JUDGMENT OF THE COURT OF 13 NOVEMBER 1975 [1]

General Motors Continental NV v Commission of the European Communities

Case 26/75

Summary

Competition — Dominant position — Concept — Exploitation — Abuse (EEC Treaty, Article 86)

When combined with the freedom of the manufacturer or its authorized agent appointed by the public authority to fix the price for its service, the delegation by a Member State to such person in the form of a legal monopoly of the duty governed by public law which consists in carrying out the technical inspection of vehicles before they are used on the public highway, leads to the creation of a dominant position.

The abuse of such a position may be, *inter alia,* in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favourable price levels applying in other sales areas in the Community or by leading to unfair trading in the sense of Article 86 (2) (a).

In Case 26/75

GENERAL MOTORS CONTINENTAL NV, a limited company incorporated under Belgian law whose registered office is at Antwerp, represented by Michel Waelbroeck, Advocate at the Court, d'Appel, Brussels, with an address for service in Luxembourg at the Chamber of André Elvinger, 80 Grand-rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Michel van Ackere, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Pierre Lamoureux, 4 boulevard Royal,

defendant,

1 — Language of the Case: French.

Application for the annulment of the decision of the Commission of 19 December 1974, relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851-General Motors Continental);

THE COURT

composed of: R. Lecourt, President, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

In order to be used on the public highway in Belgium vehicles registered in that country must satisfy the requirements of the Royal Decree of 15 March 1968 which embodies a general regulation concerning the technical standards to be met by motor vehicles and their trailers (Moniteur belge of 28 March 1968, p. 3266, as subsequently amended on several occasions).

Each type of chassis or unit-construction vehicle manufactured or assembled in Belgium or imported for use in that country must be approved by the Minister for Transport or his representative and be the subject of an approval (procès-verbal d'agréation) (Article 3 (1) and Article 10 (1) of the Royal Decree of 15 March 1968).

Where a type of vehicle has thus obtained an approval the manufacturer or, where he is established abroad, his sole authorized agent in Belgium shall issue, in respect of each new vehicle of the same type which is in use on the road, a certificate 'of conformity' which attests that the vehicle entirely satisfies the requirements contained in the certificate of approval (Article 10 (4) of the Decree).

The manufacturer or his sole authorized agent subsequently affix to each vehicle the compulsory type-shield (Article 16 (2) of the Decree).

Following instructions from the Belgian Minister for Transport, since 15 March 1973 the State testing-stations, which until that date carried out the inspections

of used vehicles, have no longer issued certificates of conformity and type-shields for vehicles which have been registered abroad for less than six months; since this date, therefore, the conformity inspections of such vehicles has been carried out by the manufacturer's authorized agent in Belgium.

For the purposes of the Royal Decree of 15 March 1968, a limited company incorporated under Belgian law having its registered office at Antwerp, is the sole authorized agent of Adam Opel AG, Rüsselsheim/Main, a manufacturer of private motor cars, and of other manufacturers belonging to the General Motors group.

GMC is responsible for obtaining a certificate of approval for all types of General Motors vehicles included in its Belgian sales programme. It applies for 'general' approvals for Opel and Vauxhall models; for the American models produced by General Motors, it applies for 'low-volume' type approvals, valid for up to 10 units per year. GMC subsequently issues the certificates of conformity and the type-shields for each vehicle sold through its approved dealers.

Private customers and dealers importing vehicles manufactured within the General Motors group into Belgium otherwise than through GMC's standard distribution system — parallel imports — are also obliged to resort to GMC, in its capacity as sole authorized agent for the approval procedures for both new vehicles and, since 15 March 1973, for vehicles registered abroad for less than six months.

Between 15 March and 31 July 1973, GMC charged the same rates for the issue of certificates of conformity and type-shields in five cases of parallel imports as it has charged previously for inspecting certain American models BF 5 000 plus BF 900 VAT).

With effect from 1 August 1973 it implemented its new scale of charges, which distinguishes between GMC vehicles of American manufacture and those of European manufacture: the costs charged for a private motor car manufactured in Europe by an undertaking within the General Motors group and already type-approved in Belgium were BF 1 250 whereas, as regards private motor cars manufactured in the USA by General Motors the costs were BF 5 300, 7 000, or 30 000, as the case might be.

On 3 August 1973, GMC took action to reimburse part of the amounts charged in the five cases mentioned above. In two cases BF 4 900 and in three cases BF 4 425 were returned.

