

In Case 322/81

NV NEDERLANDSCHE BANDEN-INDUSTRIE MICHELIN, having its registered office at 's-Hertogenbosch, represented by Ivo van Bael and Jean-François Bellis, of the Brussels Bar, and by Simeon Moquet Borde and Associates, acting through Dominique Borde, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Cote d'Eich,

applicant,

and

THE FRENCH REPUBLIC, represented by Noel Museux, Deputy Director of Legal Affairs at the Ministry of Foreign Relations, acting as Agent, and Alexandre Carnelutti, Secretary for Foreign Affairs, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

intervener,

v

COMMISSION OF THE EUROPEAN [UNION], represented by Giuliano Marengo and Pieter Jan Kuyper, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Decision of the Commission of the European [Union] of 7 October 1981 relating to a proceeding under [Article 102 TFEU] (N/29.491 - Bandengroothandel Frieschebrug BV/ NV Nederlandsche Banden-Industrie Michelin) (Official Journal 1981, L 353, p. 33) is void,

## THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, O. Due and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat  
Registrar: P. Heim

gives the following

## JUDGMENT

### Decision

- 1 By application lodged at the Court Registry on 28 December 1981 NV Nederlandsche Banden-Industrie Michelin (hereinafter referred to as "Michelin NV"), a company incorporated under Netherlands law, having its registered - office at 's-Hertogenbosch, brought an action under [the fourth paragraph of Article 263 TFEU] for a declaration that the Commission Decision of 7 October 1981 relating to a proceeding under [Article 102 TFEU] (IV/29.491 -Bandengroothandel Frieschebrug·BV/ NV·Nederlandsche Banden-Industrie Michelin) (Official Journal, L 353, p. 33) was void or alternatively that Article 2 of that decision, imposing a fine on Michelin NV, was void or at any .rate for an order reducing the fine.
- 2 Michelin NV is the Netherlands subsidiary of the Michelin group. It is responsible for the production and sale of Michelin tyres in the Netherlands, where it has a factory for the production of new tyres for vans and lorries.
- 3 In Article 1 of the Decision in question the Commission declared that during the period between 1975 and 1980 Michelin NV infringed [Article 102 TFEU] on the market in new replacement tyres for lorries, buses and

similar vehicles by:

- (a) tying tyre dealers in the Netherlands to itself through the granting of selective discounts on an individual basis conditional upon sales "target;" and discount percentages, which were not clearly confirmed in writing, and by applying to them dissimilar conditions in respect of equivalent transactions; and
- (b) granting an extra annual bonus in 1977 on purchases of tyres for lorries, buses and the like and on purchases of car tyres, which was conditional upon attainment of a "target" in respect of car tyre purchases.

In Article 2 the Commission fined Michelin NV 680 000 ECU or HFL 1 833 184.80.

4 The main submissions which the applicant, supported by the Government of the French Republic, advance against that decision may in substance be rearranged as follows:

I. The Commission's administrative procedure was irregular because:

- (1) The Commission did not provide Michelin NV with the documents in the file, in particular the results of inquiries addressed to users and Michelin NV's competitors:
- (2) In its decision the Commission made no mention of the results of the hearing or of the statements made by witnesses and experts at the hearing; and
- (3) During the administrative procedure the Commission did not disclose the criteria upon which it planned to fix a fine.

II. The Commission wrongly considered that Michelin NV had a dominant position inasmuch as it relied on :

- (1) An incorrect definition of the substantial part of the common market at issue; and

- (2) An incorrect assessment of Michelin NV's position in relation to its competitors as regards:
  - (a) Michelin NV's share of the relevant product market, particularly the definition of that market; and
  - (b) other evidence tending to prove or disprove the existence of a dominant position.

III. The Commission wrongly decided that

- (1) Michelin NV's discount system; and
- (2) The grant of an extra discount in 1977 amounted to an abuse within the meaning of [Article 102 TFEU].

IV. The Commission wrongly considered that the conduct in question was liable to affect trade between Member States.

V. The Commission should not have fined Michelin NV or at any rate should have fined it a lesser amount.

I – The regularity of the administrative procedure

*(1) Non-disclosure of documents in the file*

- 5 The applicant maintains that the Commission acted in breach of the rights of the defence by not allowing it to see the documents in its file during the administrative procedure. However, specific expression is given to that complaint only as far as concerns the results of inquiries made by the Commission of certain dealers concerning the discount practices of Michelin NV's competitors.
- 6 The Commission's reply to that submission is that in its decision it did not use the results of that investigation, which merely confirmed what it already

knew from the information obtained from Michelin. It maintains that by virtue of Article 20 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87) it was under the duty not to divulge the information obtained from its investigation since it concerned the discount systems applied by Michelin NV's competitors.

- 7 In this regard it should be recalled that the necessity to have regard to the rights of the defence is a fundamental principle of [Union] law which the Commission must observe in administrative procedures which may lead to the imposition of penalties under the rules of competition laid down in the Treaty. Its observance requires *inter alia* that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement.
- 8 Once the Commission had decided that the information obtained during the investigation was covered by the principle of the non-disclosure of business secrets, it was under the duty, by virtue of Article 20 of Regulation No 17, not to disclose it to Michelin NV. Consequently it could not use that information to support its decision in this case if the refusal to disclose it reduced Michelin NV's opportunity to express its views on the accuracy or scope of the information or on the conclusions drawn from it by the Commission.
- 9 However, at no point in the statement of the reasons on which the decision at issue is based is express reference made to the investigation in question. Nor does it appear that the Commission relied by implication on this part of the file. In so far as the Commission does refer in its decision to the discount policy of Michelin NV's competitors, it does so in general statements which Michelin NV has not challenged at any stage and which moreover are irrelevant for the purposes of assessing Michelin NV's conduct. The investigation in question was not taken into consideration in the procedure before the Court either.
- 10 Nevertheless, the fact that the Commission made no reference to the investigation at issue when stating the reasons on which the decision was based is not sufficient to justify the rejection of Michelin NV's submission. For the purpose of establishing that conclusion it must also be stated that the decision is actually based on other circumstances justifying its adoption, a matter which relates to the substance of the case.

