II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 October 1988

relating to a proceeding pursuant to Article 85 of the EEC Treaty (Case No IV/32.173 — Continental/Michelin)

(Only the French and German texts are authentic)

(88/555/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2, 4, 6 and 8 thereof,

Having regard to the application for negative clearance or exemption, filed on 27 October 1986 by Continental Gummi-werke AG, Hanover, Federal Republic of Germany (hereinafter referred to as 'Continental'), and by the Compagnie Général des Établissements Michelin, Michelin et Cie, Clermont-Ferrand, France (hereinafter referred to as 'Michelin'), of the cooperation agreement concluded by them on 4 November 1983 for the development of a new run-flat tyre/wheel system,

Having published a summary of the agreement and of the notification in accordance with Article 19 (3) of Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The procedure

(1) On 27 October 1986, Continental and Michelin notified the Commission of a cooperation agreement entered into by them on 4 November 1983 on the development of a new run-flat tyre/wheel system for passenger car tyres. Pursuant to Article 2 of Regulation No 17, they applied for negative clearance or, alternatively, exemption under Article 85 (3) of the Treaty.

B. The undertakings concerned

(2) Continental Gummi-Werke AG is a major tyre manufacturer whose head office is situated in Hanover, Federal Republic of Germany. It has subsidiaries within and outside the Community. Continental has since 1979 acquired three other tyre manufacturers: in 1979, the European Uniroyal companies (now 'Uniroyal Englebert'), whose head offices are situated in Aachen, Federal Republic of Germany, Herstal, Belgium, and Clairoix, France (group shareholding of 100 %); in 1985, Semperit Reifen AG, whose head office is situated in Vienna, Austria (group shareholding of 75 %); and in 1987, General Tire Inc., whose head office is situated in Acron, Ohio, USA (group shareholding of 100 %). With the acquisition of General Tire, Continental has become one of the largest tyre manufacturers in the world.

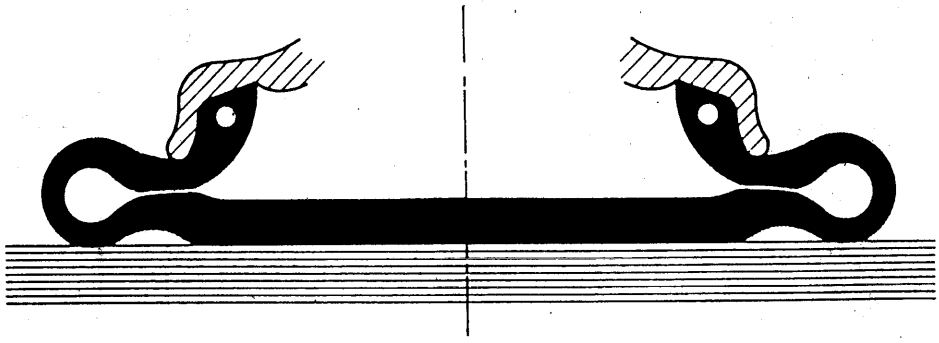
(3) The Michelin Group owned by the parent company Compagnie Générale des Établissements Michelin, Michelin et Cie, whose head office is situated in Clermont-Ferrand, France, is according to its own figures the second largest tyre manufacturer in the world after Goodyear, USA. It has subsidiaries within and outside the Community. The Group also owns Kléber (Pneumatiques Kléber, group shareholding of 92,9 %).

C. The product

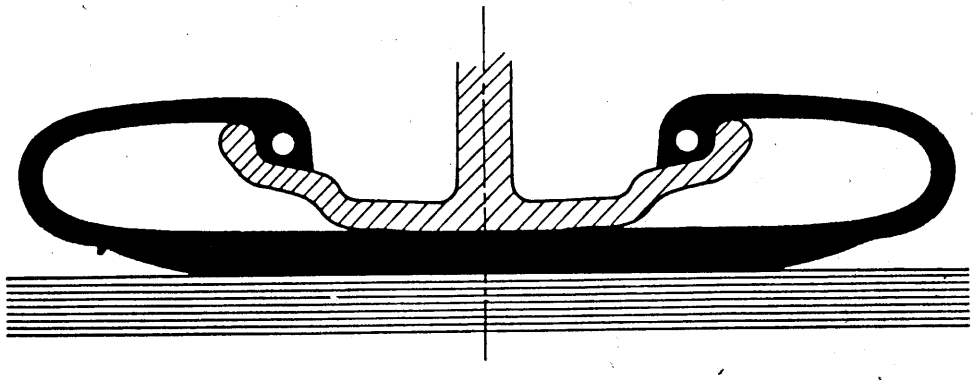
(4) Continental has since 1979 been working on the development of a new tyre/wheel system. Under the new system, in contrast to previous systems, the tyre engages radially the inner periphery rather than the outer periphery of the rim.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 129, 18. 5. 1988, p. 4.