The Commission of the European Communities considered that by requiring parallel importers of Opel vehicles to pay an excessive price for the technical inspections and administrative costs involved in the issue of certificates of conformity and type-shields GMC had abused a dominant position within a substantial part of the common market within the meaning of Article 86 of the EEC Treaty. On 26 July 1974, therefore, acting on its own initiative, it set in motion against GMC the procedure provided for by Regulation No 17/62 of the Council of 6 February 1962, the first regulation implementing Article 85 and 86 of the Treaty (OS p. 204).

In pursuance of Article 19 (1) of Regulation No 17/62 and of Article 2 (1) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (OJ p. 2268), the Commission informed GMC by letter on 31 July 1974 of the statement of objections which it intended to raise against it.

On 6 September 1974 GMC informed the Commission in writing of its views on these objections.

On 19 December 1974, the Commission adopted Decision No IV/28·851-General

Motors Continental, relating to a proceeding under Article 86 of the EEC Treaty.

In Article 1 of this decision the Commission find that:

'between 15 March and 31 July 1973, General Motors Continental NV intentionally infringed Article 86 by charging a price that was abusive for the issue of certificates and shields which it was required to issue under Belgian law after inspecting Opel vehicles to check their conformity with the generally approved type and after determining identification of the vehicles.'

By reason of this infringement Article 2 of the decision imposes on GMC a fine of 100 000 units of account, that is, BF 5 000 000, the decision being enforceable against General Motors NV in accordance with the provisions of Article 192 of the EEC Treaty.

The Commission's decision was notified to GMC by letter dated 24 December 1974, received on 6 January 1975, and published in the Official Journal of the Communities on 3 February 1975 (OJ 1975, L 29, p. 14).

II — Written procedure

On 7 March 1975 General Motors Continental NV brought proceedings against the decision of the Commission under Article 172 and 173 of the EEC Treaty.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to open the oral procedure without holding any preparatory inquiry.

However, the Commission replied in writing to a question put to it by the Court.

III — Conclusions of the parties

The *applicant* claims that the Court should:

- annul the decision of the Commission of the European Communities of 19 December 1974;
- alternatively, annul the decision in so far as it imposes on General Motors Continental a fine of 100 000 units of account;
- in any case, order the Commission to pay the costs.

The *Commission* contends that the Court should:

- dismiss the application as unfounded;
- order the applicant to pay the costs.

IV — Submissions and arguments of the parties

First submission: infringement of Article 86 of the EEC Treaty

The *applicant* maintains that the contested decision infringes Article 86 of the EEC Treaty in that it is wrong in finding that GMC holds a dominant position in a substantial part of the common market, that it abused this dominant position and that this abuse was likely to affect trade between Member States.

A — The dominant position

The *applicant* maintains that according to the contested decision it had 'a dominant position with regard to applications for general type approval and the issue of certificates of conformity and typeshields in Belgium, both for new Opel vehicles and those registered abroad for no longer than six months in a substantial part of the common market'. However, the market in question cannot be defined in such narrow terms.

(a) The activity in question, which consists in obtaining type approval for a given model and issuing certificates of conformity and type-shields is merely

one of the activities incidental to the sale of motor vehicles, like the guarantee or after-sales service. It is completely artificial to regard each of these activities as a separate market. As regards private motor cars this concept involves, in Belgium, the recognition of at least 60 separate markets for the activities which it covers, and 60 dominant positions within these markets.

(b) The artificial nature of the market referred to by the Commission is also shown clearly by the fact that during the year following 31 July 1973, the date on which the Commission accepts that the alleged infringement came to an end, GMC received only 42 applications for certificates of conformity for Opel cars, although the number of new vehicles registered in Belgium during the same period amounted to 368 932.

(c) The market which the Commission should have taken into consideration is the whole of the market of or the sale in Belgium of new motor vehicles. The Commission has not even attempted to establish whether GMC holds a dominant position within this market.

(d) It is true that GMC is alone empowered to make applications for type approval and to issue certificates of conformity and type-shields for new Opel vehicles and for those which have been registered abroad for less than six months. This does not, however, signify that GMC is shielded from competition. Because of the intensive competition existing between manufacturers it could not allow itself to alienate the owners of General Motor cars. This is demonstrated by the speed with which GMC reduced its inspection costs at the end of May 1973 after its attention had been drawn to complaints from private importers of European-manufactured vehicles. GMC was not in a position to take action without taking particular account of competitors, buyers or suppliers. It is impossible to isolate the market in approval formalities from the general sales market in new motor vehicles.