*(2) Failure to discuss the results of the hearing and the statements of the witnesses and experts*

- 11 As evidence of the irregularity of the procedure the applicant also contends that in its decision the Commission made no mention of the results of the hearing held during the administrative procedure or of the statements made by the witnesses and experts at that hearing.
- 12 In reply to this submission the Commission refers to the large number of paragraphs devoted in its decision to refuting the applicant's arguments and states that it took account of all the evidence and testimony produced during the procedure.
- 13 The submission is essentially an allegation that the decision does not properly state the reasons on which it is based.
- 14 In this regard it should be recalled that although [Article 296 TFEU] requires the Commission to mention the facts forming the basis of the decision and the considerations which led it to adopt the decision, it does not require the Commission to discuss all the points of fact and law dealt with during the administrative procedure.
- 15 In its statement of the reasons on which the decision in question was based the Commission sets out the factual and legal considerations on which its decision was founded. Moreover, at various places it expressly refers to statements made by witnesses at the hearing and replies to arguments advanced by Michelin NV during the procedure.
- 16 The submission alleging that the statement of reasons is inadequate cannot therefore be upheld.

*(3) Failure to disclose during the administrative procedure the criteria on the basis of which the Commission intended to fix the fine*

- 17 The applicant maintains that the Commission infringed the rights of the defence by not disclosing during the administrative procedure the criteria on the basis of which it planned to fix any fine.
- 18 The Commission's reply to that submission is that the precise considerations leading to the fixing of the amount of the fine depend on the course of the administrative procedure and that it cannot therefore prejudge this issue before hearing the undertaking.
- 19 In this regard it need only be recalled; as the Court held in its judgment of 7 June 1983 in Joined Cases 100 to 103/80 *Musique Diffusion Francaise SA and Others v Commission* [1983] ECR 1825, that to give indications as regards the level of the fines envisaged, before the undertaking has been invited to submit its observations on the allegations against it, would be to anticipate the Commission's decision and would thus be inappropriate.
- 20 In the statement of its objections of 5 March 1980 the Commission expressly indicated that it intended to fine Michelin NV an amount to be fixed by taking into account the duration and gravity of the infringement which it regarded as serious. In doing so the Commission gave Michelin NV the opportunity to defend itself not only against the finding of an infringement but also against the imposition of a fine.
- 21 Hence this submission cannot be upheld either and it must be concluded that no irregularity in the Commission's administrative procedure has been proven.

## II – The dominant position of Michelin NV

- 22 By a first set of submissions concerning the content of the decision at issue the applicant denies that it holds a dominant position on the market in new replacement tyres for heavy vehicles in the Netherlands. In substance it contends that the Commission's assessment of its market position is vitiated by error first because the Commission confined its analysis to the Netherlands market alone and relied on an incorrect definition of the relevant product market and secondly because in

finding the existence of a dominant position it took account of immaterial factors and disregarded criteria excluding the existence of such a position.

*(1) The substantial part of the common market at issue*

- 23 The applicant's first submission under this head challenges the Commission's finding that the substantial part of the common market on which it holds a dominant position is the Netherlands. Michelin NV maintains that this geo- graphical definition of the market is too narrow. It is contradicted by the fact that the Commission itself based its decision on factors concerning the Michelin group as a whole, such as its technological lead and financial strength which, in the applicant's view, relate to a much wider market or even the world market. The activities of Michelin NV's main competitors are world-wide too.
- 24 The Commission maintains that this objection concerns less the definition of the market than the criteria used to establish the existence of a dominant position. Since tyre manufacturers have on the whole chosen to sell their products on the various national markets through the intermediary of national subsidiaries, the competition faced by Michelin NV is on the Netherlands market.
- 25 The point to be made in this regard is that the Commission addressed its decision not to the Michelin group as a whole but only to its Netherlands subsidiary whose activities are concentrated on the Netherlands market. It has not been disputed that Michelin NV's main competitors also carry on their activities in the Netherlands through Netherlands subsidiaries of their respective groups.
- 26 The Commission's allegation concerns Michelin NV's conduct towards tyre dealers and more particularly its discount policy. In this regard 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 market. 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.

- 27 This finding is not related to the question whether in such circumstances factors relating to the position of the Michelin group and its competitors as a whole and to a much wider market, may enter into consideration in the adoption of a decision as to whether a dominant position exists on the relevant product market.
- 28 Hence the relevant substantial part of the common market in this case is the Netherlands and it is at the level of the Netherlands market that Michelin NV's position must be assessed.

*(2) Assessment of Michelin NV's position in relation to its competitors*

- 29 Before the submissions and arguments regarding the assessment of Michelin NV's position in relation to its competitors are examined more closely it should be recalled, as the Court has repeatedly held, most recently in its judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, that [Article 102 TFEU] is an application of the general aim of the activities of the [Union] laid down by [Article 3 TEU], namely the institution of a system ensuring that competition in the common market is not distorted.
- 30 Consequently [Article 102 TFEU] prohibits any abuse by an undertaking of a dominant position on the common market or a substantial part thereof in so far as it may affect trade between Member States, that is to say in so far as it prohibits any abuse of a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.
- 31 The various criteria and evidence relied upon by the parties regarding the existence of a dominant position must be examined in that light. They concern first Michelin NV's share of the relevant product market and secondly the other factors which must be taken into consideration

in the assessment of Michelin NV's position in relation to its competitors, customers and consumers.