Conventional tyre system



RHT system



The tyre therefore — in contrast to the present system — grips the rim from the outside and hooks up behind the radially inward projecting rim flanges. The system is therefore known as the reversed hooking tyre system or RHT system. Its main advantage compared with the present system is that, in the event of a puncture, the new tyre is pressed against the supporting surface of the rim and continues to run on it when flat without the side-wall of the tyre touching the road surface. In the case of conventional tyres, such contact of the side-walls of the tyre when flat with the road surface, together with the friction between the side-walls within the tyre, would quickly lead to the tyre's destruction. With the new system, the driver can continue to drive for several hunderd kilometres at reduced speed with a flat tyre. This development potentially makes it possible to dispense with the spare wheel.

The parties also claim that the novel construction of the tyre and rim might offer other advantages compared with the traditional system.

These include :

— reduced weight due to dispensing with the spare wheel,
— more room for mounting the brakes,
— improved ride.

The development of the RHT system is at present restricted to passenger car tyres.

D. The market

(5) The tyre market is worldwide. It is covered by a relatively small number of suppliers. A total of 84 % of all sales is accounted for by 10 groups of firms. In 1987, Michelin held second position on the world market and Continental fourth position. Michelin estimates its share of the world market at 18 %, while Continental estimates its world market share at 4 %. Within the European Community, Michelin (including Kléber) is the largest and Continental the second largest supplier. Michelin's share of the Community market for passenger car tyres may be estimated at [. . .] (1) and Continental's share at [. . .].

(6) Sales of car tyres can be subdivided into two groups : sales to the motor-vehicle industry for fitting to new cars (original equipment) and sales to the tyre trade for the replacement of worn tyres (replacement equipment). The parties estimate that some 40 % of all tyres are sold as initial equipment and 60 % as replacement tyres.

E. The agreement notified

(7) The purpose of the cooperation agreement was, during an initial stage, to assess the RHT system developed by Continental in terms of its characteristics, qualities and performance in comparison with current radial tyres, both under normal rolling conditions and while flat. Should such assessment be successful, the purpose of the agreement was, during a second stage, to develop RHT tyres further

(1) In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of the Regulation No 17 concerning non-disclosure of business secrets.

on the basis of the tyre developed by Continental. In cooperation with customers and in accordance with their needs, a joint system of tyre size standardization and physical tolerances of RHT tyres is to be established.

The parties have agreed to unlimited exchange of information only with regard to the mounting systems, architecture and geometry of the new tyre.

Exchange of information is limited:

— in the case of the rim, to its geometic definition,

— in the case of component parts, to the physical characteristics of the compounds utilized,

— in the case of tests, to the testing methods and results,

— in the case of manufacturing methods, to the basic principles of the manufacturing processes for the tyre bead area.

Information is not in principle exchanged on the formula or the methods of refinement of the compounds utilized in perfecting the RHT. Information is to be provided here only if the other party is otherwise unable to develop and manufacture the RHT.

When the agreement was notified, the parties were at the second stage of cooperation. Following comparison of their respective technical knowledge (patents and know-how), they have been working on a division-of-labour basis on the development of the RHT system. Since the agreement was concluded (on 4 November 1983), a large number of joint meetings has taken place.

(8) With regard to the development of the RHT system during the present second stage of cooperation and the joint assessment of results, the agreement contains the following further provisions:

1. *Length of cooperation*

The cooperation is to continue until the completion of the first RHT and for five years thereafter following the year in which the RHT has been marketed by one of the parties. The cooperation is subsequently automatically renewed for additional periods of one year unless terminated by one of the parties by the furnishing of six months prior written notice to the other party.

During the first four years following the conclusion of the agreement, the results of the cooperation are to be periodically reviewed in order to determine whether it should be continued, modified or terminated. Should one of the parties then decide to terminate the cooperation, the other party may continue to utilize the other's patents and know-how. If one of the parties terminates the cooperation because it has developed a new tyre with better run-flat characteristics, that party must offer to revise the agreement with the other party so that the new technology may be incorporated in it.

