyre exports were as a result clearly limited. Secondly, dealers in other European countries were not able to receive the rebates granted to the French resellers.
- (246) This policy made parallel imports difficult and partitioned markets, and this explains, firstly, the relatively low level of imports and, secondly, the maintenance of a national market for new replacement tyres. This isolated the French market, enabling Michelin to have a dominant influence there, without any risk of external influences.
- (247) As regards retreads, the specific features of the French market made it more difficult for the dealer to decide to have customers' casings retreaded in other Member States. However, in cases where this would have been possible (frontier areas, for example) and where the desire to do so existed, the system established by Michelin prevented any such practice. The end-of-year rebates were always calculated by reference to the purchases made from Michelin's French subsidiary, and the purchases made there by dealers were also recorded in order to check whether the dealer had achieved the thresholds for access to certain programmes. As a result, dealers also had a strong incentive not to diversify their suppliers.
- (b) **The service bonus**
- (248) This bonus had the same features as the quantity rebates, except that the minimum turnover thresholds were imposed by Michelin. The amount of the bonus was linked to the number of points obtained under an assessment grid essentially regarding the quality of service.
- (249) The service bonus was unfair because of the way in which it was fixed. It also had a loyalty-inducing effect and was in the nature of a tied sale in view of some of its clauses.
- Unfairness
- (250) The granting of the points was somewhat subjective and gave Michelin a margin of discretion in its assessment. In addition, some of the points depended on the provision of very precise strategic information on the market (from 1980 to 1992), which was not in the dealer's interest (no return in the form of studies, for example).

(251) As noted in the previous section describing the operation of the bonus, Michelin was able, through the bonus, to make a subjective assessment that affected the amount of the bonus to be granted. This allowed the manufacturer's representative to put strong pressure on the dealer as regards future commitments and allowed him, if necessary, to use the arrangement in a discriminatory manner.

(252) Some of the headings were by their very nature subjective in their assessment and/or the number of points granted could vary 'depending on the quality of the service provided' ⁽⁴⁰⁾. However, the tally of the points scored was calculated by Michelin's representative, who also set the targets and the corresponding points for the current year. Michelin's ability to unilaterally decrease the bonus during the year if the targets were not met is yet another factor which enabled Michelin to make the conditions granted to dealers dependent on its subjective assessment. Michelin's argument that use was made of this possibility only in exceptional cases does not alter the fact that it was an abuse. In addition, a number of replies given by dealers to the requests for information make matters clear: 'The assessment made is dependent on Michelin's goodwill' or again: 'Michelin can use this bonus in whatever way it wants. We have had unilateral changes imposed on us'. Another dealer explains that he has been subject to retaliatory measures in the form of the 'drastic reduction of certain bonuses: service bonus' ⁽⁴¹⁾.

(253) Having regard to the particular responsibility of an undertaking in a dominant position, this kind of subjectivity and/or margin of discretion, being almost inevitably a source of discrimination, must be regarded as an abuse within the meaning of Article 82 of the EC Treaty.

Loyalty-inducing effect

(254) Up to 1992, points were granted if the dealer achieved a minimum percentage of purchases of Michelin products. Meeting this target set by Michelin as part of the service bonus greatly strengthened the links between Michelin and dealers by means of a loyalty-inducing effect which must be regarded as an abuse. Up to 1992 at least, a heading 'service new products' enabled the dealer to

obtain additional points if his purchase of new products amounted to a specific percentage in relation to the regional share of such products. However, since the earning of points did not depend on quantities, but on the achievement of a given percentage in relation to the regional share of such products, this was a variant of a loyalty bonus which must be regarded as an abuse where it is required by an undertaking in a dominant position. The heading constituted an improper incentive to promote new Michelin products at the expense of competing products. The dealer was unlikely to risk the loss of two points that could result in a reduction in the total amount of his annual bonus. He was thus forced in most cases to comply with the regional market share percentages set by Michelin.

(255) Michelin points out, in its reply to the statement of objections, that, in order to obtain the maximum bonus, it was sufficient to obtain 31 points out of the 35 listed in the sheet and that a dealer could thus have coped with the loss of the 'abusive' points in question. The Commission would emphasise here that, even in 1996, the abusive points 'market information' and 'services new products' represented five points, and, as regards retreads and the exclusive aspect linked to them, two additional points. Thus, it would have been impossible for a dealer to obtain the maximum points without an infringement of the competition rules. Furthermore, it was easier for the dealer to earn these points which, though abusive, cost little, than to improve the quality of the plant and equipment of the sales outlet, or the service provided to customers, nor can Michelin defend the abusive nature of a particular point by arguing that others are not abusive.

A tying effect which is, by its nature, loyalty-inducing:

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

⁽⁴⁰⁾ For example, twice as many points could, in certain cases, be granted for the assessment 'excellent' as for the assessment 'good'.

⁽⁴¹⁾ Replies to the request for information of 17 December 1997.