(e) In order to be covered by Article 86 the dominant position must extend to 'a substantial part of... the common market'. The action for which GMC is criticized can certainly not be regarded as having a substantial anti-competitive effect.

(f) GMC is alone entitled to apply for type approval and to issue certificates of conformity and type-shields for all General Motors vehicles and not merely for parallel imports. For the purposes of defining the market to be taken into consideration, there is no difference between the formalities affecting either type of vehicle.

(g) The activity in question cannot be regarded as a separate market on the basis of its rather exceptional nature.

(h) The case-law of the Court of Justice shows that the existence of an exclusive right granted by national legislation is not in itself sufficient to confer on the holder of that right a dominant position within the meaning of Article 86, and the mere power to prevent parallel imports of a given product cannot give rise to a dominant position in a substantial part of the common market if this product is in competition with other products.

The *Commission* does not accept this reasoning.

(a) The price charged for inspecting imported vehicles for conformity with the national safety standards is not one of the parameters of competition on the market in which the various makes of motor vehicle compete ('inter-brand' competition). It only influences 'intra-brand' competition and makes it possible to favour GMC and its official distribution network therein. A manufacturer or dealer who intends to meet a reduction in the selling price of a competing model of another make by reducing the price of the approval procedure merely strengthens the

position of the parallel imports of his make of vehicle in relation to his own vehicles, and not the position of his own vehicles in relation to those of the other make. This also applies to the converse situation.

The price of the approval and testing formalities for General Motors vehicles other than parallel imports is negligible and is not charged separately. It plays no part in the 'inter-brand' competition on the Belgian market in motor vehicles.

(b) The specific nature of the activity in question prevents its being considered as an integral part of the whole of the market for sales of new vehicles in Belgium. It results from a legal obligation which is imposed in the general interest. It does not give rise to an argument based on sales or advertising. It is thus clearly distinct from the sale of motor vehicles and its ancillary activities such as the guarantee and after-sales service. The latter form part of the very nature of the activity of the seller of motor vehicles and are parameters of competition for the market between the various makes of such vehicles.

The inspection procedures are nonetheless carried out on the basis of commercial criteria and in this way are subject to the rules on competition contained in the Treaty.

(c) The applicant is therefore wrong to maintain that the market to be considered is the whole of the market for sales of new vehicles in Belgium, in which it clearly does not hold a dominant position. On the other hand, under Belgian legislation it alone is empowered to carry out the inspection formalities for vehicles in the General Motors group which are imported new or registered abroad for less than six months. Any person acquiring such a vehicle is totally dependent upon this company to obtain the necessary certificate of conformity, for which no substitute is available. As a result of this monopoly the applicant is in a position to control parallel imports of General Motors cars, as it holds the key to the market in General Motors vehicles in Belgium.

The fact that in Belgium a large number of manufacturers or authorized agents hold such a monopoly certainly constitutes a special situation when compared to that normally encountered in the application of Article 86 of the EEC Treaty. It is merely the consequence of the Belgian legislation existing in this field and in no way prevents the situation being considered from the point of view of Article 86.

(d) Of course, a possibility of 'intra-brand' competition exists in actual or potential parallel imports. However, by fixing very high prices for the inspection formalities GMC is precisely in a position to restrict competition, or even to eliminate it by imposing a prohibitive price. GMC holds a dominant position not only as a result of its exclusive right to carry out the inspection formalities by fixing the price for such formalities as it pleases, but can also abuse this position to the extent to which it can impede parallel imports.

(e) The argument based by the applicant on the relatively small number of applications which it received for certificates of conformity for Opel cars in relation to the number of new vehicles registered in Belgium cannot be accepted. GMC's dominant position extends to the issue of certificates of conformity for all vehicles which it manufactures or for which it is the authorized agent in Belgium and, therefore, not only for cars of the Opel make. Moreover, according to the case-law of the Court of Justice the concept of a 'dominant position within the common market or in a substantial part of it' cannot be defined on the basis of abstract quantitative criteria. The effects of the dominant position on the

working of competition across the frontiers between the Member States and on free access to the markets must be taken into particular account. GMC's dominant position affects the freedom to make parallel imports and the case with which this can be done. The total dependence on GMC of every parallel importer into Belgium of a General Motors vehicle for the issue of the certificate of conformity demonstrates the existence of a dominant position capable of falling within the ambit of Article 86, even though the number of parallel imports from other Member States has fallen. The relatively low figure for the parallel imports is irrelevant: the very high cost of the inspection formalities during the period considered by the contested decision was likely to affect trade between Member States.