(a) Michelin NV's share of the relevant product market

- 32 The applicant first of all denies that it possesses the market share from which the Commission deduced the existence of a dominant position and contends that the Commission based its decision on an artificial and arbitrary definition of the relevant product market.
- 33 In its decision the Commission relied upon the fact that from 1975 to 1980 Michelin NV's share of the market in new replacement tyres for lorries, buses and similar vehicles in the Netherlands was 57 to 65% whereas the market shares of its main competitors were only 4 to 8%.
- 34 Michelin NV does not dispute those figures but maintains that the Commission failed to take account of the relationships between competing products by excluding in particular car and van tyres as well as retreads: if retreads for heavy vehicles are taken into consideration for example, Michelin NV's market share is only some 37%, which is not such as to establish a dominant position.

*(aa) The market in replacement tyres for heavy vehicles*

- 35 The applicant claims that the definition of the relevant market on which the Commission based its decision is too wide, inasmuch as in the eyes of the consumer different types and sizes of tyres for heavy vehicles are not inter-changeable, and at the same time too narrow inasmuch as car and van tyres are excluded from it although they occupy similar positions on the market. It further argues that the Commission's reasoning in its decision is contradictory in so far as it puts itself alternately in the shoes of the ultimate consumer and in those of the dealer. However, at the level of dealers' total sales, the average proportion of sales of Michelin heavy-vehicle tyres represents only 12 to 18%, which rules out the existence of any dominant position.

- 36 The Commission defends the definition of the relevant product market used in its decision by pointing out that with a technically homogeneous product it is not possible to distinguish different markets depending on the dimensions, size or specific types of products: in that connection the elasticity of supply between different types and dimensions of tyre must be taken into account. On the other hand the criteria of interchangeability and elasticity of demand allow a distinction to be drawn between the market in tyres for heavy vehicles and the market in car tyres owing to the particular structure of demand, which, in the case of tyres for heavy vehicles, is characterized by the presence above all of experienced trade buyers.
- 37 As the Court has repeatedly emphasized, most recently in its judgment of 11 December 1980 in Case 31/ 80 *NV L'Oreal and SA L'Oreal v PVBA De Nieuwe AMCK* [1980] ECR 3775, for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.
- 38 Moreover, it was for that reason that the Commission and Michelin NV agreed that new, original-equipment tyres should not be taken into consideration in the assessment of market shares. Owing to the particular structure of demand for such tyres characterized by direct orders from car manufacturers, competition in this sphere is in fact governed by completely different factors and rules.
- 39 As far as replacement tyres are concerned, the first point which must be made is that at the user level there is no interchangeability between car and van tyres on the one hand and heavy-vehicle tyres on the other.

Car and van tyres therefore have no influence at all on competition on the market in heavy-vehicle tyres.

- 40 Furthermore, the structure of demand for each of those groups of products is different. Most buyers of heavy-vehicle tyres are trade users, particularly haulage undertakings, for whom, as the Commission explained, the purchase of replacement tyres represents an item of considerable expenditure and who constantly ask their tyre dealers for advice and long-term specialized services adapted to their specific needs. On the other hand, for the average buyer of car or van tyres the purchase of tyres is an occasional event and even if the buyer operates a business he does not expect such specialized advice and service adapted to specific needs. Hence the sale of heavy-vehicle tyres requires a particularly specialized distribution network which is not the case with the distribution of car and van tyres.
- 41 The final point which must be made is that there is no elasticity of supply between tyres for heavy vehicles and car tyres owing to significant differences in production techniques and in the plant and tools needed for their manufacture. The fact that time and considerable investment are required in order to modify production plant for the manufacture of light- vehicle tyres instead of heavy-vehicle tyres or vice versa means that there is no discernible relationship between the two categories of tyre enabling production to be adapted to demand on the market. Moreover, that was why in 1977, when the supply of tyres for heavy vehicles was insufficient, Michelin NV decided to grant an extra bonus instead of using surplus production capacity for car tyres to meet demand.
- 42 The Commission rightly examined the structure of the market and demand primarily at the level of dealers to whom Michelin NV applied the practice in question. Michelin NV has itself stated, although in another context, that it was compelled to change its discount system to take account of the tendency towards specialization amongst its dealers, some of whom, such as garage owners, no longer sold tyres for heavy vehicles and vans. This confirms the differences existing in the structure of demand between different groups of dealers. Nor has Michelin NV disputed that the distinction drawn between tyres for heavy vehicles, vans and cars is also applied by all its competitors, especially as regards discount terms, even if in the case of certain types of tyre the

distinctions drawn by different manufacturers may vary in detail.

- 43 Nevertheless, it cannot be deduced from the fact that the conduct to which exception is taken in this case affects dealers that Michelin NV's position ought to be assessed on the basis of the proportion of Michelin heavy-vehicle tyres in the dealers' total turnover. Since it is a question of investigating whether Michelin NV holds a dominant position in the case of certain products, it is unimportant that the dealers also deal in other products if there is no competition between those products and the products in question.
- 44 On the other hand, in deciding whether a dominant position exists, neither the absence of elasticity of supply between different types and dimensions of tyres for heavy vehicles, which is due to differences in the conditions of production, nor the absence of interchangeability and elasticity of demand between those types and dimensions of tyre from the point of view of the specific needs of the user allow a number of smaller markets, reflecting those types and dimensions, to be distinguished, as Michelin NV suggests. Those differences between different types and dimensions of tyre are not vitally important for dealers, who must meet demand from customers for the whole range of heavy-vehicle tyres. Furthermore, in the absence of any specialization on the part of the undertakings concerned, such differences in the type and dimensions of a product are not a crucial factor in the assessment of an undertaking's market position because in view of their similarity and the manner in which they complement one another at the technical level, the conditions of competition on the market are the same for all the types and dimensions of the product.
- 45 In establishing that Michelin NV has a dominant position the Commission was therefore right to assess its market share with reference to replacement tyres for lorries, buses and similar vehicles and to exclude consideration of car and van tyres.