- (257) As from 1992, the service bonus awarded the dealer an additional point if he systematically had Michelin casings retreaded by Michelin. As from 1996, it was awarded 'if he systematically has the first retreading of Michelin casings done by Michelin'. The possible loss of that point and the possible reduction in the total amount of the annual bonus that could be earned meant a direct increase in the unit cost of all the tyres purchased from Michelin, since the dealer lost not only the bonus on retreads, but also that linked to the whole of his turnover with Michelin.
- (258) The manufacturer thus used its position in the tyre trade in general and in the market for new truck tyres in particular as a means of ensuring that dealers had retreads carried out by it. Dealers could not risk losing a rebate on the total annual turnover with Michelin by having an independent retreader carry out retread work. Dealers have to purchase new tyres, such purchases account for a considerable proportion of their turnover, and truck tyres, a market on which Michelin has a dominant position, represent a large percentage of such turnover. Consequently, any rebate lost on that market is of vital importance to dealers, all the more so if, as in this instance, the whole of the turnover with Michelin is affected.
- (259) The service bonus was abolished in 1997.
- (c) **The progress bonus**
- (260) This bonus, like the 'achieved-target bonus' which replaced it in 1997 and 1998, was particularly abusive since, in order to obtain it, the dealer had to commit himself to a minimum amount of purchases (called the base) corresponding either to the previous year's purchases or to the average of the last two or three years (with adjustments in coefficients).
- (261) The spirit of the system is summed up in a circular to the Michelin sales force issued in January 1995, which states that '[...]'.
lin's representative exercised implicit control over the fixing of the bases, by means of the following arrangements (truck tyres):
- choice between the level achieved in the previous year or the average for the last two or three years. Sometimes, the base agreed the previous year was taken as the reference,
 - application (to the number of tyres) of a uniform regional coefficient, established on the basis of Michelin's forecast on how the market would develop. Michelin's ambitions on a given market were taken into account here, often in terms of market shares. In 1994, for example, the coefficient was in all cases negative, except in one of the seven sectors making up the French market. In 1995 and 1996, it was positive in all the sectors, though with appreciable variations by region (ranging from [...] in 1995),
 - at the end of some years, a reducing coefficient, established by Michelin, was applied. In the case of truck tyres, the reducing coefficient was 2 % in 1992, 8 % in 1994, 0 % in 1994 and 1995 and 8 % in 1996,
 - exceptionally, correction of the figures obtained to take account of any circumstances increasing or decreasing the dealer's purchasing capacity could be applied (for example, the establishment of a competing distributor in the area, the acquisition or loss of a customer with strong potential, a decision on the part of the retailer to stop purchasing imports, etc.). Though requested to do so by the Commission, Michelin did not provide a list of the firms concerned and of the factors which led to such corrections.
- (262) However, the practice sometimes went further than simply requiring the dealer to increase purchases: Miche-
- (263) This individualised bonus corresponds exactly to what the Court ruled against in the abovementioned Michelin judgment. An undertaking in a dominant position cannot require dealers to exceed, each year, their figures for the previous years and thus automatically increase its market shares by taking advantage of its dominant position.
- (264) Here again, the bonus was unfair, because of the requirement imposed by Michelin to increase purchases and because of the insecurity brought about by the individualised determination of the minimum base. The bonus was also loyalty-inducing and market-partitioning since it applied only to purchases made from Michelin France.

Unfairness

- (265) The progress bonus was unfair since, though it appeared to be based on an agreement, it amounted in fact to a requirement unilaterally imposed by the manufacturer to increase purchases of Michelin tyres on the market.
- (266) The progress bonus made it possible to obtain annual rebates, provided that an individual objective (the base) established by reference to the specific situation of each dealer (in particular, previous purchase figures) was exceeded. As a result, two dealers who during the year had purchased the same quantities in absolute terms could obtain very different rebates depending on the initial base, the method chosen by Michelin to calculate the base and what was agreed in subsequent negotiations. Since the criteria for establishing the bases were neither applied uniformly nor known in advance by dealers, and given Michelin's clear influence on the final determination of the base, the system involved a manifest factor of insecurity and allowed discrimination between dealers which must be regarded as unfair.

Loyalty-inducing effect

- (267) The progress bonus also had a marked loyalty-inducing effect. Once the purchase-increase target was set, it became crucial for the dealer to meet the target, which in practice deprived him of the option of obtaining his supplies to any significant extent from other suppliers. Dealers who had committed themselves to exceeding a 'minimum base' (minimum purchase targets) at the end of the year were bound by this in two respects. Firstly, at the start of the year, since the minimum base included a number of steps, with a commitment to purchase greater quantities entitling the dealer to higher rebates. Secondly, at the end of the year, to exceed the minimum set and to exceed it by as large an amount as possible (up to 25 %), since the size of the rebates that could be obtained, while potentially certainly very large, depended on the degree to which the base was exceeded.
- (268) As from 1995, the end-of-year pressure increased considerably. If he achieved the base, the dealer obtained not only a rebate of 0,5 % on the total amount of truck/earthmover tyres purchased, but also continued to receive bonuses of 12 % to 15 % on purchases in excess

of the minimum established in the base. The incentive to exceed the base by 20 % was even stronger, since the dealer was then entitled to rebates ranging from 2 % to 2,5 % of his total annual turnover with Michelin.

- (269) The end-of-year pressure on dealers whose purchase volumes had enabled them to sign a commercial agreement was also very marked during the period examined. In addition to the steps in the quantity rebates, the progress bonus enabled them to obtain large additional, progressive rebates, merely as a result of achieving or exceeding the base. Achieving the base meant obtaining 1 % of the 'truck/earthmover/forklift/light plant' turnover by way of 'support for industrial products' ⁽⁴²⁾. Exceeding the base entitled the dealer to progressive rebates of up to 3 % of the figure if the base was exceeded by 15 %.
- (270) In its reply to the statement of objections, Michelin argues that the loyalty-inducing effect did not arise in practice since 'in less than 5 % of cases was the base agreed for a given year greater than the base and outturn figures for the previous year'. The Commission notes here that Michelin is including dealers for all types of tyres combined, which distorts the calculation of any ratio and clearly does not provide a basis for refuting the abuse.

Market-partitioning effect

- (271) The progress bonus, like the quantity rebates, also had a highly market-partitioning effect since only purchases made from Michelin France were taken into account.

(d) *The commercial agreements*

- (272) These agreements were an extension of the quantity rebate and progress bonus scheme with additional rebates (several % of turnover). They reinforce the abusive nature of the other bonuses with a clause requiring FRF 24 million (between 1991 and 1994) minimum turnover with Michelin, enabling Michelin to be assured of cooperation on the part of the main dealers.

⁽⁴²⁾ As from 1993.

(273) The individual commercial cooperation agreements were, for the largest dealers signing them, merely an extension of the steps in the scale associated with the quantity rebates and progress bonus. In this respect, they involve the same types of abuse, and the prospect of being able to sign a commercial agreement increased the pressure on the large dealers who had reached the top of the rebate scales. These agreements must also therefore be regarded as abusive.

Additional impact of the overlapping of practices: aggravated abusive nature of the 'System' formed by the general conditions of sale.