(f) The fact that after applying it for several months, GMC reduced its scale of inspection charges from BF 5 900 to BF 1 000 in no way shows that this company did not hold a dominant position. During this period GMC was able to require systematically, and in five cases actually to charge, the excessive price of BF 5 900 for the certificate of conformity. This finding is sufficient evidence that it was in a position to act without taking particular account of the buyers.

B — The abuse

The *applicant* maintains that there can be no question in this instance of an abuse of a dominant position. Neither the object nor the effect of the conduct for which it is criticized was to affect competition adversely.

(a) Contrary to the argument put forward by the Commission, the case-law of the Court of Justice shows in particular that the purposes of Article 85 and 86 are the same, that is, to maintain effective competition in the common market. A specific activity which has no adverse effect on competition does not constitute an abuse within the meaning of Article 86 of the EEC Treaty. Where such conduct corresponds to one of the examples given in the second paragraph of this provision it only gives rise at the most to a rebuttable presumption of an abuse. Any automatic application of Article 86 to specific activities on the ground of their legal nature is not permissible.

(b) GMC 's purpose was in no way to discourage parallel imports of Opel vehicles by imposing an excessive rate for the inspection formalities for such vehicles. On the contrary, GMC simply maintained in force after 15 March 1973 a rate which had been established solely in relation to American vehicles and applied it for a very short period and in a very small number of cases to European-manufactured vehicles. After being informed of a complaint GMC immediately reduced this rate to a fraction of its original amount and refunded the excess.

(c) The conduct for which GMC is criticized did not adversely affect competition within the common market.

In each of the five cases in which the highest rate was imposed the excess was promptly refunded by GMC.

(d) Moreover, the contested decision is wrong in finding that the requirement of an excessive price for the approval procedures 'acts to the detriment of, and unfairly discriminates against, those dealers who import, or are in a position to import, new Opel vehicles into Belgium as parallel imports and who are able to compete for custom in Belgium with Opel dealers appointed by GMC'. The General Motors sales agreement prevents the import into Belgium of new Opel vehicles by dealers who are not authorized by GMC. The latter are therefore not in a position to compete with Opel dealers who are approved by this company. It was also impossible for the unapproved dealers to import, for the purposes of resale, new Opel vehicles

purchased from approved General Motors dealers. The normal result of the low level of prices in Belgium was to render unattractive the import of new cars by natural or legal persons for their own use. As regards those persons in Germany who benefited from a special discount, the imposition of a sum of BF 5 000 did not unduly impede intra-Community trade but merely reduced to a certain extent the advantage deriving from the special discount. As regards the natural or legal persons who import used cars for their own use or for the purposes of resale, they are not in competition with GMC or its approved dealers. In these circumstances, even if the refund made was not taken into account, the alleged abuse could not have impeded trade within the Community, nor have protected GMC and its approved dealers against competition from third parties.

For its part, the *Commission* considers that the applicant has clearly abused a dominant position.

(a) The applicant's interpretation of Article 86 is mistaken.

Unlike Article 85, Article 86 does not provide that the behaviour of an undertaking holding a dominant position must have 'as its object or effect' to affect adversely competition within the common market. The adverse effect on competition lies in the very fact of abusing a dominant position. It does not constitute an additional independent criterion for the application of Article 86. This conclusion results both from the wording of Article 86 and from an analysis of its structure and function.

In this instance it is sufficient to find that the imposition, for the issue of certificates of conformity and type-shields for parallel imports of Opel vehicles, of a price which is unquestionably excessive and, therefore, 'unfair', constitutes an abuse within the meaning of subparagraph (a) of the second paragraph of Article 86.