2. *Extension of the scope of cooperation*

The agreement may be extended to include the development of the RHT for other categories of tyres. For such categories of tyres the time limit for the period of cooperation will commence on the date of the decision to extend the scope of cooperation. Although the relevant decisions were supposed to have been made by 1 April 1988, the Commission has not received any information on any extension of the scope of cooperation.

3. *Joint exploitation of patents and know-how*

It is provided that each party shall remain the owner of its own work product and all improvements thereto made in the course of the cooperation. Where results are developed from mutually conceived ideas, the respective research and development managers of each party shall decide on a case-by-case basis who will be the owner of the rights deriving therefrom. The agreement provides for the setting-up of a common entity by 1 April 1986 in a country to be agreed upon. Although the common entity has not as yet been set up, the parties still intend to do so, and its legal form is still being examined.

Each party is to hold an equal interest in the common entity, and its decisions are to be taken by mutual agreement. The research and development managers of each of the parties are to be co-executive directors of the common entity. As defined in the agreement, the common entity's sole function is the exploitation of patents and know-how. Once it has been set up, it is to have the following tasks:

— it will be the sole and exclusive agent for the patents and know-how as long as one of the patents remains valid in any country,

— it will ensure the collection and distribution of the royalties paid by third parties for the patents and know-how.

As defined in the agreement, patents means all patents and patent applications existing at the time the agreement was concluded and any future patents and patent applications relating to the cooperation and specifically needed for the manufacture, use and sale of the RHT in any country.

As defined in the agreement, know-how means any confidential information developed or acquired (with a right to disclose) by either party prior to or during the term of the agreement, relating to the cooperation and specifically needed for the manufacture, use and sale of the RHT in any country.

4. *Grant of licences*

The common entity will grant licences in the following cases :

— a worldwide, non-exclusive licence covering all of the patents and know-how resulting from the cooperation is to be granted to either party if it decides to undertake the industrial manufacture of the RHT during the term of the agreement or thereafter,

— a non-exclusive licence covering all of the patents and know-how resulting from the cooperation will be granted upon request by one of the parties and after consultation with the other party to any other tyre manufacturer for the manufacture and sale of RHT tyres,

— a similar licence will be granted at Continental's request to its current licensees,

— each of the parties may grant any of the abovementioned licensees its know-how, information and technical assistance not covered by the agreement upon such terms and conditions as that party and the other manufacturer may agree. In such cases, the common entity may at that party's request act as the collection agent.

5. *Infringement of patents and confidentiality*

The parties will provide mutual assistance in action against patent infringements, with the common entity paying for the expenses incurred.

The parties are required to keep confidential all technical information exchanged between them or their affiliates for a period of five years after the expiry of the agreement. Nevertheless, the party benefiting from such information will be released from the obligation of confidentiality if it can establish its own prior knowledge thereof, if the information was already public knowledge or if it has become public knowledge due to acts of third parties not involving the benefiting party.

6. *Commercial development*

The parties are not subject to any restrictions in deciding whether or not to market the RHT or any of the component parts of the system. However, they are required to advise the other party six months in advance, if the RHT is to be marketed.

The parties will coordinate their positions in presenting the RHT to all official authorities for their approval.

The parties are free in their choice of motor vehicle manufacturer(s) and the conditions on which they will present and sell the RHT; however, they agree to coordinate the technical presentation of the RHT to motor vehicle manufacturers.

Cooperation in the commercial development of the RHT will continue for two years following the year in which the RHT is first marketed by one of the parties.

F. The parties' submissions

(9) The parties have essentially put forward two arguments to justify their cooperation, namely the need for further technical development of Continental's prototype to the manufacturing stage and the fact that an individual tyre manufacturer cannot on its own introduce a new system such as the RHT-system on to the market, since the motor-vehicle industry strictly avoids becoming dependent on a single tyre manufacturer so as not to risk its own production being brought to a standstill in the event of disruptions in supplies by that single supplier. The industry's concern always to have at least two sources of supply is, it is argued, particularly great in the case of the RHT, since the motor vehicle industry would have to adapt to the new tyre/wheel system in the construction of its cars.