(274) Over and above the fact that each of the elements making up the general conditions of sale constituted in its own right an abusive practice in several respects, it is important to note the extent to which the combination and interaction of the various conditions helped to reinforce their impact and thus the abusive nature of the 'system' considered as a whole. Each of the objections will be looked at below to demonstrate how each of these conditions contributed to this and how their respective abusive effects combined with one another and reinforced the effectiveness of the relevant practices.

(275) In general, the mere fact that the combined effects of the system forced specialist dealers in practice to 'resell at a loss' Michelin tyres to final consumers, their profit margin being re-established only when they receive payments of the various rebates, premiums and bonuses, sometimes up to thirteen months after the date of the transaction, proves the abusive nature of the system under Article 82 of the Treaty. The fact that Michelin was able to impose such a practice reveals the extent to which it was able to use its position as a necessary partner and to distort competition between suppliers.

(276) This situation imposed cash-flow problems and losses on dealers while Michelin made a not inconsiderable cash-flow gain that was not justified by any economic service performed in return. Placing dealers in this precarious financial situation reinforced the unfair nature of Michelin's relations with dealers.

(277) Consequently, by making use of the fact that dealers had become economically dependent on the rebates paid after purchases had been made, Michelin was able, under the cover of 'agreements', to impose certain requirements

regarding increased sales on the market which, given the market's maturity, in fact amounted to the establishment of a relationship of virtual exclusivity.

(278) The unfairness of the system was also reinforced by the margin of subjectivity in determining the level of the progress bonus and the service bonus, enabling Michelin to use these tools as a means of exerting pressure. Dealers were placed in a precarious position in the negotiations on the targets, which took place before rebates had been paid. It must be borne in mind that Michelin was theoretically able, for example, to change the amount of some of the bonuses during the year ('service bonus').

(279) Furthermore, through its overall operation, the system resulted in uncertainty as to the final net price of the product, a practice which is unacceptable when imposed by an undertaking in a dominant position. Since most of the rebates were conditional, the dealer did not know the final unit price until the last day in February of the year following that in which the purchase was made.

(280) Since market trends are by definition uncertain, the dealer could not know in advance what quantities he was likely to purchase during the year or whether or not he would meet the targets he had committed himself to. 'Overstocking' was not a solution, since the storage of tyres, which are bulky and costly in relation to the specialist dealers' financial capacities, represents a substantial proportion of the dealers' financing requirement. It is therefore out of the question for a dealer to 'overstock' in the long term.

The abusive elements of the new system (1997 to 1998 inclusive)

New truck tyres

(281) The new system introduced by Michelin in 1997 was based essentially on invoice rebates and on an achieved-target bonus. Although the invoice rebates seemed to differ quite distinctly from the practice of quantity rebates and to put less pressure on dealers, they still, as will be demonstrated, involved some abuse. The new 'achieved-target bonus' which was a sort of substitute for the 'progress bonus', still tended to tie the dealer closely to the manufacturer in an abusive manner.

(i) Invoice rebates

- (282) The invoice rebate system which replaced the former quantity rebate system appeared to be less unfair and less loyalty-inducing since it 'automatically' granted the dealer a rebate which was dependent on his previous performance, i.e. on the previous year, or on the average of the two or even three previous years, whichever was more favourable to the dealers. Nevertheless, this practice must still be regarded as abusive, since it had a loyalty-inducing effect in several respects.
- (283) Firstly, since the amount of the rebates was proportional to the figures for the previous years, there was always a loyalty-inducing effect, since any additional purchase of Michelin products could enable the dealer to obtain a higher invoice rebate rate the following year.
- (284) Secondly, if the dealer's purchases for the current year would have allowed him to claim a higher invoice rebate rate than the rate applied during the year, the dealer received an 'end-of-year adjustment' equivalent to the rate differential. The loyalty-inducing effect thus also applied within a given year.
- (285) Thirdly, for a given level of invoice rebate (15 %, 16 %, etc.), an 'end-of-year rebate' (not to be confused with the 'end-of-year adjustment') was paid, its rate ranging from 0 % to 3 % in line with the relevant rebate level and the net turnover invoiced. Thus, within a given invoice rebate rate, the end-of-year rebate depended on the level of sales of Michelin products during the current year. The loyalty-inducing effect was thus further reinforced.

small, during a given year could affect the dealer's profit margin on sales of Michelin truck tyres for the whole year. This created substantial pressure to achieve Michelin's sales targets and was liable to prevent dealers from selecting the most favourable source of supply and made it more difficult for competitors to enter the market.

(288) This was all the more the case as almost all the factors helping to increase the pressure on dealers under the 'progress bonus' were in evidence here too:

- the rebate percentages were always substantial (2 % of invoiced net turnover in 1997, 1,5% in 1998),
- the difference between Michelin's position and that of its main competitors remained considerable,
- Michelin's representatives were omnipresent.

(289) Furthermore, the dealer could not set his 'target' himself. It was established on the basis of the 'dealer's potential' (i.e. his performance in previous years) and the anticipated trend on the market. Michelin gave the dealer the choice between his figures for the previous year and the average for the last two or three years, adjusted to take account of the anticipated growth trend on the market (1 % in 1997). This already created a loyalty-inducing effect, since, if he wished to obtain the bonus, the dealer clearly could not go below his performance figures for the previous year or years. Thus, if he was a long-established Michelin customer, he could not cut his purchases in half if he wished, for example, to change supplier or try out other products. He could perhaps reduce his purchases slightly, but never significantly.

(ii) The achieved-target bonus

- (286) This new bonus made it possible to obtain an amount corresponding to a percentage of net annual turnover invoiced (2 % in 1997 and 1,5 % in 1998) if the target was achieved. Achieving the target also entitled the dealer to the PRO bonus (only for 1997).
- (287) It is inherent in any system of rebates granted on the basis of quantities sold during a relatively long reference period that pressure increases on the purchaser, at the end of the reference period, to achieve the level of purchases necessary for obtaining the rebate. Variations in the rate of rebate as a result of one last order, even if
- (290) In fact, even this last option was difficult to put into practice. The system gave the dealer a strong incentive to choose the highest target amongst the three options offered to him, which considerably reinforced the loyalty-inducing effect.
- (291) It must not be forgotten that, while the invoice rebate rate was established on the basis of the three possible ways of defining the reference base, it was also determined 'on the basis of the solution which is most favourable to the dealer'. The rebate was thus calculated on the basis of the option which corresponded to the highest number of tyres purchased. Thus, for example,

if in 1996 a dealer had sold 1 084 tyres, his average for 1996/1995 being 945 and that for 1996/1995/1994 being 868, it was the first option (1996, 1 084 tyres) which was automatically applied.