(b) Secondly, it must be borne in mind that parallel imports of new or used Opel cars could and did take place: as long as it has not been exempted under Article 85 (3) of the Treaty, the selective clause in the General Motors sales agreement had not been imposed on any dealer in General Motors vehicles. Prices are subject to fluctuations. The benefit of the discounts usually granted to certain categories of private individuals on the purchase of a vehicle could have encouraged them to make parallel imports. Competition in fact exists between secondhand car-dealers and the dealers approved by GMC to the extent to which the latter also sell used cars, and indeed new cars in so far as the secondhand and new car markets are not completely impervious to one another.

(c) During the period preceding the refund and in the five cases in question the excessive price imposed by GMC in fact imposed on the parallel imports an 'unfair' charge and therefore affected trade between the Member States. The subsequent refund cannot remove the infringement retroactively but can merely influence an assessment of its gravity.

(d) No time-limit was attached to the application of the excessive rate to parallel imports of vehicles from other Member States. At the time in question it was unqualified and general in nature and therefore likely to affect trade between Member States.

C — The fact of affecting trade between Member States

The applicant maintains that the finding in the contested decision that 'the abuse constituted by GMC's inspection charges has in fact affected trade between Member States' loses sight of the fact that in each of the five cases referred to the applicants were refunded after a very short time, with the result that in the end the trade between Member States was not affected.

The statement that 'The abuse contained in the imposition of excessive charges ...

likely to deter customers and independent dealers in other countries of the common market from purchasing Opel vehicles, or noticeably to impede such sales' in fact ignores the absence of any adverse effect on competition.

The *Commission* considers that the subsequent refund of the difference between the excessive charge and the normal charge for certificates of conformity in no way alters the fact that the infringement in fact took place; it only influences the degree of gravity of the infringement and, therefore, the amount of the fine.

Second submission: Infringement of an essential procedural requirement

The *applicant* considers that the reasons given for the contested decision are contradictory and insufficient.

(a) Article 1 of the operative part of the decision finds that GMC intentionally infringed Article 86 'by charging a price that was abusive' for the inspection formalities. The Commission refuses to take account of the fact that, before it first intervened, GMC decided to refund the excess in the five cases in question. The Commission considers that the factors constituting an infringement had existed from the moment the abusive price was fixed and charged and the subsequent partial refund cannot affect this. However, in the same decision the Commission expressly declares that there would have been no infringement if GMC had reserved the possibility of a subsequent adjustment when it requested payment for the inspection carried out in the five cases in question. It is contradictory to state at the same time, on the one hand, that to fix and charge an excessive amount itself constitutes an infringement of Article 86, even if the excess is subsequently refunded and, on the other hand, that if the charge is only made 'subject to a partial refund' or 'subject to internal cost review' it is not abusive to fix and charge an excessive amount. The decision by which the Commission attempts to justify its different treatment of these two situations is not valid; its reasoning is contradictory.

(b) A contradiction which affects an essential part of the statement of the reasons for a decision means that the statement of reason is inadequate.

The *Commission* considers that the applicant's attempt to find a contradiction in the contested decision is quite artificial.

(a) It is not contradictory to find, on the one hand, that until the refund was made or GMC decided to carry out an internal cost review payment of the excess was final and was regarded as such both by the parallel importers and GMC and that the subsequent refund cannot alter retroactively the fact that the elements constituting the infringement had existed and, on the other hand, that a calculation and charge made subject to an express reservation would not necessarily have led to the same finding. The different conclusions made on these two cases is in no way based upon subjective considerations.

(b) Moreover, the applicant's arguments do not show in what way the reasons for the contested decision are insufficient.

Third submission: Infringement of Article 15 (2) and (5) of Regulation No 17

The *applicant* considers that no fine should have been imposed as it put an end voluntarily to the infringement and took steps to refund all the applicants who had been overcharged. GMC has not infringed Article 86 either intentionally or negligently. Moreover, the imposition of a fine is not justified either by the gravity of the alleged infringement or by its duration.

(a) The rates in question were not established in order to be applied to

European vehicles. When its attention was drawn to the fact that it was wrongly applying a rate laid down in respect to American vehicles, GMC immediately ceased to apply it and adopted a rate which the Commission itself regarded as appropriate. This action on the part of GMC clearly shows that it had no intention of abusing its position. The fact that the alleged infringement was not intentional is also shown by the finding that the sum requested was at first reduced to an amount lower than that which later appeared justified.

(b) The contested decision is solely based on the view that GMC acted intentionally. It cannot subsequently be justified on other grounds. However, for the sake of completeness it should be pointed out that the very short period which elapsed between GMC's reaction to the complaints made and its decision, taken before the Commission intervened, to reimburse all the buyers involved, whether they complained or not, shows that its action can also not be regarded as negligent.