In this connection, the parties have stated that they will offer licences on reasonable terms to all interested competitors. They add that the purchasing power of the motor vehicle industry is so great that in practice they would not do otherwise since it will probably be insisted upon by the industry.

(10) With regard to the further technical development of the prototype, the parties have pointed to the many problems arising from the new system of hooking the tyre to the rim. In addition to the construction of the rim itself, these involve finding solutions to construction-related changes in the running characteristics of the new tyre which make it equal or indeed superior to the conventional radial tyre.

The parties have cited the following areas of work as examples of their continuing cooperation :

— alignment of non-flat quality standards for the RHT,

— optimization of rim contour and of possible solutions for the bead of the tyre with regard to contour and structure,

— methods for measuring and criteria for assessing the tyre uniformity and ways of perfecting it,

— assessment and improvement of the performance qualities of the tyre under normal rolling conditions and when flat,

— standardization of tyre, rim, valve and cover strips,

— procedure for mounting the tyre on the rim.

Continuing cooperation is also justified by reference to the work to be carried out jointly with the motor vehicle manufacturers to adapt vehicles to both partners' tyres and by the fact that both partners will, even after the RHT has been developed, remain responsible for solving problems that will arise only once the new tyre has entered into day-to-day use.

With regard to the large number of technical problems, the parties have stated that it was doubtful from the outset whether Continental would have been able to solve such problems at all or at least without considerable loss of time and that cooperation was therefore appropriate with a partner that could provide the project with the necessary impetus on the basis of its technical development potential.

(11) Lastly, the partners emphasize that their cooperation is restricted to the areas which are directly connected with the development of the new wheel/tyre system and that they will otherwise remain competitors. This means that, while the RHT tyres ultimately manufactured by them will be based on the same system and must satisfy the technical requirements of the system, they will otherwise differ from one another in terms of compounds, profile and non-system-related structure, as do current radial tyres of different makes.

G. Comments from third parties

Comments were received from third parties in response to the summary of the notified cooperation agreement published in accordance with Article 19 (3) of Regulation No 17. The subsidiaries of Goodyear and Firestone within the Community spoke of the market power enjoyed by Continental and Michelin and feared that they would not be granted licences or only belatedly. Firestone also expressed concern that it would suffer from the establishment of standards for the new tyre system if it were not promptly informed about them.

In view of the parties' statements concerning licences (see 9 above), these fears appear groundless.

It is also true that Michelin and Continental, together with Goodyear, Firestone and all the other important tyre manufacturers are members of the European Tyre and Rim Technical Organization (ETRTO), based in Brussels. ETRTO establishes standards for tyres, rims and valves. Continental has already notified four sizes of the new tyre and, with the agreement of other members, these have been published in the 1988 ETRTO Standards Manual.

II. LEGAL ASSESSMENT

A. Article 85 (1)

Agreement between undertakings

(12) Continental and Michelin are undertakings within the meaning of Article 85 (1), and the cooperation agreement is an agreement within the meaning of that provision.

Restrictions of competition

(13) Through the agreement, Continental and Michelin have given precedence to cooperation for the development of the RHT rather than to the separate development by each of them of their own run-flat tyre. Article 3.3.4 of the agreement reads as follows: 'Should the Cooperation be terminated by one Party in accordance with Article 3.3.2 due to the development by that Party of a new technology having better prospects for run-flat characteristics, that Party shall offer to revise this Agreement with the other Party so that such technology may be incorporated herein under similar and reasonable terms.'

Although Michelin has stated that the group has for years been working on the development of run-flat tyres that have led to systems competing with the RHT, the agreement has not so far been extended to include any such system. The Commission concludes from this not only that Michelin has in the mean time concentrated on the joint development of the RHT system because it is technically superior to its own systems on which it has been working, but also that both partners are in practice agreed to concentrate on the development of the RHT and to abandon the development of their own systems. This involves a restriction of their freedom of action.

(14) On the other hand, the partners have pointed out that their cooperation is restricted to the development of the RHT system and that, on the basis of that system, they will market competing tyres under their own trade marks that will show significant differences in inportant respects, such as the rubber mixture, the profile and width of the tread, and the strength of the side walls.

The Commission considers that the cooperation limited to the RHT system has the effect of restricting competition, since the motor-vehicle industry is restricted in its choice to a single tyre/wheel systems, whereas, if these two partners with their strong market positions had proceeded separately, the motor vehicle industry could have selected from among the competing run-flat tyre systems that might then have been available the one which they considered most suitable for themselves.