*(bb) The taking into consideration of competition from retreads*

- 46 In order to prove that its market share is less than the Commission claims the applicant also contends that the Commission arbitrarily

excluded retreads from the relevant market; in the applicant's view these offer consumers a genuine alternative as regards both quality and price. To support that argument Michelin NV produces a number of calculations intended to show the competitiveness of retreads compared with new tyres.

- 47 In the Commission's view, retreads must be excluded from the relevant market because they cannot replace new tyres. This, it argues, is first of all because consumers consider them inferior in terms of safety; secondly most retreads are produced to order for the transport undertakings themselves so that the market in question is one for the supply of services; lastly, since retreads are a secondary product as compared with new tyres, which are, as it were, the raw material for retreading, which largely prevents them from being replaced by retreads, competition must be assessed on the primary market, which is the key to the whole market.
- 48 In this regard it must first be recalled that although the existence of a competitive relationship between two products does not presuppose complete interchangeability for a specific purpose, it is not a precondition for a finding that a dominant position exists in the case of a given product that there should be a complete absence of competition from other partially interchangeable products as long as such competition does not affect the undertaking's ability to influence appreciably the conditions in which that competition may be exerted or at any rate to conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude.
- 49 It is clear from the facts, as established from the parties' statements and those made by the witnesses examined at the hearing during the administrative procedure, that it cannot be denied that new tyres and retreads are interchangeable to some degree but only to a limited extent and not for all purposes. Although Michelin NV has produced calculations to show that the price and quality of retreads are comparable to those of new tyres and that a number of users do in fact consider the two groups of products interchangeable for their purposes, it has nevertheless admitted that in terms of safety and reliability a retread's value may be less than that of a new tyre and, what is more, the Commission has shown that a number of users have certain

reservations, which may or may not be justified, regarding the use of a retread, particularly on a vehicle's front axle.

- 50 In order to assess the effect of this limited competition from retreads on Michelin NV's market position it must be borne in mind that at least some retreads are not put on sale but are produced to order for the user as some transport undertakings attach importance to having their own tyre carcasses retreaded in order to be sure of not receiving damaged carcasses. It must be acknowledged that there has been no agreement between the parties as regards the percentage of tyres retreaded in this way as a form of service; the Commission has estimated it at 80 to 95% of retreads whereas Michelin NV maintains that it is only 15 to 20% and that in most cases the order is placed in the name of the dealer and not that of the user. Despite that disagreement between the parties it may be said that a proportion of retreads reaching the consumer stage are not in competition with new tyres because they involve a service provided directly by the retreading firms to the users.
- 51 Furthermore, in assessing the size of Michelin NV's market share in relation to its competitors' it must not be overlooked that the market in renovated tyres is a secondary market which depends on supply and prices on the market in new tyres since every retread is made from a tyre which was originally a new tyre and there is a limit to the number of occasions on which a tyre may be retreaded. Consequently a considerable proportion of demand will inevitably always be satisfied by new tyres. In such circumstances the possession by an undertaking of a dominant position in new tyres gives it a privileged position as regards competition from retreading undertakings and this enables it to conduct itself with greater independence on the market than would be possible for a retreading undertaking.
- 52 It is clear from the considerations set out above that the partial competition to which manufacturers of new tyres are exposed from retreading undertakings is not sufficient to deprive a manufacturer of new tyres of the economic power which he possesses by virtue of his dominant position on the market in new tyres. In assessing Michelin NV's position in relation to the strength and number of its competitors the Commission was therefore right to take into consideration a market share to 57 to 65% on the market in new replacement tyres for heavy

vehicles. Compared with the market shares of Michelin NV's main competitors amounting to 4 to 8%, that market share constitutes a valid indication of Michelin NV's preponderant strength in relation to its competitors, even when allowance is made for some competition from retreads.

- (b) The other criteria and evidence proving or disproving the existence of a dominant position
- 53 The applicant challenges next the relevance of the other criteria and evidence used by the Commission to prove that a dominant position exists. It claims that it is not the only undertaking to have commercial representatives, that the numbers employed by its main competitors are even larger in relative terms and that its wide range of products is not a competitive advantage because the different types of tyre are not interchangeable and it does not require dealers to purchase its whole range of tyres.
- 54 It also claims that the Commission took no account of a number of evidential factors which were incompatible with the existence of a dominant position. For instance, dealers' net margins on Michelin tyres and competing tyres are comparable and the cost per mile of Michelin tyres is the most favourable for users. Since 1979 Michelin NV has made a loss. As its production capacity is insufficient, its competitors, which are also financially stronger and more diversified than the Michelin group, can at any moment replace the quantities which it supplies. Lastly, because users of heavy-vehicle tyres are experienced trade buyers they have the ability to act as a counter-poise to the tyre manufacturers.
- 55 In reply to those arguments it should first be observed that in order to assess the relative economic strength of Michelin NV and its competitors on the Netherlands market the advantages which those undertakings may derive from belonging to groups of undertakings operating throughout Europe or even the world must be taken into consideration. Amongst those advantages, the lead which the Michelin group has over its competitors in the matters of investment and research and the special extent of its range of products, to which the Commission referred in its decision, have not been denied. In fact in



the case of certain types of tyre the Michelin group is the only supplier on the market to offer them in its range.