(c) Under Article 15 (2) of Regulation No 17, in fixing the amount of the fine the Commission must take into consideration the gravity and the duration of the infringement. Even if it were accepted that, technically, the applicant infringed Article 86 the decision must still be annulled in so far as it imposes a fine on the applicant.

Any damage suffered was entirely made good and neither the object nor the effect of the price charged was to discourage other persons or undertakings from importing Opel vehicles into Belgium. The alleged infringement only lasted for two and a half months and was brought to an end before intervention on the part of the Commission.

(d) In accordance with Article 15 (5) of Regulation No 17 fines may not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification. The contested decision is essentially based on the ground that the purpose or, at least, the effect of the alleged infringement was to prevent unappointed dealers from making parallel imports. However, these imports were rendered impossible by the General Motors sales agreement, which was notified to the Commission.

The *Commission* contests the applicant's arguments.

(a) The statement that GMC had applied to European cars the much higher rate laid down for the inspection of American cars as the result of an unnoticed error cannot be accepted. GMC applied this rate with full knowledge of the fact that it was excessive and knowingly exploited its dominant position by imposing unfair and discriminatory prices. Nor is it established that GMC did in fact put an end to the infringement voluntarily once it learned of the existence of complaints.

(b) At all events, the imposition of excessive rates represents, at the least, negligence on the part of GMC and Article 15 (2) of Regulation No 17 does not distinguish between intentional conduct and negligence when dealing with the grounds on which a fine may be imposed. The existence of negligence is itself sufficient to justify the imposition of the penalty; at most it may result in a different assessment being made of the gravity of the wrongful act and, therefore, of the extent of the penalty to be imposed.

(c) The contested decision expressly took into account in favour of the applicant the fact that it put an end to the infringement after a short time and refunded the excess to the five buyers in question. However, it was also necessary to take account of the need to protect the freedom and ease of parallel imports within the common market.

(d) The fine was imposed as the result of an abuse of a dominant position through the imposition of unfair prices. This fact was of course not shown in the agreements notified to the Commission and it is in any case absurd to maintain that an abuse of a dominant position may form the subject of a notification and thus benefit from the terms of Article 15 (5) of Regulation No 17.

V — Oral procedure

At the hearing on 7 October 1975, the parties presented oral argument and answered questions put by the Court.

The Advocate-General delivered his opinion at the hearing on 19 February 1975.

Law

1 By an application received at the Court Registry on 7 March 1975 General Motors Continental NV requested the annulment of the decision of 19 December 1974 (OJ 1975, L 29, p. 14), by which the Commission imposed on GMC a fine of 100 000 u.a., that is BF 5 000 000 on the ground that, between 15 March and 31 July 1973, the applicant had infringed Article 86 of the EEC Treaty by charging an excessive amount on the import of five motor vehicles manufactured in another Member State for the inspection for conformity with the specifications contained in the approval certificate prescribed by the Belgian authorities (hereinafter referred to as the 'approval procedure') which it must carry out as the sole authorized agent of the manufacturer in Belgium.

2 The applicant put forward certain submissions against this decision which concern the infringement of the rules contained in Article 86 of an essential procedural requirement and of Article 15 (2) and (5) of Regulation No 17 of the Council of 6 February 1962 (OJ 1962, p. 204).

3 It is first necessary to consider the submissions based on Article 86, which raise the question whether, through the approval procedures, the applicant holds a dominant position within the meaning of Article 86 and, if so, whether its behaviour constituted an abuse of this position.

The dominant position

4 The applicant maintains, first, that contrary to the statement made in the decision in question, the activity involved in applications for vehicle approval and the issue of certificates of conformity could not constitute a dominant position within the meaning of Article 86.

5 Far from constituting a market in itself, this activity is merely ancillary to the market in motor cars, the open and highly competitive nature of which is undesirable.

6 Therefore, the provisions of Article 86 could not be applied to charges the imposition of which was penalized by the decision of the Commission, as the incidence of such charges can only be assessed in relation to the market in motor cars as a whole, in which the applicant does not hold a dominant position.

7 The approval procedure in the context of which the impositions in question were made is, by nature, a duty governed by public law which is so delegated by the Belgian State that, for each make of motor car the performance of this duty is reserved exclusively to the manufacturer or its sole authorized agent, appointed by the public authority.