(15) The joint exploitation of patents and know-how is to be carried out through a common entity in which each party holds an equal interest and which is to act as their sole and exclusive agent for patents and know-how as long as one of the patents remains valid in any country (Article 3.5.1). Its decisions will be taken by mutual agreement. Although the common entity has not yet been set up, the parties are sticking to their intention to do so.

Though the exclusive commitment to the common entity, the parties lose their freedom to grant licences independently to third parties. This remains true, even if, under Article 3.5.3, the common entity is entitled, upon request by one of the parties and after consultation with the other party, to grant patent and know-how licences for the manufacture and sale of RHT tyres to any other tyre manufacturer. Even if, as emphasized by the parties, the consultation requirement does not mean that the other party can prevent the grant of a licence, the Commission must assume from the way in which the common entity is to work that the grant of licences to third parties will in practice be based on agreement between the parties. Consequently, the joint exploitation of patents and know-how by the common entity constitutes a restriction of competition.

(16) Lastly, although they will distribute their own makes of RHT in competition with one another, Continental and Michelin will not be completely free in marketing the product during the initial stage. In section IV of the agreement, the parties have undertaken to advise the other party six months in advance of any decision to market the RHT and to coordinate their positions in presenting the RHT to all official authorities and to the motor vehicle manufacturers.

(17) The following provisions of the agreement are not to be regarded as restrictions of competition :

— the requirement to provide mutual support in action against patent infringements (Article 3.5.5),

— the requirement to keep secret all technical information exchanged between them or their affiliates.

Effect on trade between Member States

(18) Until such time as the cooperation between the parties is extended to include another type of tyre, the relevant product market is the market for car tyres. For the purposes of this decision, the Commission is starting from the assumption that conventional radial tyres are equivalent to the RHT and therefore interchangeable with it. Although the new RHT system goes beyond the limits for achieving genuine technological progress set by the construction of conventional radial tyres and therefore offers new development possibilities resulting in the advantages listed in the facts (point 4), it will for the foreseeable future have to compete with conventional radial tyres. It will be up to motor-vehicle manufacturers to decide whether and in respect of which models they will introduce the new system.

(19) The relevant geographical market is the whole of the Community. Michelin is the leading tyre manufacturer in the Community, ahead of Continental. On the submarket for car tyres, both together had a market share of some 46 % in 1986. Their market shares in the individual Member States in 1986 were as follows :

Market shares of Continental and Michelin in car tyres in 1986

Country	Continental group	Michelin group	Both groups
Federal Republic of Germany	[...]	[...]	[...]
Belgium/ Luxembourg	[...]	[...]	[...]
Denmark	[...]	[...]	[...]
Spain	[...]	[...]	[...]
France	[...]	[...]	[...]
Greece	[...]	[...]	[...]
Italy	[...]	[...]	[...]
Netherlands	[...]	[...]	[...]
Portugal	[...]	[...]	[...]
United Kingdom	[...]	[...]	[...]
Ireland	[...]	[...]	[...]

As may be seen, the two groups together accounted for almost half of the market for current car tyres in 1986 in the Federal Republic of Germany, Belgium and Luxembourg, Denmark and the Netherlands. In Spain and France, Michelin accounted for half of the market.

(20) It is to be expected that the market position of both groups will strengthen further if the RHT system is successfully introduced. Continental and Michelin are endeavouring separately, on the basis of the technical potential of the jointly developed RHT system, to discover the particular type of construction and material which will give their own make of RHT superior running characteristics. They are thereby creating for themselves a lead which the other tyre manufacturers will not be able to catch up with even if, as anticipated, they receive licences for patent and know-how deriving from the cooperation and from the period before the conclusion of the cooperation agreement and for know-how not falling within the scope of the agreement. Such other tyre manufacturers would probably enter the market with their own fully developed RHT only when the RHT of the Continental and Michelin groups was well established on the market and accepted by motor vehicle purchasers as final consumers to such an extent that they would express a preference for the mounting of such tyres. The RHT is a new product which can change the tyre market as a whole. Because of the lead they would enjoy, such changes would work to the advantage of Continental and Michelin. It can therefore be assumed that the pattern of sales of tyres would be appreciably altered in favour of these two groups.

The agreement is therefore liable to affect trade between Member States.