- 56 That situation ensures that on the Netherlands market a large number of users of heavy-vehicle tyres have a strong preference for Michelin tyres. As the purchase of tyres represents a considerable investment for a transport undertaking and since much time is required in order to ascertain in practice the cost-effectiveness of a type or brand of tyre, Michelin NV therefore enjoys a position which renders it largely immune to competition. As a result, a dealer established in the Netherlands normally cannot afford not to sell Michelin tyres.
- 57 It is not possible to uphold the objections made against those arguments by Michelin NV, supported on this point by the French Government, that Michelin NV is thus penalized for the quality of its products and services. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.
- 58 Due weight must also be attached to the importance of Michelin NV's network of commercial representatives, which gives it direct access to tyre users at all times. Michelin NV has not disputed the fact that in absolute terms its network is considerably larger than those of its competitors or challenged the description, in the decision at issue, of the services performed by its network whose efficiency and quality of service are unquestioned. The direct access to users and the standard of service which the network can give them enables Michelin NV to maintain and strengthen its position on the market and to protect itself more effectively against competition.
- 59 As regards the additional criteria and evidence to which Michelin NV refers in order to disprove the existence of a dominant position, it must be observed 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. Finally, neither the

size, financial strength and degree of diversification of Michelin NV's competitors at the world level nor the counterpoise arising from the fact that buyers of heavy-vehicle tyres are experienced trade users are such as to deprive Michelin NV of its privileged position on the Netherlands market.

- 60 It must therefore be concluded that the other criteria and evidence relevant in this case in determining whether a dominant position exists confirm that Michelin NV has such a position.
- 61 Michelin NV's submissions disputing that it has a dominant position on a substantial part of the common market are therefore unfounded.

### III – The abuse of the dominant position

- 62 By a second set of submissions the applicant challenges the decision in question inasmuch as it accuses it of committing an abuse, within the meaning of [Article 102 TFEU], of its dominant position on the Netherlands market in new replacement tyres for heavy vehicles. It contests the finding reached by the Commission in its decision to the effect that it restricted dealers' freedom of choice, thereby causing them to be treated unequally and restricting access to the market for other manufacturers, in two ways, first by means of its discount system in general and secondly by the grant of an extra bonus in 1977 which was conditional upon the attainment of a sales target for car tyres.

#### *(1) The discount system in general*

- 63 Michelin NV maintains that in its decision the Commission failed to recognize the true features of the discount system at issue. It contends that it was a simple quantitative discount having no other function than the legitimate aims of inducing dealers to buy more tyres and providing a reward for the service consisting in the attainment of a jointly agreed sales figure for Michelin tyres. To prohibit such a system would, in its view, amount to condemning the dominant undertaking to lose ground and penalizing it merely for having a dominant position.

64 The Commission contends that the discount system applied by Michelin NV constituted an abuse because it was based on the fixing of individual and selective sales targets not clearly defined in writing, thus tying tyre dealers to Michelin NV, and because it involved dissimilar conditions in respect of equivalent transactions. In its view it was a variant of the fidelity-rebate system, as dealt with in the judgment of the Court of 13 February 1979 in the *Hoffmann-La Roche* case, with the added condition that the customer must obtain his supplies, or at least a large proportion of them, from the undertaking in the dominant position, thereby tending to deprive the customer of any choice as regards his sources of supply.

65 Michelin NV's position is supported by the French Government which contends that a discount system based on sales targets cannot be considered an abuse *per se*. Only the existence of other circumstances, which it claims are not present in this case, could make the system incompatible with [Article 102 TFEU].

(a) The operation of the discount system

66 The oral argument before the Court revealed that apart from the fixed invoice discount and the cash discount for payment before the due dates, which were the same for all dealers and are not at issue in this case, the discount system in question involved an annual variable discount a proportion of which was paid initially every month and then every four months in the form of an advance on the annual discount. The percentage of this variable annual discount was determined according to the dealer's turnover in Michelin heavy-vehicle, van and car tyres in the previous year, with no distinction of category, on the basis of a progressive discount scale which was, however, abandoned in 1978. The advance on the annual discount was less, generally by 4% but sometimes by more, than the percentage laid down by the scale.

67 The annual variable discount, or at any rate the full rate thereof, was not obtained until the dealer achieved during the year in question a sales target which was expressed as a number of heavy-vehicle tyres sold and was fixed or agreed at the beginning of the year. Until 1978 there were

three targets, a minimum, intermediate and maximum, on which the final discount depended. After 1979 a single target was fixed for the purposes of the grant of the annual variable discount.

68 The Commission has not challenged the explanations given by Michelin NV in the procedure before the Court to the effect that the variations between the rate of discount granted upon the attainment of the maximum target and the rate granted in the event of a failure to achieve the minimum target were small, namely from 0.2 to 0.4%. That range of variation, which the decision indicated was much greater, must therefore be considered established.

69 Neither the discount system as a whole nor the scale of discounts was published by Michelin NV. It is not denied that the criteria on the basis of which the sales targets were fixed or agreed were not known in advance. The targets were discussed at the beginning of each year between the dealer and Michelin NV's commercial representative. In practice no written confirmation was provided by Michelin NV after the discussions, although where appropriate written notes were taken or exchanged during them. Contrary, however, to the assertion in the fourth paragraph of point 28 of the Commission's decision, it has not been demonstrated that dealers hesitated to complain about the lack of written confirmation. This point must therefore be disregarded.

(b) The application of [Article 102 TFEU] to a system of target discounts

70 As regards the application of [Article 102 TFEU] to a system of discounts conditional upon the attainment of sales targets, such as described above, it must be stated first of all that in prohibiting any abuse of a dominant position on the market in so far as it may affect trade between Member States [Article 102 TFEU] covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance\_ or development of the level of competition still existing on the market.

- 71 In the case more particularly of the grant by an undertaking in a dominant position of discounts to its customers the Court has held in its judgments of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and Others v Commission* [1975] ECR 1663 and of 13 February 1979 in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 that in contrast to a quantity discount, which is linked solely to the volume of purchases from the manufacturer concerned, a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers, amounts to an abuse within the meaning of [Article 102 TFEU].
- 72 As regards the system at issue in this case, which is characterized by the use of sales targets, it must be observed that this system does not amount to a mere quantity discount linked solely to the volume of goods purchased since the progressive scale of the previous year's turnover indicates only the limits within which the system applies. Michelin NV has moreover itself pointed out that the majority of dealers who bought more than 3 000 tyres a year were in any case in the group receiving the highest rebates. On the other hand the system in question did not require dealers to enter into any exclusive dealing agreements or to obtain a specific proportion of their supplies from Michelin NV, and that this point distinguishes it from loyalty rebates of the type which the Court had to consider in its judgment of 13 February 1979 in *Hoffmann-La Roche*.
- 73 In deciding whether Michelin NV abused its dominant position in applying its discount system it is therefore necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.
- 74 It is in the light of those considerations that the submissions put forward by the applicant in answer to the two objections raised in the

contested decision to the discount system in general, namely that Michelin NV bound tyre dealers in the Netherlands to itself and that it applied to them dissimilar conditions in respect of equivalent transactions, must be examined.

(c) The binding of dealers to Michelin NV

- 75 The applicant's first submission in this regard is directed against the finding reached by the Commission in its decision that all the circumstances showed that Michelin NV by its discount system closely bound tyre dealers to itself.
- 76 To substantiate that objection the Commission stated in the preamble to its decision that the aim of the discount system was to put strong pressure on dealers to sell each year more Michelin tyres than in the previous year and to increase the proportion of Michelin tyres in their total sales as shown by the regular calculations made by the applicant's commercial representatives of its position with each dealer in relation to its competitors (the "temperature Michelin"). According to the Commission, such conduct constituted a distinct abuse of its dominant position.
- 77 However, it must be observed that during the procedure before the Court the Commission accepted that Michelin NV had ceased recording what has been called the "temperature Michelin" on its customers' files and that it was impossible to prove any direct link between the "temperature Michelin" on the one hand and the targets and discounts on the other. The Commission confined itself to observing that it was very probable that there was an indirect link between the "temperature Michelin" and the discount system. Such an allegation, which is not based on any evidence and is denied by Michelin NV, is not sufficient however to prove that the discount system in question was contrary to [Article 102 TFEU] in that regard.
- 78 The Commission further contended that a system based on annual targets puts strong pressure on the dealer to obtain his supplies from the same supplier because of the dealers' uncertainty as to the rates of discount and the risk of losing some of the discount if the sales target

is not attained, which in this case is heightened by the lack of transparency of the system and the fact that Michelin NV's commercial representatives regularly drew dealers' attention to the possible advantages of placing a final order at the end of the year and the consequences of failing to attain the targets.

- 79 Michelin NV denied that dealers were dependent upon it and referred in particular to the low variations in the discount based on the targets, which it claims were counterbalanced by the advantage which it experienced of enabling it to plan its production better. It contended that, as its discount system had been in operation for a long time, all the dealers were well acquainted with it and therefore suffered no uncertainty in this regard. The purpose of the disputed discount system was to reward the purchase of increasing quantities of goods. To prohibit an undertaking in a dominant position to use such a system would be tantamount to condemning it to lose ground.
- 80 In this regard it must first be stated that the variation of 0.2 to 0.4%, as established - during the procedure before the Court, in the discounts based upon the attainment of the sales target is indeed slight. Nevertheless the effects of the discount under discussion can by no means be assessed solely on the basis of the percentage variation in the discounts linked to the targets.
- 81 The discount system in question was based on an annual reference period. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In this case the variations in the rate of discount over a year as a result of one last order, even a small one, affected the dealer's margin of profit on the whole year's sales of Michelin heavy-vehicle tyres. In such circumstances, even quite slight variations might put dealers under appreciable pressure.
- 82 That effect was accentuated still further by the wide divergence between Michelin NV's market share and those of its main competitors. If a competitor wished to offer a dealer a competitive inducement for

placing an order, especially at the end of the year, it had to take into account the absolute value of Michelin NV's annual target discount and fix its own discount at a percentage which, when related to the dealer's lesser quantity of purchases from that competitor, was very high. Despite the apparently low percentage of Michelin NV's discount, it was therefore very difficult for its competitors to offset the benefits or losses resulting for dealers from attaining or failing to attain Michelin NV's targets, as the case might be.

- 83 Furthermore, the lack of transparency of Michelin NV's entire discount system, whose rules moreover changed on several occasions during the relevant period, together with the fact that neither the scale of discounts nor the sales targets or discounts relating to them were communicated in writing to dealers, meant that they were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do so.
- 84 All those factors were instrumental in creating for dealers a situation in which they were under considerable pressure, especially towards the end of a year, to attain Michelin NV's sales targets if they did not wish to run the risk of losses which its competitors could not easily make good by means of the discounts which they themselves were able to offer. Its network of commercial representatives enabled Michelin NV to remind dealers of this situation at any time so as to induce them to place orders with it.
- 85 Such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus limits the dealers' choice of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.
- 86 It must therefore be concluded that by binding dealers in the



Netherlands to itself by means of the discount system described above Michelin NV committed an abuse, within the meaning of [Article 102 TFEU], of its dominant position in the market for new replacement tyres for heavy vehicles. The submission put forward by the applicant to refute that finding in the contested decision must therefore be rejected.

(d) Discrimination against certain dealers

- 87 In a second submission, concerning the discount system in general, the applicant challenges the Commission's finding that its discount system involved the application of dissimilar conditions to equivalent transactions with dealers within the meaning of [Article 102 (c) TFEU] inasmuch as different discounts were granted to dealers in comparable situations. Michelin NV maintains that the discounts are not discriminatory and that the differences between the rates of discount received by different dealers are due to the application of a discount scale based on the dealer's total purchases from Michelin NV in the previous year.
- 88 To justify its finding, the Commission in the procedure before the Court relied upon a comparison of the discounts received by various dealers with the annual quantities of heavy-vehicle tyres purchased by them and upon a table showing the number of tyres sold in the various tyre categories in respect of which different rates of discount were granted in 1976 and pointed out a number of inconsistencies and anomalies which in its view emerged from them and demonstrated the existence of discrimination.
- 89 However, it is clear from what has been stated regarding the operation of the discount system that the amount of the annual variable discount depended primarily on the dealer's turnover in Michelin tyres without distinction of category and not on the number of heavy-vehicle tyres purchased by the dealer. Furthermore, during the oral procedure the Commission had to admit that it had made a mistake as regards certain evidence contained in the customers' files used by Michelin NV for the purposes of its discount system. The possibility cannot be excluded that this is the explanation for certain inconsistencies and anomalies which the Commission thought it could discern in the documents which it

examined.

- 90 Although a system based on individual sales targets fixed or agreed every year for each dealer necessarily involves certain differences between the rates of discount granted to different dealers for the same number of purchases and although in addition Michelin NV has admitted that it could not apply its scale of discounts mechanically, as some dealers did not accept an automatic reduction in the discount as a result of a reduction in turnover, it has not been established that such differences in treatment between different dealers are due to the application of unequal criteria and that there are no legitimate commercial reasons capable of justifying them. It is not therefore possible to infer from such differences that Michelin NV discriminated against certain dealers.
- 91 It must therefore be concluded that the Commission has not succeeded in demonstrating that the discount system in question involved the application of discriminatory discounts to different dealers and that the decision at issue must be declared void in so far as it declares in Article 1 (a) that Michelin NV infringed [Article 102 TFEU] by applying to its dealers dissimilar conditions in respect of equivalent transactions.

*(2) The extra bonus in 1977*

- 92 The applicant next challenges the finding reached by the Commission in the decision at issue that Michelin NV abused its dominant position by granting in 1977 on purchases of tyres for lorries, buses and similar vehicles an extra bonus of 0.5% conditional upon the attainment of a target for purchases of car tyres.
- 93 In the Commission's view, the extra bonus was intended to compel dealers to make a special effort on the market in car tyres so that they might receive a bonus on sales of heavy-vehicle tyres. That, it claims, is a commercial practice similar to that covered by [Article 102 (d) TFEU].
- 94 Michelin NV contends that the Commission relied upon an incorrect interpretation of the facts. In its submission the extra bonus granted in 1977 cannot be regarded as a discount on heavy-vehicle tyres since it

was linked to the attainment of a target for car tyres. It also denies that the grant of the extra bonus was linked to a special target other than that normally fixed for sales of car tyres.

- 95 In this connection it should be observed first of all that, as is clear from the explanations provided by the parties in the procedure before the Court, the system of discounts applied by Michelin NV to car tyres was similar to that applied to sales of heavy-vehicle tyres. Under that system the proposed rate of each dealer's variable annual discount on sales of car tyres was increased by 0.5% by Michelin NV during 1977.
- 96 It is common ground that owing to a temporary shortage Michelin NV was unable to meet demand for heavy-vehicle tyres on the Netherlands market in 1977. It was therefore impossible for dealers to attain their targets for sales of heavy-vehicle tyres and it was in those circumstances that Michelin NV granted the extra bonus in question.
- 97 It is clear from the foregoing that, irrespective of whether the extra bonus was linked to a special higher target and whether the bonus was announced at the beginning of the year or only in September 1977, it fell within the scope of the operation of the annual variable discount on sales of car tyres. Although Michelin NV's reason for granting the bonus was to make good the losses incurred by dealers as a result of its inability to supply them with the quantities of heavy-vehicle tyres needed to achieve their sales targets for such tyres, the fact remains that the bonus was granted on sales of car tyres according to a target set for those tyres and was not dependent on the quantity of heavy-vehicle tyres sold.
- 98 It follows that there is no ground for describing the bonus, as the Commission has done, as a discount on sales of heavy-vehicle tyres. In granting the bonus Michelin NV did not make a benefit granted on sales on one market dependent upon the attainment of a target for sales on another market. The Commission's argument that the practice in question is akin to a linked obligation within the meaning of [Article 102 (d) TFEU] is therefore unfounded.
- 99 It must therefore be concluded that the Commission has not

established that in granting the extra bonus in 1977 Michelin NV abused its dominant position on the market in heavy-vehicle tyres. Accordingly Article 1 (b) of the decision at issue must be declared void.

#### IV – Effect on trade between Member States

- 100 The applicant denies that its discount system was capable of affecting trade within the meaning of [Article 102 TFEU].
- 101 In its decision the Commission stated that other manufacturers, whose chances of penetrating the Netherlands market were reduced owing to the fact that dealers' freedom to purchase was restricted, mostly had 'their production plant in other Member States and that 25 to 28% of heavy- vehicle tyres competing with Michelin tyres on the Netherlands market came from other Member States of the [Union].
- 102 Michelin NV, supported by the French Government, contended that conduct confined to the territory of one Member State cannot affect trade between Member States. In its view the Commission's arguments amount to a presumption that trade is affected and are based on a purely abstract and theoretical analysis; the Commission has not specifically established that the applicant's conduct affects competition and seals off the Netherlands market.
- 103 In this connection it must be stated 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.
- 104 It has not been denied in this case that important patterns of trade exist as a result of the establishment of competitors of significant size in other Member States. The effects of the discount system on the chances of Michelin NV's competitors of obtaining access to the Netherlands market have already been examined in the context of the examination of the abusive nature of Michelin NV's conduct. It must also be remembered that [Article 102 TFEU] does not require it to be

proved that the abusive conduct has in fact appreciably affected trade between Member States but that it is capable of having that effect.

- 105 It follows from the foregoing that the submissions seeking to deny that Michelin NV's discount system affects trade between Member States are unfounded.

#### V – The fixing of the fine

- 106 The applicant's objection to the fixing of the fine is that it cannot be accused of acting intentionally or negligently as regards the conduct in question as it was impossible for it to foresee a sudden change in the Commission's administrative practice and the Court's case-law on discounts. Finally, as an alternative claim, it asks the Court to reduce the fine.
- 107 In that respect it must be emphasized that Michelin NV was aware of the factual elements justifying both the finding of the existence of a dominant position on the market and the assessment of the contested discount system as an abuse of that position. The discount system was set up deliberately. The fact that hitherto neither the Commission nor the Court has had to adjudicate on a discount system having the same features as the system in question does not exonerate Michelin NV. At all events, in view of the previous decisions of the Commission and judgments of the Court Michelin NV ought to have expected that such a system would fall within the sphere of application of [Article 102 TFEU].
- 108 It follows that the Commission was right to decide that it was entitled to impose a fine on Michelin NV under Article 15 (2) of Regulation No 17.
- 109 The fines which the Commission may impose under Article 15 (2) are from 1 000 to 1 000 000 units of account or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of the undertaking concerned. The article provides that in fixing the amount of the fine within those limits the gravity and the duration of

the infringement are to be taken into consideration.

- 110 As far as the duration of the infringement is concerned, it is common ground that the system at issue was applied during a period from no later than 1975 to 1980. As regards Michelin NV's argument that the Commission itself could have shortened the duration of the infringement by acting more quickly, it is necessary to take into account the difficulties of investigating a discount system which was not laid down in writing and whose terms lacked transparency. In those circumstances the Commission was justified in taking the whole period into consideration in order to determine the duration of the infringement.
- 111 In assessing the gravity of the infringement regard must be had, according to the circumstances, to a large number of factors which may include in particular the size and economic strength of the undertaking, which may be indicated by the total turnover of the undertaking and the proportion of that turnover accounted for by the goods in respect of which the infringement was committed. Therefore Michelin NV's arguments challenging the permissibility of taking turnover into account are in any case unfounded. Moreover, it is for the Court, exercising its powers of unlimited jurisdiction on this subject, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine.
- 112 In this regard it must be stated that the objections raised by the Commission to the extra bonus granted in 1977 have not withstood examination by the Court. On the other hand, as far as the discount system in general is concerned, the Commission's main charge has been confirmed. It is true that this system has not been shown to be discriminatory and that the variation in the target discount was considerably less than appeared from the decision in question. The Commission also had to admit that it wrongly interpreted Michelin NV's customer records and it could not support its allegation that the purpose of the sales targets fixed by Michelin NV was to compel dealers continually to increase the proportion of Michelin tyres in their total turnover. However, even though those circumstances may constitute a ground for fixing the fines at a level lower than that determined by the Commission, they do not substantially alter the gravity of Michelin NV's abuse of its dominant position.

113 The amount of the fine must therefore be fixed in the light of the finding that, apart from the extra bonus granted in 1977, the discount system had an adverse effect on free competition within the common market, which is a fundamental principle of the Treaty, even though the variation in the discount was relatively slight and it has not been proved that the system was applied in a discriminatory manner. In those circumstances it is appropriate to fix the fine at 300 000 ECU, or HFL 808 758.

114 As already stated, it is necessary to declare void Article 1 (a) of the contested decision in so far as it declares that Michelin NV applied to dealers dissimilar conditions in respect of equivalent transactions, and also Article 1 (b) concerning the extra bonus in 1977. The fine imposed in Article 2 of the decision must be fixed at 300 000 ECU, or HFL 808 758. The remainder of the application must be dismissed.

#### VI -Costs

115 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Under paragraph (3) of that article the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some and fails on other heads.

116 In this case each party, including the intervener, has failed on certain heads. Each must therefore bear its own costs.

On those grounds,

THE COURT

hereby:

1. Declares void Article 1 (a) of the Commission Decision of 7 October 1981 (IV/29.491 -Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin (Official Journal L 353, p. 33), in so far as it declares that Michelin NV applied to tyre dealers in the Netherlands dissimilar conditions in respect of equivalent transactions, and Article 1 (b) of that decision;
2. Fixes the amount of the fine imposed on the applicant in Article 2 of that decision at 300 000 ECU or HFL 808 758, to be paid in guilders;
3. Dismisses the remainder of the application;
4. Orders each party, including the intervener, to bear its own costs.

Mertens de Wilmars	Koopmans	Bahlmann	Galmot
Pescatore	Mackenzie Stuart Everling	O'Keeffe	Due

Delivered in open court in Luxembourg on 9 November 1983.

For the Registrar  
H. A. Ruhl  
Principal Administrator

J. Mertens de Wilmars  
President