- (292) If the dealer signed a more ambitious 'target contract' enabling him to move up to a higher section of the grid, he could obtain a higher invoice rebate. However, this worked both ways: if the dealer opted for a 'target' which was lower than the figure set, he was liable to see a reduction in his 'invoice rebate', since he ran the risk of moving down the grid. Taking the previous example, selecting a different option (the average for 1996/1995 or 1996/1995/1994) would have meant a loss on the invoice rebate, which would have fallen from 17 % to 16,5 %, since the position on the grid would have been lower.
- (293) The dealer also risked obtaining a lower rate on the end-of-year rebate. The invoice rebate rate was one of the criteria included in calculation of the end-of-year rebate rate. Thus, in 1997, a dealer in the 16,5 % section could obtain an end-of-year ranging from 1,5 % to 2,5 %, whereas a reseller in the 17 % section could obtain a rate ranging from 2 % to 3 %.
- (294) The result naturally was that the dealer was prompted to choose a 'target' which would 'if possible', enable him to obtain a higher invoice rebate, and one which would not at all events cause him to lose the rebate to which he was entitled on the basis of his previous purchase figures. Consequently, the dealer's choice was severely limited, to Michelin's advantage: the dealer rarely opted for a 'target' which was lower than the figure used in calculating the invoice rebate. However, such figure was the one corresponding to the highest figure for purchases from Michelin.
- (295) It may be concluded from all these considerations that the achieved-target bonus was in itself abusive within the meaning of Article 82 of the Treaty since it was unfair and loyalty-inducing.

Retreads

- (296) In 1997, Michelin maintained the practice of quantity rebates, consisting of progressive rebates in line with purchases made during the year. The practice was very similar to that which had previously existed and, since the circumstances were almost identical, it must be regarded in the same light. Any such practice imposed by an undertaking in a dominant position puts pressure

on dealers, particularly at the end of the period, in such a way as to restrict their choice of sources of supply and to impede other producers' access to the market, without this being based on any economically justified *quid pro quo*. These rebates must therefore be regarded as an abuse within the meaning of Article 82. In 1998, the end-of-year quantity rebates were abolished from the general conditions, but continued to apply under the commercial agreements.

2. THE PRO AGREEMENT ('AGREEMENT FOR OPTIMUM USE OF MICHELIN TRUCK TYRES')

- (297) Introduced in 1993, this bonus was conditional upon signature of a PRO agreement and upon having already earned a progress bonus (or, as from 1997, an achieved-target bonus). A requirement was that Michelin casings had to be sent for retreading to Michelin exclusively. A bonus was granted for each casing presented.
- (298) This bonus clearly had a double tied-sales effect: in the first place, Michelin was using its dominant position on the market for new tyres to enhance its position on the retread market. Secondly, Michelin was using its dominant position on the retread market to strengthen its position on the new tyre market:
- in order to obtain the bonus, it was necessary to sign a progress bonus commitment,
 - the number of PRO bonuses was limited by the number of new tyres purchased.
- (299) In addition, this bonus was market-partitioning since it was limited to purchases made in France and since the retreading of casings outside France, even by a Michelin subsidiary, meant the loss of the PRO bonus for the relevant casings.

Abusive character of the PRO agreement

Tied or conditional sales

- (300) The PRO agreement adversely affected competition in two ways. First (see paragraphs 301 to 303), Michelin

was using its dominant position on the market in new truck tyres as a lever to preserve or improve its position on the neighbouring retreads market. The second effect (see paragraphs 304 et seq.) was the converse of the first one: Michelin was using the retreads market, where it was also dominant, to strengthen its position on the market in new truck tyres.

(301) To qualify for the large rewards available under the PRO bonus scheme, the dealer had to undertake among other things to 'to present his customers' truck tyres to Michelin for retreading when they have reached the legal tread wear limit' (clause in PRO agreement). The exclusive character of this clause appears to be confirmed when Michelin writes 'given that their first REMIX retread is the retread best able to preserve Michelin truck casings, and to restore them to new tyre performance'; but in its reply to the statement of objections Michelin says that there was no exclusivity in practice, and that Michelin did not in fact require it. It cannot be denied, however, that the existence of such a clause was a natural inducement to dealers to send all their tyre carcasses to Michelin, even where it might not have been justified by the economic circumstances. This reduced the supply of Michelin carcasses to other undertakings, which in some cases might be operating exclusively in the retreads business. In its reply to the statement of objections Michelin estimates that it succeeded in collecting only '[...] of new tyres sold', but adds 'in Europe'. Leaving aside the difficulty of measuring such a figure with any precision, a rate as low as this would be inconceivable in France, where Michelin sells [...] of original equipment truck tyres and about [...] of new replacements, and retreads about [...] of the market. Clearly France is a very special market, because Michelin retreads more tyres than it sells, so that it must be able to collect and retread not only almost all of its own new tyres but also a large number of its competitors' tyres. This special feature of the French market may well be due to the abusive character of the first retread clause just described.

(302) The repercussions were particularly serious, because Michelin truck carcasses made up not only a large percentage of heavy tyres in general, but an even larger percentage of total retreadable carcasses. Bottom-of-range tyres are very often not retreadable; Michelin tyres differ from a large proportion of the competing brands in that they are specially designed in order to

be retreaded. An exclusive dealing obligation can therefore place a major obstacle in the way of Michelin's competitors on the retread market.

(303) The situation is aggravated by the fact that Michelin is already very strong on the retread market, with shares close to [...]; its competitors have shares several times smaller, and generally operate on the retread market only. Unlike Michelin, therefore, they could not use their new tyre business to support or strengthen their retread business.

(304) The other obligation entered into by a party to the PRO agreement concerned a 'truck progress bonus' for the current year. Bonuses were given on the basis of the number of Michelin casings brought to Michelin for retreading, but in order to qualify for them the dealer had to undertake to buy Michelin new truck tyres. Here the manufacturer was using retreading as a lever to guarantee sales on the market in new tyres.

(305) As noted above, the progress bonus obliged the dealer to achieve a level of purchases of new truck tyres determined by reference to his specific circumstances, 'depending on past performance and future prospects'; it comprised a number of mechanisms that tended to bind dealers to the manufacturer and to ensure their loyalty.

(306) In addition, the rewards the dealer could obtain under the PRO agreement were restricted by the number of truck and earthmover tyres bought from Michelin in the previous year. Dealers who had bought 1 000 new tyres in the previous year would receive a bonus on no more than 1 000 retreaded tyres, no matter what quantity they actually sent for retreading. If they wanted to obtain these bonuses, it was to their advantage not just to buy new Michelin tyres, without which they would not be entitled to the bonus, but to buy as many new Michelin tyres as possible. The reward could then be very big, because next year they could obtain a substantial discount on every tyre sent for retreading. This left them even more deeply committed to increasing sales of Michelin products and ever-closer links with Michelin.

(307) If in the course of a year a dealer wanted to promote a different new replacement tyre, and hence to change supplier, he had to be aware that the rewards under the PRO scheme would fall dramatically the following year, because the number of bonuses granted on carcasses was in any event restricted to the number of new tyres bought the previous year. The dealer was therefore under strong pressure to continue buying new tyres from Michelin. The effect was to rigidify the distribution of new replacement tyres.

(308) Towards the end of 1994 an additional clause (avenant) was added to the agreement which strengthened the lever effect still further. Dealers whose purchases of truck and earthmover tyres had increased by more than 25 % in 1994 by comparison with 1993, and who had achieved the commercial target promised at the beginning of the year, were now to be covered by an 'exceptional PRO clause'. Under this arrangement the quantity of retreadable casings sent in 1994 on which they could qualify for the PRO bonus was equal to the number of new truck and earthmover tyres bought from Michelin in the same year. Thus additional bonuses could now be obtained without regard to the number of new tyres bought the previous year; but some conditions did not change. The bonuses were still linked to purchases of new tyres, though now in the current year rather than the previous year, and, more importantly, the dealer had to increase purchases of truck tyres from Michelin quite substantially, and to comply with the commitments given. The overall effect, therefore, was to strengthen the incentive, and in any event to assure Michelin that the dealer was tied into the progress bonus mechanism, on the basis of high volumes.

(309) There was a similar effect on new dealers, who in the nature of things had not made any purchases the year before. Up to 1996 they were not entitled to this bonus. In 1996 Michelin amended the agreement, and introduced an exception for new arrivals so that the maximum sums to be obtained could be determined by reference to the purchases provided for in the progress bonus scheme. This did not change the abusive effect, because, as has been shown, the progress bonus scheme itself provided for a bonus which bound the dealers closely to Michelin and rigidified Michelin's position.

(310) The bonus was concerned with retreading, and was based on the number of tyres sent to Michelin for retreading during the current year, so that there would not appear to be any justification for making it dependent on the purchase of new tyres, or for limiting it to

the number of new tyres bought during either the previous year or the current year. Michelin was here making the conclusion of the agreement subject to acceptance by the dealers of supplementary obligations which, by their nature and according to commercial usage, had no connection with subject of the agreement. This constitutes an abuse within the meaning of point (d) of the second paragraph of Article 82 of the Treaty.

(311) The two clauses just described were removed in 1998, and the PRO agreement was replaced by the carcass quality service clause, which eliminated the abusive components in the system.

Compartmentalising the market

(312) It has already been shown that Michelin's commercial policy, and especially the end-of-year rebates, isolated the French market and gave dealers a strong incentive to have all their retreading carried out by Michelin France. The PRO bonus strengthened this partitioning effect, contrary to Article 82 of the Treaty. The bonuses obtained under the PRO agreement were calculated in proportion to the volume of new tyres bought from Michelin France. To qualify for these bonuses, dealers were required to buy new tyres from Michelin in France, and to send the carcasses to Michelin for retreading. This placed a barrier in the way of any purchase of new tyres abroad, because a dealer who did buy any volume abroad would have to forgo the retread bonus on that volume. Sending Michelin casings abroad for retreading would have had the same effect, because the bonus would be lost even if they were sent to another Michelin subsidiary. Thus it was also made impossible to send tyres abroad.

(313) Bearing in mind that Michelin casings are by far the most common on the market, and the casings which are easiest to retread, there can be no doubt that the partitioning effect of this policy was appreciable.

(314) In its reply to the statement of objections Michelin says only that 'for tax purposes Michelin would not have been able to justify the granting of a bonus under the PRO to a dealer who sent a casing to a related company located abroad'. Michelin here seeks to justify the partitioning effect of the bonus by referring to its tax obligations. The Commission has not sought to establish

whether or not this statement is true in tax terms; the Commission takes the view that an undertaking holding a dominant position has a responsibility to ensure that it does not create a system that partitions national markets, even if that means putting an end to a bonus available domestically.

3. THE BUSINESS COOPERATION AND SERVICE ASSISTANCE AGREEMENT (THE MICHELIN FRIENDS CLUB)

- (315) The main purpose of the Club agreement was to attract the largest dealers. The obligation to ensure that a certain proportion of one's sales was composed of Michelin products, a proportion known as the 'temperature', was not spelt out in the agreements themselves, but this obligation was a real one, and is evidenced in the papers assembled during the inspections carried out on Michelin's premises. An internal Club document, for example, says that [...]. Other documents mention a threshold of [...] Michelin products for trucks.
- (316) Apart from the unfair foreclosure effect produced by this threshold, mention should also be made of the obligation not to divert spontaneous customer demand away from Michelin products which was written into the cooperation agreement until October 1995.

Abusive aspects of the Club

- (317) 1. The Club was used by Michelin as a tool for rigidifying or indeed improving its position on the market in new replacement truck tyres. One of the formal obligations on the dealer was to promote the Michelin brand and not to divert spontaneous customer demand away from Michelin tyres. In some Club agreements Michelin expressly says that it reserves the right to monitor compliance with this clause. Spontaneous demand for Michelin products is very high, so that an obligation of this kind must necessarily be considered abusive, as it is aimed directly at eliminating competition on the part of other manufacturers, guaranteeing the maintenance of Michelin's position, and limiting competition on the market.
- (318) In practice the situation is even worse, because this clause became an obligation on the dealer to guarantee a certain market share for Michelin products (the Michelin 'temperature'), probably at a level varying from one dealer to another and from one region to another,

but certainly at around [...] of sales on the new tyre market. The effects are similar to those of a fidelity clause: the dealer enjoys the many advantages of belonging to the Club, but in return must remain faithful to Michelin. A practice of this kind certainly bears no direct relation to any real cost savings to the manufacturer, and as Michelin has a dominant position on the market it can only be a barrier to whatever competition still exists there.

- (319) There is considerable evidence to show that the temperature condition was central, and that the Michelin market share considered necessary was around [...]. First, the average share of Michelin tyres in sales by Club members in Europe is [...]; the corresponding figure for independent specialised dealers is only [...]; for the Euromaster network, which is actually controlled by Michelin, it is only [...]. Second, numerous documents found on Michelin's premises speak by implication of this market share obligation as a condition of entry to the Club and of continued membership thereafter⁽⁴³⁾. At the hearing Michelin stated that more than 47 % of the Club dealers did not meet these temperature conditions. This figure is somewhat strange, to say the least, because if the temperature does correspond to the average of sales, then 53 % of dealers must have been exceeding their temperature quite substantially in order to offset the temperature shortfall of the 47 % referred to by Michelin.

- (320) This is aggravated by the fact that Michelin already had an integrated network on the market which ensured it very large market shares. Once the two networks were added together, there was a ratchet effect that ensured that Michelin's market shares would hold steady and even increase in a large proportion of the truck tyre trade in France (more than [...] of the total trade in new tyres, and more than [...] of the trade in retreaded tyres, all brands together), while at the same time the truck tyre trade was itself bound to Michelin for a large proportion of its sales.

⁽⁴³⁾ In the minutes of a commercial meeting with a customer, the Michelin representative writes: '[...]' (inspection of 12 June 1997). In other minutes, on the subject of entry to the Club, the Michelin representative writes, '[...]' (inspection of 12 June 1997). A manuscript paper of 30 January 1996 refers to the market share thresholds needed for entry to the Club: '[...]' (inspection of 12 June 1997). Lastly, in view of the advantage of continued relations with a strategic dealer, a representative proposes that generosity should be shown: '[...]'.

- (321) 2. That Michelin did indeed set out to oblige the members of its club to guarantee a Michelin 'temperature' is also shown by the clause in the agreement requiring the dealer to 'carry a sufficient stock of Michelin products to meet any customer demand immediately'. It is expressly stated there that an individualised stock grid may be drawn up 'which takes account of the local, regional and national market segments', and which is to be expressed 'in percentage form'. It would seem, then, that this grid is to be drawn up on the basis of Michelin market shares, or at the very least on the basis of the shares Michelin would like to achieve. This can only induce dealers to guarantee Michelin those shares, and to limit access to the market by other competitors. Dealers, after all, have no interest in keeping stocks which they cannot or do not want to sell. They will not buy competing goods as long as they have Michelin products in stock. But as a result of this clause they always will have a stock of Michelin products 'in a volume that matches Michelin's market share', and not in a volume that matches their own wishes. There is consequently a barrier to entry by other manufacturers, and Michelin's own market shares are rigidified.
- (322) 3. The Club agreement binds dealers by a series of obligations which allow Michelin an exceptionally far-reaching right to monitor the activities of the members, and which do not appear to be in any way justified otherwise than by Michelin's desire to supervise distribution in detail. Conduct on the part of an undertaking holding a dominant position which has the object or effect of binding dealers closely to it in organisational and commercial terms can only increase their dependence, which constitutes an abuse within the scope of Article 82 of the Treaty.
- (323) This is true of the obligation to supply Michelin with detailed financial information, or the obligation to keep Michelin informed of the identities of all the partners or shareholders in the business and of any circumstance which might affect control of the company and its strategic choices. Every aspect of the dealer's financing and strategy becomes an open book to Michelin, which regularly holds meetings with dealers to discuss their finances and to advise them on their financial affairs.
- (324) Michelin's influence over the organisation of the dealer's business does not end there. The dealer must promise Michelin to carry out a wide-ranging outlet audit, and above all must accept a list of areas for progress suggested by Michelin; otherwise the promised financial advantages will be withheld. The dealer must take part in numerous promotion programmes, notably for truck tyres, and use Michelin signs and advertising. The dealer's staff is to be trained at the Michelin training centre. All aspects of the business, and investments in particular, are inevitably influenced by Michelin's wishes.
- (325) From a commercial point of view, finally, the obligation on the dealer to keep Michelin informed of the dealer's statistics and sales forecasts, category by category for all brands, and of the development of Michelin's market share, entitles Michelin to monitor the dealer's commercial policy. As Michelin has a large sales force with instructions to assemble this information, the dealer can never decide to sell competing products without Michelin being aware of the fact: and membership of the Club requires a spirit of partnership and observance of Michelin volumes and the Michelin 'temperature'.
- (326) This leaves the dealer completely dependent on Michelin, so that there is necessarily a loyalty-inducing effect. Any change in the dealer's commercial or strategic policy would leave him open to reprisals on the part of Michelin. Certainly the members of the Club all shared the feeling that there could be no turning back. It would be very difficult for members of the Club to give up not just the financial contributions but also the know-how they have obtained with the help of the dominant manufacturer. Indeed when the first firms signed the agreement it was quite impossible to leave, as they would have been required to repay all the sums received in financial contribution. The commitment they had entered into could fairly be described as a lifetime one.
- (327) The benefits to Michelin, on the other hand, were considerable. In its dealings with the trade in general, Michelin was being given reliable statistics on developments on the market. In its dealings with the individual dealers, Michelin was fully informed at all times of the financial position of its customers, so that it could adapt its marketing pressure or the financial benefits it was granting. It could also satisfy itself that dealers were buying faithfully from Michelin and did not intend to join another network.
- (328) The dealer was therefore closely bound to the manufacturer in terms of finance, organisation and marketing, in a manner that clearly constitutes abuse within the meaning of Article 82 of the Treaty.