B. Article 85 (3)

(21) Under Commission Regulation (EEC) No 418/85 of 19 December 1985 on the application of Article 85 (3) to categories of research and development agreements [1], the provisions of Article 85 (1) were declared inapplicable to such categories of agreements subject to the conditions specified in the Regulation.

Under Article 3 (2) of the Regulation, the block exemption cannot be applied to the cooperation agreement between Continental and Michelin because the car tyres manufactured by the parties to the agreement account for more than 20 % of all car tyres manufactured in the common market. The Commission must therefore examine whether the agreement may be granted an exemption by individual decision, such a decision having to take account not only of the criteria specified in Article 85 (3), but also in particular of world competition and the particular circumstances prevailing in the manufacture of high-technology products (10th recital of Regulation (EEC) No 418/85).

(22) Examination of the cooperation agreement under Article 85 (3) produced the following results:

Improved production of goods and promotion of technical progress

(23) It is beyond dispute that joint research is permissible even between partners having strong market positions [2].

However, in view of the relatively late notification of the agreement (three years after its entry into force) and the fact that, at the time the agreement was concluded, Continental had already developed a new tyre/wheel system, the Commission had to ask itself whether joint rather than individual research was at all necessary here.

The parties have convinced the Commission on this point that, on the basis of Continental's prototype, it was only joint research and development which had made possible a tyre/wheel system appropriate for industrial manufacture and that further work was still required. Such work relates to improvement to the running characteristics of the RHT in general, which are different to those of conventional tyres, and in particular to its safety when running flat, inspection procedures for mass production of the tyres, the further development and improvement of production facilities for the tyres themselves and of equipment and products for tyre maintenance. Other joint measures are involved in the introduction of the RHT system among motor-vehicle manufacturers, since the system requires changes in the construction of motor vehicles.

(24) The parties have also justified the need for cooperation on the grounds that Continental would not on its own have been able to solve the numerous technical problems involved, or would have been able to do so only with a considerable delay in time. The Commission may leave open the question of whether this argument is valid from an economic point of view, since, in the course of its contacts with the two parties and on the basis of the examples and explanations given by them, it has reached the conviction that the cooperation with Michelin has substantially enriched the project. For example, an appropriate rim for industrial mass production was selected only during the course of the joint research and development.

Nor does the Commission deny the advantages for safety of the RHT deriving from the practical testing of the new system by both parties.

[1] OJ No L 53, 22. 2. 1985, p. 5.

[2] Commission Decision 72/41/EEC — Henkel/Colgate, OJ No L 14, 18. 1. 1972, p. 14.

(25) The need for cooperation is shown lastly by the argument put forward by the parties that one producer alone could not introduce such a tyre system in the motor-vehicle industry, since motor-vehicle manufacturers always wish to collaborate with at least two tyre producers, so as to avoid supply bottle-necks. Since the new system must first be accepted by the motor-vehicle industry and since such acceptance is dependent on motor-vehicle manufacturers adapting to the new system in the construction of their cars, the result would not have been any different if Continental had developed the RHT alone and had then granted a licence to Michelin. Quite apart from the fact that Continental would thus have lost the advantages of cooperation, the introduction of the RHT among motor-vehicle manufacturers would have been possible only together with one or more licensees. In the particular circumstances involved in this case, therefore, no objection can be made to the fact that, despite the effects on competition described above, Continental preferred cooperation with Michelin to the granting of a licence.

(26) The design of the RHT has overcome the limits inherent in conventional radial tyres and therefore offers advantages which would not have been achieved with the old system. Cooperation on its development therefore contributes to improving the production of goods and to promoting technical progress.

Consumers' share of the advantages resulting from the agreement

(27) The introduction of a run-flat tyre is in the interests of consumers. Such a tyre also allows more room for the braking system, and it has better handling characteristics on road surfaces. These qualities of the RHT system considerably increase the personal safety of the individual car driver. The avoidance of traffic accidents is in the private and the public interest.

Continental's cooperation with Michelin ensures the introduction of a fully developed product. Since both groups represent tyre brands that are widely used, the new system has better prospects of establishing itself generally on the motor-vehicle market in a few years.

Indispensability of the agreements to the attainment of these objectives

Length of cooperation

(28) The parties have justified the length of the cooperation on research and development (five years following the year in which the RHT is first marketed, with automatic renewal for additional periods of one year unless the agreement is terminated by the furnishing of six months prior notice) by the fact that the problems arising in daily use during the first few years would have to be solved jointly in the interests of road safety.