8 However, although it entrusted this task of inspection to private undertakings the State took no measures to fix or limit the charge imposed for the service rendered.

9 This legal monopoly, combined with the freedom of the manufacturer or sole authorized agent to fix the price for its service, leads to the creation of a dominant position within the meaning of Article 86 as, for any given make, the approval procedure can only be carried out in Belgium by the manufacturer or officially appointed authorized agent under conditions fixed unilaterally by that party.

10 It thus emerges, that the submission which the applicant bases on the fact that it held no dominant position must be rejected.

The abuse

11 It is possible that the holder of the exclusive position referred to above may abuse the market by fixing a price — for a service which it is alone in a position to provide — which is to the detriment of any person acquiring a motor vehicle imported from another Member State and subject to the approval procedure.

12 Such an abuse might lie, *inter alia,* in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favourable level of prices applying in other sales areas in the Community, or by leading to unfair trade in the sense of Article 86 (2) (a).

13 However, the applicant maintains on this point that conduct complained of did not constitute an 'abuse' within the meaning of Article 86.

14 In order to demonstrate this point the applicant puts forward a number of arguments based on the actual circumstances in which the charge in question was imposed and, subsequently, largely refunded in the five cases referred to by the Commission.

15 The question whether the applicant abused its dominant position must be considered in the light of all the factors which gave rise to the decision of the Commission.

16 It is not disputed that in the five cases to which the Commission refers, and which arose between 15 March and 31 July 1973, the applicant imposed a charge which was excessive in relation to the economic value of the service provided by way of the approval procedure.

17 However, the applicant maintains on this point that the inspections which it carried out during this period represented an unusual activity on its part, in that it had only been made to assume responsibility for them as from 15 March 1973 when the State testing-stations were discharged from undertaking these same inspections.

18 As these inspections only constituted an occasional activity on the part of the applicant and one of minute inportance in relation to the inspections which it normally carries out on the vehicles which it puts directly on the market and which are, therefore, manufactured in accordance with the standards imposed by Belgian legislation, the departments responsible applied the charge which was until then normal for the inspection of the vehicles which it imported.

19 The applicant again draws attention to the fact that following the complaints made by the parties concerned it very quickly reduced the charge for the inspection of imported vehicles of European manufacture to a level which was more in line with the real cost of the operation and refunded the excess to the parties concerned, and that this took place before the Commission began its investigations.

20 This conduct on the part of the applicant, the truth of which is not contested by the Commission, cannot be regarded as an 'abuse' within the meaning of Article 86.

21 The applicant has given an adequate explanation of the circumstances in which, in order to meet a new responsibility transferred from the State testing-stations to the manufacturers or authorized agents of the different makes of motor car in Belgium, it applied, for an initial period, to European cars a rate which was normally applied to vehicles imported from America.

22 The absence of any abuse is also shown by the fact that very soon afterwards the applicant brought its rates into line with the real economic cost of the operation, that it bore the consequences of doing so by reimbursing those persons who had made compaints to it and that it did so before any intervention on the part of the Commission.

23 Although the decision in question may be explained by the Commission's wish to react energetically against any tendency to abuse what is clearly a dominant position, its intervention was unjustified in the actual temporal and factual circumstances in which it took place.

24 In these circumstances the contested decision must be annulled but the parties must bear their own costs.

Costs

25 Under Article 69 (3) of the Rules of Procedure, where the circumstances are exceptional, the Court may order the parties to bear their own costs in whole or in part.

On those grounds,

THE COURT

hereby:

1. **Annuls the decision of the Commission of 19 December 1974 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851-General Motors Continental);**

2. **Orders each party to bear its own costs.**

Lecourt Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 13 November 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 29 OCTOBER 1975 [1]

Mr President,
Members of the Court,

I — Facts

Under the Royal Decree of 15 March 1968, all motor vehicles — whether produced or assembled in Belgium or imported into that country — must satisfy certain technical requirements fixed by this regulation in order to be used on the public highway.

It is for the Minister for Transport or his representative to issue an approval for each type of vehicle.

It is for the manufacturer or, where he is established abroad, for his sole authorized agent in Belgium, to check that every new vehicle of an approved type conforms to the specifications required for such approval.

This technical inspection is authenticated by issuing a certificate of

1 — Translated from the French.