(329) 4. Lastly, until October 1995 the Business Cooperation and Service Assistance Agreement expressly required the dealer to have the first retread of Michelin truck and earthmover casings carried out by Michelin. Michelin states that it did not formally require compliance with this clause, but in fact the great majority of retreads for Club dealers were carried out by Michelin, and this continued after 1996. It has already been explained by way of example that in one case Michelin threatened to refuse entry to the Club to dealers who wished to cooperate with competing retreaders.

(330) These are forms of exclusive dealing with effects analogous to those of tied sales, and must therefore be considered to constitute abuse within the meaning of Article 82 of the Treaty.

(331) This is because dealers are under pressure to send their carcasses to Michelin: they will be reluctant to endanger their partnership with Michelin, with all the advantages it brings for the whole of their business, over a question of retreading, which is in any event a minor part of their tyres business as a whole. Thus the dealer's choice is being restricted: the dealer will not be able to have Michelin casings retreaded by other retreaders, and the other retreaders are faced with an obstacle barring their access to this market.

Further arguments put forward by Michelin

(332) In its reply to the statement of objections Michelin puts forward two general arguments to counter the Commission's objections. It says that in the space of 20 years its shares of the market in new replacement tyres have fallen from [...], and that it has seen a substantial fall on the market in retreaded tyres too; and it states that the prices of truck tyres have fallen by more than [...] in ten years, after allowing for inflation. These falls, Michelin argues, prove that Michelin does not hold a dominant position and has not abused one.

(333) The Commission would point out first of all that the Court of First Instance of the European Communities has held, in its judgment in Joined Cases T-24/93, T-25/

93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports v Commission* ⁽⁴⁴⁾, that 'where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterised as an abuse of a dominant position within the meaning of Article 86 of the Treaty'. If in the present case the intention of the dominant undertaking was significantly to increase market shares, and that result was not achieved, the conduct at issue could constitute abuse nevertheless. That conduct might still have helped to maintain or stabilise Michelin's market shares.

(334) In the NBIM judgment the Court of Justice found that 'temporary unprofitability or even losses are not inconsistent with the existence of a dominant position. By the same token, the fact that the prices charged by Michelin NV do not constitute an abuse and are not even particularly high does not justify the conclusion that a dominant position does not exist.'

(335) In addition, the question whether an undertaking holds a dominant position within the meaning of Article 82 of the Treaty has to be considered in relation to the period in which the conduct at issue is observed. Throughout the period in question, and in earlier years too, Michelin always satisfied the market share test developed by the Court of Justice.

(336) Lastly, Michelin's statement of the facts is itself extremely disputable. As regards the retread market, it is remarkable that over so long a period, from 1980 to today, Michelin should have maintained such high market shares, falling by only [...] percentage points, from [...] of the market. It did this at a time when its market shares in other Member States were very much lower. Michelin estimates that its shares of the market in new replacement tyres have fallen from [...]. But according to information supplied by Michelin itself the Michelin group's market shares oscillated between [...] between 1990 and 1997, beginning at [...] in 1990 and standing at [...] in 1997. These figures alone would demonstrate Michelin's capacity to maintain its market shares, at least during the 1990s. If Michelin did indeed see its market

⁽⁴⁴⁾ [1996] ECR II-1201.

shares fall, the fall must have taken place essentially in the 1980s, and was presumably the result of the ending of Michelin's exclusive rights in respect of radial tyres ⁽⁴⁵⁾.

- (337) Turning to the fall in prices, Michelin asserts, carefully, that prices for truck tyres fell by [...] over the ten years, without going into more detail regarding Michelin's own prices.
- (338) The data obtained by the Commission from INSEE, the French National Economic Studies and Statistical Institute, confirm that there was a fall in prices for new replacement tyres on the French market. From an index figure of 104 in 1991 prices had fallen to a figure of 92 by 1998 before allowance for inflation.
- (339) But INSEE attributes this fall to the drop in market prices for hydrocarbons and rubber, which are important components in the cost of tyre manufacture, and considers it similar to what happened on other markets related to the motor industry.
- (340) Despite what appears to have been an unpromising market, Michelin succeeded in maintaining its prices, or even increasing them fairly substantially for certain types of truck tyre. The following table is based on data sent by INSEE and Michelin ⁽⁴⁶⁾; it shows quite clearly that Michelin managed to maintain its prices even while the market was collapsing.
- (342) According to the answer to a request for information sent to Michelin, however, Michelin did suffer a fall in prices, but over the period in question the fall, calculated on the basis of the truck tyres range weighted by the average discount allowed to dealers, was limited to [...] before allowance for inflation, so that the best that can be said is that the fall kept Michelin in line with the market.
- (343) The conclusion is that like the rest of the market Michelin incorporated the fall in raw material prices into its own prices, while maintaining its initial price differential.

D. EFFECT ON TRADE BETWEEN MEMBER STATES

- (344) In its judgment in Case 56/65 Société Technique Minière v Maschinenbau Ulm ⁽⁴⁷⁾ the Court of Justice held that anticompetitive conduct affects trade between Member States if 'having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States.'
- (345) In the NBIM judgment the Court said that 'when the holder of a dominant position obstructs access to the market by competitors it makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting patterns of trade and competition on the common market' ⁽⁴⁸⁾.

Table 24

Year	Michelin	Market	Inflation
1991	100	100	100
1992	[...]	102,8971	102,3712
1993	[...]	102,0682	104,4762
1994	[...]	92,55605	106,315
1995	[...]	91,67193	108,1122
1996	[...]	92,4929	110,3253

- (341) In its letter of 25 July 2000 Michelin contested the validity of this analysis, saying that in the years 1991 to 1996 Michelin's prices had been going through a phase of catching up.

⁽⁴⁵⁾ As the inventor of the radial tyre, Michelin held a patent protecting it from competition from other manufacturers in the 1970s and early 1980s.

⁽⁴⁶⁾ Michelin's catalogue prices for sales to specialised dealers.

⁽⁴⁷⁾ [1966] ECR 235.

⁽⁴⁸⁾ Loc. cit. (see footnote 15), at paragraph 103.

market share is more or less fixed, and in consequence other manufacturers' penetration of the French market cannot exceed a small percentage. The conduct on the part of Michelin which is at issue, and its consequent maintenance of its market share, is accordingly liable to restrict freedom of trade between Member States in a way that harms the achievement of the objective of establishing a single market, in particular by changing the structure of competition within the common market.

- (347) The unfavourable effects of the abusive discount system on trade between Member States are appreciable. The evidence shows that even quite small rebates could be considered significant by the dealers. The dealers were faced with an invidious choice between making sales efforts for the other manufacturers or for Michelin and it was only natural for the dealers to try to increase their Michelin sales — inevitably at the expense of the other manufacturers because the uncertain and individualised bonus could well turn out to be better than the (known) rebate available from other manufacturers. In this way, the task of those other manufacturers trying to sell into France from other Community countries was made noticeably more difficult by the action of the dominant undertaking.

E. ARTICLE 3 OF REGULATION No 17

- (348) Article 3 of Regulation No 17 states that, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 81 or Article 82 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

- (349) The Commission ought therefore to require Michelin to bring the infringement described in Section C to an end, to the extent that it has not already done so, and henceforth to refrain from any agreement or behaviour which might have the same or a similar object or effect.

- (350) It should be noted that in the course of 1998, in exchanges of correspondence and meetings with the Commission departments, Michelin discussed commitments it might enter into in order to bring the infringement to an end. At a meeting on 4 February 1999 Michelin submitted agreements which had been amended with effect from 1 January 1999 in order to take account of the Commission's observations and to put an end to the abuse.

F. ARTICLE 15 OF REGULATION No 17

- (351) Article 15(2) of Regulation No 17 states that the Commission may, by decision, impose on undertakings or associations of undertakings fines not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 82 of the Treaty. In fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

- (352) In the present case it is clear that Michelin committed the infringement intentionally, because, as is explained in paragraph 361, the Commission fined Michelin for the same practices in 1981, and that decision was upheld by the Court of Justice in 1983. Michelin has a very large legal department, which could not be unaware that these practices constituted an infringement, especially as the Court had ruled against the same conduct on a neighbouring geographic market.

- (353) In the present case Michelin's conduct should be penalised by the imposition of a fine. In order to determine the appropriate level of the fine the Commission has to take account of the gravity and duration of the infringement and of any aggravating or mitigating circumstances.

1. GRAVITY

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

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

(356) Michelin's market shares are larger in France than they are in any other Member State. The situation might indeed be due to the history of the brand, but the strength of the Michelin Friends Club on the French market may also be a factor. The effect of the Club policy certainly helps to maintain Michelin's market share among the Club dealers, where its share is not surprisingly much higher than it is among independent specialised dealers.

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

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

2. DURATION

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

(360) The amount of the fine to be imposed on the basis of the gravity of the infringement should therefore be increased by 90 % to take account of its duration. This brings the basic amount of the fine to EUR 15,2 million.

3. AGGRAVATING CIRCUMSTANCES

(361) Michelin was fined by the Commission in 1981 in the NBIM case, and that decision was upheld by the Court in 1983⁽⁴⁹⁾, for abuse of a dominant position of the same kind, namely a system of loyalty-inducing discounts. The Commission guidelines on the method

of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty⁽⁵⁰⁾ expressly refer to repetition of the infringement as an aggravating circumstance justifying an increase in the amount of the fine.

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

(363) It must be concluded that the abuses committed by Michelin on the defined relevant markets are aggravated by the fact that this was a repeated infringement, which justifies an increase of 50 % in the basic amount of the fine, that is to say an increase of EUR 7,6 million.

4. MITIGATING CIRCUMSTANCES

(364) As indicated in Section E, Michelin submitted amendments to its commercial policy in February 1999 which took effect on 1 January 1999, and which were aimed at bringing the infringement to an end. The undertaking had therefore made these amendments even before the Commission sent the statement of objections; this has to be considered a mitigating circumstance, justifying a reduction of 20 % in the basic amount of the fine, that is to say a reduction of EUR 3,04 million.

5. AMOUNT OF THE FINE

(365) For these reasons the amount of the fine to be imposed in respect of the infringement identified in this Decision should be EUR 19,76 million,

HAS ADOPTED THIS DECISION:

Article 1

The Commission finds that, during a period extending from 1 January 1990 to 31 December 1998, Manufacture Française

⁽⁴⁹⁾ See footnote 15.

⁽⁵⁰⁾ OJ C 9, 14.1.1998, p. 3.

de Pneumatiques Michelin infringed Article 82 of the EC Treaty by applying a system of loyalty-inducing rebates to dealers in new replacement tyres and retreaded tyres for trucks and buses in France.

Article 2

For the infringement referred to in Article 1, a fine of EUR 19,76 million is hereby imposed on Michelin.

The fine shall be paid within three months of the date of notification of this Decision into the following bank account: Account No 642-0029000-95, Code SWIFT: BBVABEBB-Code IBAN: BE76 6420 0290 0095, European Commission Banco Bilbao Vizcaya Argentaria (BBVA), Avenue des Arts/Kunstlaan 43, B-1040 Brussels. After the expiry of that period, interest shall be automatically payable at the rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, giving a total of 8,05 %.

Article 3

Michelin shall refrain from repeating any conduct described in Article 1, and from adopting any measure having equivalent effect.

Article 4

This Decision is addressed to Manufacture Française de Pneumatiques Michelin, F-63040 Clermont Ferrand.

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 20 June 2001.

For the Commission

Mario MONTI

Member of the Commission