The length of cooperation in respect of the commercial introduction of the RHT on to the market was originally the same as the period for joint research and development. Following negotiations with the Commission, the parties have in the mean time reduced the period to two years following the first introduction of the RHT on to the market. In so far as the cooperation involves the establishment of standards, the provision for renewal of the cooperation is intended, according to the parties, to ensure that one of the parties is not able to gain competitive advantages for itself by exercising unilateral influence on the standard. The parties explain the requirement that either partner must inform the other six months before any introduction of the RHT on to the market as reflecting their desire not to be taken by surprise by any such introduction.

(29) In assessing the length of cooperation in the technical and commercial area, account must be taken of the fact that Article 3 of Regulation (EEC) No 418/85 limits the exemption of such cooperation between non-competing undertakings or between competitors with a combined market share of under 20 % to the duration of the research and development programme and, where the results are jointly exploited, to an initial further period of five years from the time the contract products are first put on the market within the common market. In the case of competitors having a strong market position, cooperation must, because of the larger impact on competition, be restricted particularly strictly to the period essential for the implementation of the programme.

The Commission considers that the setting of the length of cooperation on the commercial introduction of the RHT at two years is now in line with these principles.

(30) The Commission considers the length of cooperation provided for with regard to research and development to be appropriate. In reaching this view, it has taken account of the fact that, in the day-to-day use of the RHT, problems may arise which ought to be solved jointly not only because of the producers' liability, but also in the interests of general road safety. The Commission has also taken into consideration the fact that, under the agreement, cooperation is restricted to those areas which are directly connected with the development of the

RHT system and that Continental and Michelin will otherwise remain competitors. This has also allowed it to accept the automatic renewal of the cooperation agreement with the possibility of termination by giving prior notice. It is to be assumed that Continental and Michelin will limit the joint development of the RHT to the period which is absolutely necessary, since it is in their commercial interests to market the RHT in competition with one another.

(31) In the light of such interests, both partners must be allowed, through minimum coordination requirements during the initial stage of marketing and in the establishment of uniform standards (which are moreover in the interests of the consumer) to attempt to lay down starting conditions which are the same for both, so as to ensure that their development work is rewarded. The Commission therefore considers that the length of cooperation in this area now provided for by them is appropriate.

(32) Complementing the jointly pursued research and development, joint exploitation of patents and know-how by the common entity is also essential. Such exploitation may also include exploitation of patents and know-how that existed before the agreement was concluded. According to the definition given in the agreement, what is involved is only technical knowledge connected with the cooperation and needed for the manufacture, use or sale of the RHT in any country. This restriction falls within the framework of the block exemption for joint exploitation under Regulation (EEC) No 418/85, on which individual exemption decisions should also directly base themselves, at least as far as the definition of basic concepts such as that involved here is concerned.

As defined in Article 1 (2) (d), exploitation of results means 'the manufacture of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application'. Under Article 2 (d), the exemption provided for in Article 1 applies on condition that the joint exploitation relates to results which are decisive for the manufacture of the contract products or the application of the contract processes. As stated in the seventh recital, the individual forms of joint exploitation may relate only to products or processes for which the use of the results of the research and development is decisive. All these formulations do not exclude the joint exploitation of technical knowledge that existed before the cooperation began if, as argued by the two parties here, it has become a component part of the joint development to such an extent that it is necessary for the manufacture, use or sale of the RHT. Such technical knowledge has become a part of the contract processes and contract products within the meaning of the definitions given in Article 1 (2) (b) and (c) of Regulation (EEC) No 418/85.

(33) The Commission has also examined whether the life span of the common entity (as long as a patent is valid in any country) and the procedure for licensing third parties (grant of licence by the common entity upon request by one party and after consultation with the other party) are indispensable to the attainment of the objectives of the cooperation.

(34) The life span of the common entity is extended automatically each time a new patent arising from the cooperation is included, without the common entity being able to be dissolved, for example annually. This arrangement runs counter to those which the Commission considers to be automatically exemptable in its block exemption regulations: under the provisions of Article 3 of Regulation (EEC) No 418/85, joint exploitation by undertakings that are in competition with one another may be exempted for a period of more than five years only if the contract products and substitutes account for no more than 20 % of the market for all such products. Continental and Michelin are at present already well above this market share. In the area of patent licensing agreements, moreover, the Commission has opposed the automatic extension of the duration of a licensing agreement whenever a new patent of the licensor is included in it (Article 3 (2) of Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements [1]).

On the other hand, the common entity deals only with the handling of the award of patent and know-how licences, so that what is involved in this case is an administrative body.

(35) According to its terms of reference, the common entity deals with only the last aspect of the exploitation of results as defined in Article 1 (2) (d) of Regulation (EEC) No 418/85, namely the licensing of intellectual property rights and the communication of know-how. The coordination of the grant of licences in respect of the whole of the technical

[1] OJ No L 219, 16. 8. 1984, p. 15.

knowledge necessary for the manufacture of the RHT means a simplification of administrative procedures for licensees. It also ensures the correct distribution between the two parties of the royalties arising from the agreement. In contrast to the joint manufacture of contract products (which the parties to the agreement do not want), this form of exploitation is merely the economic correlative to the (exemptable) joint research and development. It appears therefore appropriate to grant a longer exemption for the common entity.

Lack of exclusion of competition

(36) The agreement does not on the basis of the above afford the possibility of eliminating competition in respect of a substantial part of the products in question. In the first place, under the agreement between the parties, competition is eliminated only in respect of the system, but not in respect of the other construction features of the RHT. The RHT tyres produced by Michelin will therefore be in competition with those produced by Continental. Furthermore, both parties will remain in unrestricted competition with one another in conventional radial tyres. Lastly, competition will continue to exist with all the other tyre manufacturers. This competition will continue in both conventional and RHT tyres since the parties will offer licences to all interested competitors on reasonable terms (see 9 above). Nor is it certain, at this very early stage, if and when RHT tyres will replace conventional systems. In any event, the partners and their competitors are all members of ETRTO and so participate in the establishment of standards for tyres, rims and valves.

C. Article 8 of Regulation No 17

(37) Article 8 (1) of Regulation No 17 provides that a decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and that conditions and obligations may be attached thereto.

Period of validity of the exemption

(38) The period of validity of the exemption must be based on the duration of the various forms of cooperation between Continental and Michelin dealt with in this Decision. In determining the relevant periods, reference must be made to the day on which the first RHT was marketed. On the basis of the information available, the Commission is assuming that this will be no later than 1 January 1989. Furthermore, the exemption covers only car tyres. It therefore appears appropriate to grant an exemption under Article 8 (1) of Regulation No 17 applying from the day of notification, 27 October 1986, and running from 1 January 1989 :

— for a period of 10 years until 31 December 1998 for the cooperation in research and development,

— for a period of two years until 31 December 1990 for the cooperation with regard to commercial development (section IV of the agreement),

— and for a period of 20 years until 31 December 2008 for the activity of the common entity.

Extension of the cooperation

(39) The parties have not as yet extended the cooperation to other tyre categories. The Commission cannot at this stage comment on any extension, since assessment must be based on other market situations and other technical circumstances depending on the tyre category to which the cooperation is extended. The decision must therefore include the obligation pursuant to Article 8 (1) that the parties must without delay inform the Commission of any extension of the cooperation.

(40) In view of the importance in the market of the partners, the Commission considers it appropriate to impose the reporting requirements set out in Article 2 of the Decision,

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) shall not apply during the following periods to the cooperation agreement on the development on a new run-flat tyre/wheel system concluded between Continental and Michelin on 4 November 1983, the exemption being restricted to car tyres :

— from 27 October 1986 to 31 December 1998 in the case of the cooperation in research and development,

— from 27 October 1986 to 31 December 1990 in the case of the coopration with regard to commercial development (IV of the agreement),

— from 27 October 1986 to 31 December 2008 in the case of the activity of the common entity.

Article 2

Continental and Michelin shall inform the Commission :

1. without delay, of any extension of the cooperation to other tyre categories and all instances of licences granted or refused to third parties ;

2. every two years, beginning on 31 December 1989, on the evolution of the present cooperation.

These obligations shall remain in force for the duration of the exemption granted in respect of the common entity, until 31 December 2008.

Article 3

This Decision is addressed to :

1. Continental Gummi-Werke AG,
   Königsworther Platz 1,
   D-3000 Hanover 1 ;

2. Companie Générale des Etablissements Michelin,
   place des Carmes Déchaux,
   F-63040 Clermont-Ferrand Cedex.

Done at Brussels, 11 October 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission