created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.

15. 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.

Moreover, Article 86 of the Treaty 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.

16. In assessing the gravity of the infringement of the Community competition rules, 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.

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.

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 Siméon 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 Côte d'Eich,

applicant,

and

THE FRENCH REPUBLIC, represented by Noël 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 COMMUNITIES, represented by Giuliano Marenco 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 Communities of 7 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/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

Facts and Issues

The facts of the case, the course of the procedure and the arguments and submissions advanced by the parties in the written procedure may be summarized as follows:

I — Summary of the facts

1. The procedure prior to the adoption of the decision in question

The applicant, NV Nederlandsche Banden-Industrie Michelin (hereinafter referred to as "Michelin NV"), is a subsidiary of the Compagnie Financière Michelin, Basel, Switzerland, which is itself a subsidiary of the Compagnie Générale des Établissements Michelin, Clermont-Ferrand, France. It is responsible for the manufacture and sale of Michelin tyres in the Netherlands where it has a factory at 's-Hertogenbosch for the production of new tyres for vans and lorries.

On 29 July 1977 a complaint against Michelin NV was lodged with the Commission by Bandengroothandel Frieschebrug BV, a tyre-retailing company

based at Alkmaar. In that complaint the Commission was asked to adopt measures against Michelin NV pursuant to Article 86 of the EEC Treaty and Article 3 of Regulation No 17 for abuse of a dominant position. The reasons for the complaint were first Michelin NV's take-over of the company Actor NV, a tyre-retailing company based at Bussum, and secondly certain of Michelin NV's policies towards tyre dealers, especially regarding the discounts and bonuses granted to them.

By a letter dated 10 October 1978 the Commission informed Michelin NV that the complaint had not been accepted as far as the take-over of Actor NV was concerned but that the Commission was continuing its investigation into Michelin NV's practices regarding discounts and bonuses.

On 5 March 1980 the Commission sent Michelin NV a statement of objections informing it that it considered that for the time being that Michelin NV held a dominant position in the Netherlands on the market for new replacement tyres for lorries, buses and similar vehicles and intended to adopt a decision declaring that Michelin NV was intentionally or at least negligently in breach of Article 86 by pursuing the following practices:

(a) applying, especially in 1975 and following years, a system of selective and discriminatory discounts with the object of binding dealers to itself by means of criteria determined from case to case;

(b) refusing to confirm in writing oral "agreements" made with dealers concerning the grant of discounts;

(c) tying sales in 1977 through the grant of an extra end-of-year bonus on purchases of heavy and light tyres conditional upon the attainment of a special "target" in respect of purchases of light tyres.

The Commission also informed Michelin NV of its intention to prohibit it from granting discounts not directly linked to a genuine lowering of costs and to impose a fine in respect of those practices to be determined in the light of the duration and gravity of the infringement, which was of a serious nature.

On 20 June 1980 the Commission notified Michelin NV of further objections concerning discriminatory practices relating to the grant of different payment periods to customers, to stock on consignment to certain dealers and to the grant of loans at reduced rates of interest to certain dealers.

Michelin NV submitted its written observations to the Commission on those objections. On 1 September 1980 the Commission held a hearing at which it heard oral argument from Michelin NV and statements from several consumers and dealers acting as experts or appearing as witnesses.

2. The contested decision

On 7 October 1981 the Commission adopted Decision No 81/969/EEC relating to a proceeding under Article 86 of the EEC Treaty (IV/29.491 — Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin) (Official Journal 1981, L 353, p. 33) which was notified to Michelin NV on 22 October 1981.

Article 1 of the decision is to the effect that:

During the period between 1975 and 1980 NV Nederlandsche Banden-Industrie Michelin infringed Article 86 of the Treaty establishing the European Economic Community by:

(a) binding tyre dealers in the Netherlands to itself through the grant of selective discounts on an individual basis conditional upon sales "targets" 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 the attainment of a "target" in respect of car tyre purchases.

In Article 2 the Commission imposed a fine of 680 000 ECU or HFL 1 833 184.80 on Michelin NV to be paid in guilders within three months of notification of the decision.

3. The grounds of the contested decision

The grounds on which the Commission's decision is based are stated in substance to be as follows:

(a) The relevant market

(i) The product market

Defined on the basis of the products, the relevant market is the market in new replacement tyres for lorries, buses and similar vehicles. The relevant market is examined at the level of the retailer.

In the case of tyre casings a distinction must be made between light tyres for cars, tyres for delivery vans and light commercial vehicles, heavy tyres for lorries and buses and tyres for agricultural tractors, road-building and earth-moving machinery, aircraft and so forth. Each of those types of tyre includes a wide range of differing qualities, treads and sizes. Manufacturers and retailers always make a clear distinction in their gross prices and discount terms between those types of tyre. Since this case does not concern the relationship between Michelin NV and the final consumer, it is not possible to distinguish several sub-markets within the lorry and bus tyre category.

The tyre market consists of two distinct sectors: the original equipment market and the replacement market. Original equipment tyres are sold by the tyre manufacturer direct to the vehicle manufacturer whilst 85 to 87% of all replacement tyres for lorries and buses are sold through a large number of specialized dealers.

Demand for lorry and bus tyres other than new tyres is met by retreads namely used tyres which, provided that the carcass was in sound condition, have been given a new tread. Retreading, which may practically double the life of such tyres, is carried out not only by tyre manufacturers themselves but also by many undertakings specializing in the process which either buy tyre carcasses

and then sell the retreads or carry out retreading to order for transport undertakings.

Retreads are not included in the relevant market. New tyres and retreads are not regarded as wholly interchangeable as many consumers consider that the use of retreads entails a safety risk. Therefore limits are frequently imposed on the use of such tyres. The way in which transport undertakings regard retreads is reflected in their price, which, even though they yield comparable mileage is 40% or more below the price of a new tyre. Moreover the possibility of offering retreads at attractive prices is obviously limited by the number of worn tyres in sufficiently good condition to undergo retreading. Furthermore, transporters regard carcasses in good condition which they have bought new and have in their opinion used competently as belonging to them and wish to receive back their own tyres after retreading. Tyre retreaders appear thus to be suppliers of services. In the Netherlands more than half of all retreads are produced to order for transporters.

(ii) The geographical market

The relevant geographical market is the Netherlands market, which forms a substantial part of the common market.

Tyre manufacturers carry out their activities on the various domestic markets primarily through the intermediary of subsidiaries established to supply the markets concerned. Trade in tyres between Member States and with a number of non-member countries mainly consists of supplies by the manufacturers themselves between their various manufacturing and sales establishments. Parallel imports and exports involve only relatively small quantities and are too random to be regarded as significant in the present state of the market. Netherlands dealers are accordingly dependent on Michelin NV for their supplies of Michelin tyres. Furthermore, for the purposes of the discounts granted to dealers, Michelin NV takes into account only the quantities of Michelin tyres purchased through the intermediary of Michelin NV. The Netherlands market would therefore appear to be the relevant market in the case of Michelin NV.

(b) The dominant position of Michelin NV

The Michelin group holds the principal position amongst tyre manufacturers in the Community; on the world market, only Goodyear is larger. Michelin introduced the radial tyre and is still the world's leading manufacturer of radial tyres, possessing a special degree of "know-how". Owing to its large-scale financial resources it has a clear lead in specialized investment in this field. The range of tyres offered by Michelin in the Netherlands is larger than that of any other manufacturer. Even though several of its competitors have managed to catch up with Michelin to some extent, users continue to show some preference for Michelin products. The fact that an exact idea may be gained of a tyre's reliability and cost price only after several years' experience with it allows well-established makes to maintain a strong position in the long term.

Michelin NV holds by far the largest share of the Netherlands market in new

replacement tyres for lorries and buses. Between 1975 and 1980 the figures for its share of share of new tyres sold were from 57 to 65%, which take no account of parallel tyre imports, which are difficult to establish, but which are estimated at several thousands and consist mainly of Michelin tyres. The market shares of the five principal competing makes are between 4 and 8%. In total 25 to 28% of heavy-duty tyres in competition with Michelin tyres on the Netherlands replacement market come from other Member States of the Community. Whereas the gross prices of Michelin tyres are comparable to the prices charged for the tyres of its main competitors, a comparison shows that the net purchase prices charged to Michelin tyre dealers are, after deduction of the discount, 10 to 15% higher than those charged for other makes.

Michelin NV's share of the market in retreads grew from 6% in 1975 to 18% in 1979. At the end of 1977 Michelin NV acquired the major retreading undertaking Tyresoles (which it disposed of again in April 1980). This acquisition allowed Michelin to obtain a further share of 20% of retreads fitted in the Netherlands and to control virtually one third of the Netherlands market in heavy-duty retreads at that time.

Michelin NV holds the principal position on the Netherlands market in new replacement tyres for cars, with a market share of about one third. Its main competitors have market shares ranging between 5 and 13%.

Michelin NV operates a substantial commercial and technical service. On their own initiative its representatives regularly visit all the tyre dealers and without informing the dealers also visit the users of heavy-vehicle tyres in order to promote sales of Michelin tyres. During their visits the representatives give technical advice to the users and carry out on-the-spot technical checks of tyres and the state of vehicles. They accept orders which they pass on to the dealer and are instructed to draw up an inventory of competing makes of tyres which they see being used. The purpose of the visits is to obtain market knowledge of direct use to the manufacturer. In addition, Michelin NV operates a specialized technical service upon which any user of Michelin tyres may call in order to resolve complicated technical problems.

All those factors give Michelin NV such complete freedom of action *vis-à-vis* its competitors and customers that it can prevent effective competition on the relevant market and adversely affect trade between Member States.

Consequently Michelin NV enjoys a dominant position on the relevant market.

(c) The conduct in question

(i) The discount system

The pricing and discount policy pursued by Michelin NV with regard to dealers between 1975 and 1980 was characterized by the following features:

A basic price which was published in price lists;

An immediate and general discount on the invoice;

Other discounts which in part were determined individually and selectively for each dealer;

A target figure for purchases, known as the "target", used as a basis in establishing those discounts;

Lack of written confirmation of targets and discounts.

In pursuing that discount policy Michelin NV restricted the dealers' freedom of choice and treated them unequally. The policy restricted access of other producers to the market.

The fixed component in the discount system, the invoice discount, was entered directly on the invoice. It was announced to dealers in writing in the form of a circular and was common knowledge. Until 1977 it was 15%; in 1978 it was increased to 22.5% and in 1979 to 30%.

Besides the invoice discount the system comprised a variable component consisting mainly of the annual bonus on which, until 1977, dealers received a monthly advance bonus which in general was some 4 to 6% lower than the annual bonus. In 1978 an automatic monthly bonus of 3 to 10% was introduced instead of the advance bonus, but was discontinued in 1979 when Michelin NV introduced a four-monthly bonus of 0 to 3% in addition to the annual bonus.

The level of the variable annual bonus component was established individually for each dealer in accordance with his efforts in distributing Michelin tyres and with reference to a number of criteria such as his estimated sales potential and Michelin NV's share in his sales. This procedure may be seen most clearly from the customer files for 1975/76 in which the proportion of Michelin tyres in the total tyre sales of the dealer is calculated. At the time Michelin called this the "température Michelin". Later the term "température" was avoided in the calculation of Michelin's percentage of total new tyre purchases. The payment of the annual bonus and the four-monthly bonus introduced in 1979 was dependent on the attainment of a target negotiated at the beginning of each year. This may be seen from the records of bonuses granted and from the customer files submitted to the Commission and the correspondence exchanged with a number of specialist dealers. The target was negotiated when the representative of Michelin NV visited the dealer.

On a number of occasions the advance bonus and the monthly bonus were paid on the basis of expected annual sales laid down in the target for specific types of lorry tyres, Michelin NV reserving the right either to alter the bonus terms and to request repayment of advances already received or to increase the bonus if the dealer exceeded his target. On their visits during the last few months of the year the representatives of Michelin NV were instructed to point out to the dealer the advantages of placing a final order before the end of the year and what it might cost him if the target fixed at the beginning of the year were not reached. Sometimes it was also pointed out to the dealer that the annual bonus due for the first six months of the year might be paid immediately if half the annual target were achieved by the end of June. The extra orders necessary for this purpose might then be financed out of the amount of the credit note to be received.

Until 1978 a graduated series of three targets was established in most cases, with corresponding bonus figures in similar graduated order. In general, the highest target was higher than the amount of purchases made in the previous year while the bonus did not show any increase. The retailer was thus kept under pressure to try to sell more Michelin tyres every year. After 1978 Michelin NV set only one target and in 1979 it also introduced a four-monthly target with a corresponding bonus amounting to roughly one third of the annual target which was again consistently higher than the number of purchases made in the previous year.

A comparison of the customer files shows that dealers purchasing very different quantities often received the same bonuses and vice versa. Furthermore, Michelin NV did not stringently apply the conditions on which the bonuses were granted. In some cases the bonus was unilaterally reduced when the target was not reached. The way in which the bonus schemes were applied was entirely at the discretion of Michelin NV in each individual case.

The criteria for determining the bonuses were not known to the dealers. The scales used for determining the level of the annual bonuses, which were discontinued after 1978, were intended only for internal use. Furthermore, until 1980 the dealers received only very sporadic written confirmation of the oral agreement concluded with the Michelin representatives regarding the bonuses. The lack of written confirmation regularly caused difficulties of interpretation and this together with the complexity of the bonus system made it very difficult, or practically impossible for the smaller dealer, to work out precisely how much he was earning on sales of Michelin tyres in a given year. Frequently the smaller dealers did not discover what their final bonuses were until they opened the envelopes handed to them at the end of the year by a Michelin NV representative. Many dealers hesitated to complain about this lack of written confirmation because Michelin NV could easily change to a competing dealer who was more cooperative.

The changes in the discount system for lorry tyres from 1975 to 1980 are set out in the following table:

Discount system for lorry tyres for the period 1975 to 1980

(in % of list price)

	1975	1976	1977	1978	1979	1980
Invoice discount	15	15	15	22.5	30	30
Monthly bonus	—	—	—	3 to 10 [1]	—	—
Four-monthly bonus	—	—	—	—	0 to 3	0 to 3
Annual bonus	10 to 22 [1]	10 to 22 [1]	10 to 22 [1]	1 to 5 [1]	0 to 2	0 to 2
Cash discount	2 [1]	2 [1]	2 [1]	2 [1]	2 [1]	2 [1]
Total (maximum)	35.4	35.4	35.4	35.675	36.2	36.2

1 — In percentage of amount invoiced.

During the same period the invoice discount automatically granted by the other tyre manufacturers amounted to 40 to 60%, sometimes supplemented at the end of the year by an annual bonus amounting to a few per cent. This annual rebate granted by other manufacturers was known beforehand and was not used as an individualized sales target.

The system of bonuses fixed on an individual and selective basis was aimed at tying the dealers closely to Michelin NV by putting them under increasing pressure to exceed each year their figures for the previous year or to maintain them in a poor year. That pressure was increased still further by the regular visits made by Michelin NV's representatives. The structure of the discount system strengthened the organizational links binding independent dealers to Michelin NV. The advance bonus, the remainder of the annual bonus, the automatic monthly bonus and the four-monthly bonus were regularly used by Michelin NV as a means of pressure even though the system was progressively simplified in 1979, particularly as regards the advance bonus.

The discount system was not only incompatible with the concept of undistorted competition within the meaning of Article 3 (f) of the Treaty; it also involved discrimination within the terms of Article 86 (c) since the discounts did not correspond to services objectively provided and ascertainable but the criteria applied were clearly subjective and essentially based on the loyalty shown to Michelin NV. Dissimilar conditions were therefore applied to equivalent transactions. In any event this policy gave Michelin NV the opportunity to practise discrimination.

The bonuses were not quantity discounts because comparable amounts purchased never resulted in the payment of the same or comparable discounts and represented Michelin NV's individual assessment of a given dealer's performance and its forecasts. Even if the difference in discounts granted to dealers amounted to no more than 2.55% in the years 1975 to 1978, it cannot be described as marginal or negligible. Since the discount system to a great extent deterred dealers from taking advantage of offers made by competitors during the course of the year, it must be regarded as a variant of loyalty rebates although it was not linked to an exclusive purchasing requirement.

The anti-competitive and discriminatory effects of the discount system were further reinforced by the absence of written notification and confirmation of targets. Until 1980 representatives gave only oral notification of the targets and associated rebates at the beginning of the year. They were not confirmed in writing. The resulting uncertainty increased the dependence of dealers. A purely oral notification used by an undertaking in a dominant position to communicate complicated terms of sale amounts, by reason of the misunderstandings and difficulties which may arise for the dealer, to abusive conduct.

The aim of this commercial policy of Michelin NV was to bind dealers to it as closely as possible. The discount system was of such a nature that it could only be practised by an undertaking in a dominant position. Michelin's competitors do not use a similar system.

To bind purchasers to a supplier occupying a dominant position constitutes an abuse within the meaning of Article 86. The conduct in question distorted competition by discouraging dealers from obtaining their supplies from competing manufacturers and by making access to the market more difficult for those manufacturers.

(ii) The extra bonus in 1977

In addition to the normal bonuses described above Michelin NV from time to time granted extra bonuses. For instance, when it could not meet demand for heavy-vehicle tyres in 1977, Michelin NV took advantage of the situation to grant an extra annual bonus of 0.5% for purchases of heavy- and light-vehicle tyres and made it conditional upon a set "target" being reached in respect of the latter. The purpose of that target was to stimulate sales of light-vehicle tyres.

This extra bonus granted in respect of heavy- and light-vehicle tyres and conditional upon the attainment of a target for purchases of light-vehicle tyres also constituted an abuse because light- and heavy-vehicle tyres belong to quite different markets. The aim and effect of this practice was to spur dealers on to achieve a target for light-vehicle tyres so as to avoid financial loss on the sale of heavy-vehicle tyres.

(d) Effect on trade between Member States

The discount system was capable of affecting trade between Member States since it restricted the dealers' freedom to make purchases. The chances of the other tyre manufacturers, many of which are established within the common market, of penetrating the Netherlands market were diminished. In so far as the purpose of the conduct in question was to maintain Michelin NV's market share and to limit the other manufacturers' shares of the Netherlands market, it was liable to restrict trade between Member States.

By making the grant of an extra annual bonus for heavy- and light-vehicle tyres dependent on the attainment of a specific target for light-vehicle tyres Michelin NV put its competitors at a disadvantage as regards their scope for selling light-vehicle tyres and for a time thereby impeded sales of light-vehicle tyres intended for the Netherlands market and originating mainly in other countries of the Community.

(e) Applicability of Article 15 (2) of Regulation No 17

The decision states that it is necessary to impose a fine on Michelin NV because it infringed, at least negligently, Article 86. It must have been aware that it was able to impede the access of other makes of new heavy-vehicle tyres to the Netherlands market and that its discount system impeded such access. Judgments given by the Court since 1973 have made it clear that a discount system whereby an undertaking in a dominant position attempts, by means of financial incentives, to prevent supplies being obtained from competitors is contrary to Article 86. Michelin NV must be aware that the system it applied, which might be regarded as a variant of a system of loyalty rebates, had the same restrictive effects on competition as a loyalty rebate and it must also have been aware of the discriminatory effects of its policy. In view of the position which the Michelin

group occupies on the European market Michelin NV may be expected to follow developments in European law attentively and adjust its policy accordingly.

To establish the duration of the infringement, the period 1975 to 1980 was taken into account as regards the application of the discount system and 1977 as regards the extra bonus granted on purchases of car tyres.

The infringement must be regarded as serious because the commercial policy pursued by Michelin NV significantly distorted competition on the Netherlands market over a long period by leaving dealers no freedom of decision as regards purchasing, creating discrimination and strengthening its dominant position. On the other hand credit should be given to Michelin NV for the changes and relaxation of its policy effected in 1978 and 1979. The Commission also regards the grant of the extra bonus in 1977 as a serious infringement.

The Commission concludes that in view of Michelin NV's total turnover, which amounted to some HFL 455 million in 1980, as well as the gravity of the infringement at issue and the intensity with which the discount system was applied, a total fine of 680 000 ECU should be imposed on Michelin NV in respect of the two infringements established.

II — Written procedure and conclusions

1. By an application lodged at the Court Registry on 28 December 1981 Michelin NV brought an action under the second paragraph of Article 173 of the EEC Treaty claiming that the Court should:

Declare the defendant's decision of 7 October 1981 void;

Alternatively, declare Article 2 of the decision void or at least reduce the fine imposed;

Order the defendant to pay the costs.

2. By an application lodged on 5 April 1982 the Government of the French Republic sought leave to intervene in support of the applicant. Leave to intervene was granted by order dated 5 May 1982.

The Government of the French Republic confines its observations to the question whether trade between Member States is affected and whether the conduct in question must be classified as an abuse. It claims that the Court should:

Declare the Commission's decision of 7 October 1981 void on the grounds of lack of competence and infringement of the Treaty;

Order the defendant to pay the costs, including those of the intervener.

3. The Commission contends that the Court should:

Dismiss the action as unfounded;

Order the applicant to pay the costs;

Order the Government of the French Republic to pay the costs arising from its intervention.

4. The written procedure followed the normal course.

5. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to request the parties to clarify and define their positions orally on a number of points of fact and law at an informal meeting with the Judge-Rapporteur and the Advocate General. That informal meeting took place on 20 January 1983.

After that meeting and upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — The submissions and arguments advanced by the parties during the written procedure

1. The relevant market

(a) The product market

Michelin NV contends that the Commission defined the market as being that for new replacement tyres for lorries, buses and similar vehicles, which is artificial and arbitrary. The market is composed of a highly diversified mixture of dimensions and types of tyre which are not interchangeable and does not include retreads, although these are interchangeable with new tyres of the same dimensions and type. The definition of the relevant product market is therefore both too wide and too narrow.

As far as interchangeability is concerned, it is as absurd to compare tyres for three-and-a-half tonne lorries to tyres for 35 tonne lorries as it would be to regard a set of shoe-sizes selected at random from all the possible shoe-sizes as constituting one single market. As far as haulage conditions are concerned, each tyre-profile, like those of road tyres or tyres for use on sites or quarries, meets specific needs which cannot be met by another type of tyre.

In assessing whether an undertaking occupies a dominant position on the market for a given product, only the choices open to the person using the product should be considered and not those of the intermediaries marketing it. A dealer's views on the interchangeability of a product are irrelevant. From the dealer's point of view — the level which the Commission took as its basis — there are no grounds for separating the market in tyres for lorries, buses and similar vehicles from the tyre market in general. At that level all products are by definition interchangeable with certain limits and heavy-vehicle tyres are simply one of the products in the product range.

There is no fixed practice in the tyre industry and no objective test for distinguishing tyres for lorries, buses and similar vehicles from other categories of tyre.

The Commission's reasoning in its decision is based on a fundamental contradiction inasmuch as the Commission alternately puts itself in the shoes of the consumer and the dealer.

It is arbitrary and illogical not to include retreads in the definition of the relevant market since they are perfectly capable of satisfying the same needs. Many letters written by retread users and produced by the applicant prove that the quality of retreads is comparable in all

respects to that of new tyres and that there are no limits on their use, for example, on the front axles of vehicles or on passenger vehicles. The prejudices still shown by some users and dealers towards the use of retreads are not sufficient for them to be classified in a market of their own. In this connection regard must be had to objective characteristics and not to subjective perceptions. As a matter of fact the use of retreads is on the increase and not all users are prejudiced against them.

Every retread that is in use takes the place of a new tyre and is sold in the same way as a new tyre through the intermediary of dealers. It is not possible to distinguish between the "product" and the "service". There is no difference between retread tyres sold in exchange for a carcass and tyres that are retreaded "carcass included". In their statistics the trade organizations make no such distinction. The limitations on the production of retreads are not a ground for excluding them from the relevant market, especially since those limitations are not very great, as any new tyre may be retreaded two or three times.

The *Commission* contends first of all that it is paradoxical for the undertaking concerned to claim that the relevant market is too wide since such a claim cannot refute the existence of a dominant position.

The applicant seeks to distinguish markets corresponding to micro-categories of tyres. For this purpose it considers only elasticity of demand, entirely ignoring elasticity of supply relating in particular to the special characteristics of production and the extent to which various products are technically complementary at manufacturing level. It is necessary to have regard to a number of criteria in order to define the relevant market. Besides elasticity of supply and demand the perceptions of traders should also be considered. The alleged incoherence of the Commission's definition of the market merely reflects a necessarily complex approach without which economically and legally correct conclusions would not be possible.

The extent to which products are interchangeable makes it possible to determine the external limits of a market — that in tyres — within which "submarkets" must be distinguished depending on the structure of demand. This is characterized by the fact that unlike buyers of car tyres buyers of heavy-vehicle tyres are most frequently trade purchasers. Lorry and bus tyres are bought by undertakings which require them regularly and in large quantities, that is to say by experienced buyers. This affects the dealer's role: a dealer in heavy-vehicle tyres is expected to give technical advice and provide a specialized after-sales service not only for the tyres themselves but also for the wheels.

On the other hand, it is not possible to distinguish within a technically homogeneous product range different markets according to dimensions, diameter or circumference. Products of different dimensions, diameters or circumferences, manufactured in identical plant belong to the same market because of elasticity of supply.

As regards the exclusion of retreads from the relevant market, the Commission stresses that 80 to 95% of retread tyres are retreaded to the order of haulage undertakings and remain their property. The market in question is therefore a service market. Furthermore, users consider retreads less safe and in practice they are used only on rear axles. Irrespective of the "objective" facts, retreads are not a genuine alternative as far as dealers are concerned. This opinion of users is reflected in the lower price of retreads. Even if mileage is taken into account, the price of retreads tends to be lower than the price of new tyres. In a price economy in which the true state of affairs is determined by the market or in other words by supply and demand, it is pointless to take "objective" characteristics into account.

Since all retreads are made from new tyres, a market share which included retreads would not give a true picture of the market position. If tyres were retreaded three times, even a monopolist manufacturing 100% of all new tyres would, according to the applicant, have a market share of only 25%. "Secondary" competition must be disregarded where it is a question of assessing the position of a manufacturer of "primary" products from which the "secondary" product is derived. Even if all retreads were sold freely and were a factor in competition, Michelin NV would still occupy the key position owing to its dominance of the market in new tyres.

To this *Michelin NV* replies that the criterion of interchangeability or the capacity to serve as a substitute is the key concept in defining the market and that the argument relating to elasticity of supply, for which in fact the Commission adduces no evidence and which it did not use in its decision, is untenable. The method of manufacture is basically the same, regardless of tyre size, so that this idea does not allow lorry and bus tyres to be classified in a market separate from the tyre market in general.

As regards the role which the dealer has to play, Michelin NV stresses that users of van tyres are to a considerable extent also trade users and that users of car tyres, particularly commercial travellers and taxi-drivers, are quite capable of making an informed and expert choice of tyre and are just as demanding as customers for heavy-vehicle tyres.

The *Commission*'s reply to that point is that the structure of demand justifies both the exclusion of original equipment tyres — which the applicant has not challenged — and the distinction drawn between heavy- and light-vehicle tyres on the replacement market. Commercial travellers and taxi-drivers cannot change the general trends in demand on the

market for light-vehicle tyres, whilst van-tyre users, although usually undertakings, are not haulage contractors and therefore are not trade purchasers.

(b) The geographical market

Michelin NV complains that the relevant geographical market has been restricted to the Netherlands.

The Commission is relying on a number of factors, such as technological advance, large financial resources and active research and development policies, which are far beyond the capacity of Michelin NV and apply only to the Michelin group as a whole. Such factors, relating to the whole group, may not be taken into account unless the Commission takes a much wider market, even the world market, as its basis.

The manufacturers with whom Michelin competes in the Netherlands are undertakings on a world-wide scale. To consider only the Netherlands market and to take into account considerations not specific to that market gives a false picture of competition in the Netherlands.

The *Commission* points out that this complaint concerns not so much the definition of the market as the finding that Michelin NV dominates the market. Once the geographical market has been defined it is quite normal to assess the position of an undertaking active on that market by reference to the advantages which it derives from belonging to a larger group.

The true economic position is that in selling their products on the various national markets in the Community manufacturers have generally decided to use subsidiaries operating on the national market. As far as sales to dealers are concerned, competition in the Netherlands is therefore between the manufacturers' local subsidiaries, the dealers in practice having no access to sources of supply outside the Netherlands. The area in which the objective conditions of competition are the same for all traders is therefore the Netherlands.

2. *The dominant position*

Michelin NV maintains that the Commission has distorted the relative positions of strength of Michelin NV and its competitors by using an artificial and arbitrary definition of the market, namely a general market in heavy-vehicle tyres. In its submission retreads must also be included in that market. Its share of the market in tyres — including retreads — for lorries, buses and similar vehicles is on average about 37%, which is not of such an order as to establish the existence of a dominant position.

The other factors relied on by the Commission as proof of Michelin NV's dominant position are irrelevant. Michelin NV is not the only undertaking to employ commercial representatives; its major competitors employ more representatives in relative terms than Michelin NV whose number of representatives has remained stable since 1970. The more or less wide range of products offered by a manufacturer cannot amount to a competitive advantage since the various types of tyre are not interchangeable and Michelin NV does not require its dealers to buy its whole range of products.

Certain factors, disregarded by the Commission, are not consistent with the existence of a dominant position in this case. For instance, the net margin which dealers earn on sales of Michelin tyres is comparable to that earned on sales of competing tyres and the cost price per kilometre for users of Michelin tyres is the cheapest. Michelin NV's financial results have deteriorated to such an extent that it has been making losses since 1979. In that same period new Japanese competitors have markedly increased their efforts to penetrate the Netherlands and European markets and their import figures show this. Michelin NV and the Michelin group as a whole do not have the production capacity to enable Michelin NV to meet all the demand for heavy-vehicle tyres alone and by stepping up production Michelin NV's competitors are in a position at any time to supply the quantities of tyres supplied by Michelin NV to its customers. Michelin NV's competitors are multinational concerns which have greater financial strength and are more diversified than Michelin.

In deducing from an examination of the market position at the level of the user instead of the relative strengths of competitors at the level of dealers that a dominant position exists *vis-à-vis* dealers the Commission's argument is highly illogical. Sales of new heavy-vehicle Michelin tyres represent on average only 12 to 18% of dealers' total turnover which precludes any dominant position.

Account should also be taken of the fact that users of heavy-vehicle tyres are experienced trade buyers and this fact considerably diminshes the importance of market shares because such buyers are in a position to offset the influence of the manufacturers: they are all the more willing to welcome commercial representatives' activities, which form part of good business management.

As regards the abuse referred to in the disputed decision as proof of the existence of the dominant position, the practice regarding heavy-vehicle tyres objected to by the Commission is exactly the same as Michelin NV's practice regarding tyres for cars and delivery vans in respect of which, however, the Commission found no dominant position. To deduce from an allegedly abusive practice that a dominant position exists when no practice can amount to an abuse in the absence of evidence of a dominant position is inverted logic and amounts to a circular argument.

The *Commission* points out that Michelin NV does not deny that its share of the market in new tyres for heavy vehicles is 57 to 65%. Even if retreads were to be included in that market, only retreads actually put on the market would have to be taken into account; retreads done to order would have to be disregarded. This would not make Michelin NV's market share much lower than that stated in the decision. Nor does Michelin NV deny that its market share is greater than its competitors' by a considerable margin.

The importance of Michelin NV's commercial representatives is clear in particular from their work at the

commercial and technical level, as described in the decision. The fact that Michelin NV's representatives can approach tyre users without having regard to the dealers, who are compelled to accept their suppliers' encroaching on their province, is evidence of Michelin NV's dominant position. Michelin NV's wide range of products makes each dealer dependent on Michelin NV which thus has the means of pressurizing dealers and influencing their purchasing policy.

The evidence which Michelin NV adduces from prices, financial results, market penetration by new competitors and the production capacity, strength and size of its major competitors does not controvert the existence of a dominant position which is proven in other ways. Neither the fact that Michelin NV does not charge excessive prices nor the fact that its profits are temporarily poor or non-existent means that no dominant position exists. New competitors have penetrated the market mainly at the expense of Michelin NV's competitors whilst Michelin NV itself has maintained its own market share.

Although when defining the market the Commission had regard to the chains of dealers at the level of which the abusive conduct took place, this does not mean that the existence of a dominant position must be proved separately in the case of suppliers, competitors, buyers, dealers and users. The dominant position affects all of them. For the proportion of Michelin products which dealers obtain from Michelin NV must be substantially the same as that which they sell to users. It is unimportant that dealers are also active on the market in other products because to obtain the products in question they must always approach the undertaking with the dominant position.

The counter-influence arising from the fact that users of heavy-vehicle tyres are experienced trade buyers cannot cancel out the dominant position but can at the most only diminish some of its effects.

3. The conduct in dispute

(a) The discount system

According to *Michelin NV,* the Commission has misunderstood the essential features of its discount system. The discount consists of a fixed component which is the same for each dealer and a variable component which is determined each year in proportion to purchases of Michelin products on the basis of an annually reviewed progressive scale which Michelin NV notified to the Commission at the beginning of the investigation in 1977. The variable component fluctuated from year to year by no more than 5%. A fraction of this component, which never exceeded a few tenths of a percentage point, was linked to the attainment of jointly agreed sales targets which were subsequently incorporated into Michelin NV's production and sales programme.

In this regard Michelin NV emphasizes in particular the very slight variation in the discounts. The maximum difference in the discounts granted to the 54

customers selected by the Commission's inspectors for the purpose of the investigation was 2 to 2.5% whereas the number of purchases of heavy-duty Michelin tyres made by those same dealers might vary from more than 13 000 to 200 per year. With a few exceptions, all dealers purchasing more than 3 000 tyres per year received the same maximum discount percentage during the period 1975 to 1979.

Michelin NV's discount was entirely quantitative. Until 1978 the scale used was based on total purchases of tyres of all types and thereafter on purchases of different types of tyre. However, the scale could not be automatically applied because dealers were not prepared to accept automatically lower discounts when sales declined.

The sales target was never the decisive factor in the discount, which was in payment for an objective service by the dealer to the manufacturer inasmuch as the information received by the manufacturer when fixing its targets enabled it to programme its production better and reduce costs.

No dealer has ever been deprived of all of his annual discount for any reason whatsoever. Every dealer knew from experience that in such a case he would lose only a few tenths of 1% at the most.

The Commission has wrongly likened the discount to a loyalty rebate such as that considered by the Court in its judgment of 13 February 1979 (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). There are no exclusive purchasing obligations. Even customers dealing in different makes of tyre receive the same discount. The "target" discount has no dissuasive effect on the dealers' purchasing policy. The differences between the discounts received by different dealers are quantitative in nature, that is to say they are based on the dealer's total turnover. The grant of a discount to encourage sales by dealers is a legitimate service under Article 86. It is a reward for the service consisting in the attainment of jointly agreed sales targets irrespective of purchases of other makes of tyre. To prohibit a manufacturer from encouraging his dealers to buy more would in fact be tantamount to condemning him to lose ground.

Nor is the discount discriminatory. The differences between the rates of discount are due to the application of a scale which is based on the dealer's total purchases from Michelin NV during the previous year. In no case was the rate of discount related to a dealer's purchases of Michelin products as a preparation of his purchases of competing makes.

The charge that the rate of discount was linked to the proportion of Michelin tyres purchased by the dealer ("température Michelin") is unjustified and not supported by any evidence. The "température Michelin" never played any part in the fixing of the discount.

In any case such slight differences cannot be due to any anti-competitive motives and do not therefore deserve consideration by the Community authorities in the application of Article 86.

The Commission's allegation that targets and discounts were never notified is

unfounded as they were agreed by the dealers and Michelin NV's commercial representatives at the beginning of the year. The cases cited by the Commission to prove that this was not the case were of dealers whose sales had suddenly fallen and who claimed that they had not properly understood the terms on which the discounts were granted although these had never caused them any problems in the past. The discounts had to be notified to the dealer otherwise they would have been pointless. Each dealer who asked for written confirmation always received it.

In short Michelin NV considers that the interpretation which the Commission seeks to place in this case on Article 86 of the EEC Treaty is inconsistent with the Court's judgment of 13 February 1979 in the *Hoffmann-La Roche* case. In that case the Court held that loyalty rebates departed from the rules of normal competition between products or services because their purpose was to reward a promise on the part of the purchaser not to obtain his supplies from competitors. In this case, however, the conduct rewarded is not the acceptance of such an obligation but the purchase of increasing quantities of goods from the supplier in question. The Commission is objecting to the discounts in question as being incentives to purchase more.

To prohibit an undertaking in a dominant position from concerning itself with the sale of its product and from encouraging dealers to buy it is tantamount to condemning it to lose ground and penalizing it merely for occupying a dominant position. Such a penalty would be all the more unjust in this case because the undertaking concerned owes its market position to the quality of its products. Since Michelin NV constantly has to face very keen competition throughout the world, any fetters on its ability to react and adapt itself to competition would be such as to put its very existence in jeopardy.

The *Commission* observes first of all that the importance attached by Michelin NV in its application to the scale used for the annual bonuses does not fit in with the explanations which it provided during the administrative procedure according to which the scale and relevant instructions were merely a guideline for internal use which was applied flexibly in order to take account of the individual situation of each dealer. The fact that the scale was applied flexibly had no real importance or may even have been completely ineffective is confirmed by the anomalies which come to light upon a close examination of the figures provided by Michelin NV of sales of different categories of tyre and the discounts granted on them.

It is clear from the customer records that the discount was linked to a target for heavy-vehicle tyres and that the target consisted in a precise number of tyres to be purchased during the current year. Even though the variations in discount from one dealer to another and the penalizing of a dealer who failed to meet his highest target but reached a lower target were limited, their effect was far

from being negligible. What is more, if the dealer did not attain the lowest target, or after 1978 the single target, he could not be sure of not losing all his annual discount because Michelin reserved the right to impose that drastic penalty. In at least one case Michelin threatened to withdraw the advance already paid on a dealer's annual bonus if he did not achieve his target for the year in question.

The contention that Michelin NV's discount was purely quantitative is contradicted by the customer records. For instance, in one case a dealer with a considerably lower total turnover than another dealer still received a higher maximum discount than the other for attaining a much lower maximum target than that set for that other dealer. This individual character of the discount system is borne out by Michelin NV's statements regarding the difficulty of reducing the discounts in the event of a decline in turnover.

Even if the penalty for not attaining the target was probably limited in most cases, the dealer was entirely at Michelin's mercy if he did not achieve the lowest target. The target and the discount were therefore important means of bringing pressure to bear.

Information received by the manufacturer in fixing the targets cannot be regarded as a service objectively rendered. If it was merely a matter of obtaining information, a simple inquiry of the dealers as to their estimated purchases in the coming year would have been sufficient. However, Michelin NV sought by means of its system artificially to encourage the dealer to adhere to his own estimates and took an active part in preparing those estimates for the purposes of fixing the targets.

In seeking to prove that its system amounted to a quantitative-discount system Michelin NV ignores the fact that its discounts were not based on a scale applying to all its trade customers, were linked to individualized targets and were applied in a way which was totally obscure as far as the dealers were concerned. Even if the customer records do not show that the proposed annual bonus was directly linked to the proportion of Michelin tyres in a dealer's total purchases, which Michelin NV representatives were required to express by the equivalent of what used to be termed the "température Michelin", Michelin NV can hardly deny that this factor was one of the most important considerations in the individual fixing of both the discount and the target.

The discriminatory character of the discount lies in the fact that Michelin NV fixed the sales targets and discounts in a manner which was individualized and lacked transparency. Although Michelin NV claims that the annual supplementary bonus scale was the objective element in the fixing of the discounts, it has never offered to prove that in practice the facts corresponded to that scale, despite all the anomalies which the Commission has pointed out. Undertakings in comparable situations were treated differently. Likewise, undertakings in quite different situations were treated in the same way. The differences found to exist between the discounts are substantial, amounting to 2 to 5% of the

annual bonus. In absolute figures, this represents thousands or tens of thousands of guilders, which are considerable sums for the undertakings involved.

Prior to a statement made at the hearing in this case in 1980, Michelin NV's policy was not to confirm officially agreed discounts; such confirmation could be obtained only by way of exception and after much insistence.

Since the targets and discounts were not confirmed in writing the dealer was left in doubt and uncertainty — not from the legal point of view but as regards the facts — because he has great problems in calculating his discount. This increased Michelin NV's freedom of action.

Michelin NV has not adduced any evidence to show that its "target" discount was a form of quantitative discount. Even if it was, such a system, applied by an undertaking in a dominant position, may amount to an abuse, for the attainment of an annual target by the dealer did not make possible a reduction in costs which Michelin NV would be entitled to reward. Cost reductions cannot be achieved by an end-of-year bonus.

In its summing up the Commission emphasizes that in the *Hoffmann-La Roche* case the Court condemned loyalty rebates because they were not based on an economic service justifying such a benefit. Rebates are permissible only if they are restricted to passing on cost savings to the buyer. Rebates not linked to cost savings and whose object is to limit the advantage for the buyer in choosing another supplier's product may not be used by an undertaking in a dominant position. With the exception of bargain prices, an undertaking in a dominant position may lower its prices ony for all buyers in general, which means that that restriction on the dominant undertaking amounts to an obligation not to discriminate.

That prohibition may even apply to certain kinds of quantitative rebates not linked to cost savings. In this regard the Commission refers to a decision of the Bundeskartellamt of 22 October 1979 (Wirtschaft und Wettbewerb, 2/1980, p. 145) which was upheld by the Kammergericht on 28 November 1980 (Wirtschaft und Wettbewerb, 1/1981, p. 15). The discounts in this case however are, in addition, individualized and secret.

The intention is not to condemn an undertaking in a dominant position to lose ground. But once the advantage of an undertaking's technological lead and the quality of its products, to which it owes its dominant position, are eroded, it must maintain its dominant position only by better economic performance and not by exploiting the advantages it enjoys by virtue of its dominant position with the result that the dominant position is self-perpetuating.

The *French Government* submits that the Commission treats the application of a discount system such as that in question as an infringement *per se* without demonstrating that such a practice might have adverse effects on competition.

The market in replacement tyres for heavy vehicles is an open and competitive market. Michelin NV allows its dealers complete commercial freedom. There is nothing reprehensible in an undertaking's creating strong ties with its dealers. They choose to buy Michelin tyres for a variety of reasons connected with the quality, prestige and price of the product.

Michelin did not seek to strengthen its dominant position but expanded entirely by means of internal growth and by a commercial policy conforming with the law, suited to commercial tyre-users and fully in line with its long-term strategy.

(b) The extra bonus in 1977

According to *Michelin NV*, the Commission's objection to the extra bonus granted in 1977 is based on a wrong analysis of the facts. Since the bonus did not amount to a form of connected transaction within the meaning of Article 86 (d), its alleged illegality lay only in the fact that the Commission described it as "an extra bonus for the purchase of lorry tyres" whereas it was linked to the fulfilment of a specific service regarding car tyres. There is no justification for that discription.

The decision to grant the bonus was taken following a temporary shortage of heavy-vehicle tyres which was due to measures adopted by Michelin NV to modernize its production programme. In order to offset the adverse effects of the shortage on dealers' remuneration, Michelin NV announced, and not until September, the grant of an extra end-of-year bonus of 0.5% for all dealers who attained the purchase target for light tyres agreed at the beginning of 1977, which was the same as for the previous year. The bonus in question was an extra discount on purchases of car tyres, consisting of an increase in the usual discount on purchases of car tyres for 1977, and was no different from the usual discount on purchases of car tyres to which the Commission had never objected.

The Commission is therefore making two errors in claiming that the sales target for light tyres was a "special" target and that the bonus of 0.5% was calculated on purchases of light and heavy tyres when it was calculated on the basis of total purchases of all current categories of tyres.

In its argument the Commission is confusing the bonus and the concept of "connected transactions" within the meaning of Article 86 (d) of the Treaty. The Commission should have abandoned the argument that the bonus amounted to an abuse within the meaning of Article 86 (d) because it did not involve making the sale to a customer of product A subject to his purchase of product B.

In accusing Michelin NV of taking advantage of the shortage of heavy-vehicle tyres to compel dealers to make an extra effort to sell car tyres, the Commission is imputing deliberate intent to Michelin NV. A measure intended merely to provide dealers affected by the

shortage with extra remuneration cannot be termed an abuse. The extra bonus had no anti-competitive purpose or effect.

In reply the *Commission*, relying on the customer records, denies that dealers were not offered the extra bonus until September. In any case, even if it was not offered until September 1977, it would still have made it possible to influence purchases in the last quarter, which commercially is the most important part of the year in the tyre trade. The bonus was linked to a special target, at any rate to a target expressly fixed for car tyres. It was the same as, or even higher than, the annual maximum target — and in a year in which demand for car tyres was falling. Michelin NV introduced the bonus because it had foreseen a shortage of heavy-vehicle tyres on the Netherlands market due to an increase in its exports to the United States. It was therefore an addition to the discounts on heavy-vehicle tyres and was meant to compensate lower sales of such tyres.

The effect of the extra bonus system was that a dealer who did not succeed in attaining the sales target agreed for car tyres did not earn any compensation for losses due to the shortage of heavy-vehicle tyres. The profit held in prospect by the extra bonus was directly intended to stimulate the dealers' activity on quite a different market on which demand was weak. At a time when turnover in heavy-vehicle tyres was falling as a result of a shortage caused by Michelin NV itself, an extra effort on the market in car tyres was demanded from dealers if they wished to receive compensation for the consequences of that shortage. The dealers had no choice but to accept that conduct on the part of the dominant undertaking if they wished to maintain their competitive position on the market. Even if that commercial practice does not come within the letter of Article 86 (d), it is conduct which distorts competition on the market in light tyres and comes within the spirit of that provision. In any event the practice is caught by the general prohibition of abuse of a dominant position contained in Article 86. It is not a normal means of competition for an undertaking to maintain the limited degree of competition on the market in replacement tyres for heavy vehicles by attempting to strengthen its position in respect of car tyres, which constitute a different market.

4. Effect on trade between Member States

Michelin NV contends that the conduct in question was confined entirely to the Netherlands and was therefore subject to the laws of that country; it carries on its activities solely in the Netherlands and the alleged offences took place entirely in that country. All the dealers are established in the Netherlands.

The Commission has not proved that the conduct in question sealed off the Netherlands market; it itself stated

that parallel imports took place; it accepts too that the tyre market is competitive. No evidence or fact has been adduced to prove that owing to Michelin NV's discount system a single dealer on a single occasion placed an order with Michelin NV rather than with another manufacturer. The Commission's assertion that Michelin NV's competitors were affected by the practices in question is not based on a shred of evidence.

In taking this case up the Commission has interfered in a purely local dispute between Michelin NV and a few dealers in the Netherlands which has no Community dimension at all.

The *Commission* considers that the fact that the conduct in question was confined to the Netherlands is not sufficient to preclude an effect on trade between Member States. Because of Michelin NV's discount system its competitors found difficulty in gaining further access to the Netherlands market in lorry and bus tyres. The structure of competition, determined mainly by the relationships between manufacturers, dealers and consumers, was altered by the conduct in question because of the permanent privileged links between Michelin NV and the dealers.

The finding that trade between Member States is affected follows from a strictly logical deduction based on the discount system as applied by Michelin NV. A trade restriction is deemed to affect trade between Member States if it is possible to foresee with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on trade between Member States. The question whether one of Michelin NV's competitors complained of an adverse effect on trade is immaterial. The Commission does not necessarily have to adduce factual evidence that trade between Member States is affected if it is convinced of the probability that it is actually or even potentially affected. If its analysis of the discount system is correct, there is no doubt that it made it more difficult for Michelin NV's competitors to gain access to the network of independent dealers and that as a result their imports into the Netherlands were incapable of growth or were able to grow only very slightly.

The *French Government* considers that if trade between Member States is not affected, even potentially, the Commission has no power to act and cannot apply Article 86 to the conduct in question.

For the purposes of Article 86 it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the conduct in question may have an influence, direct or indirect, actual or potential, on patterns of trade between Member States. An undertaking's dominant position on the market can never be a ground for assuming that trade is affected. The analysis of the case cannot remain theoretical but must be embodied in a precise description of the present, foreseeable or reasonably foreseeable effects of the alleged restrictions to the exclusion of any subjective assessments. However, the Commission's

assertions are abstract and subjective; they are barely supported by the facts and leave a number of considerations out of account.

The market in question is an open market on which 25 to 28% of the heavy-vehicle tyres competing with Michelin tyres originate in other Member States and on which parallel imports of Michelin tyres also take place. Michelin NV has not sought to seal off the Netherlands domestic market nor has it obstructed parallel imports. Neither Michelin NV nor the Michelin group can be penalized for deciding at the right time upon an astute industrial strategy in building a factory in the Netherlands, on the ground that trade is adversely affected because Michelin NV's competitors have not pursued the same policy. It must be stated that Japanese manufacturers seized their opportunity to penetrate the market whereas Michelin's other competitors did not. The reason why its competitors are not so aggressive on the market is in fact that their products are of inferior quality. Dealers choose Michelin tyres for the quality and reputation of the product and also because of the favourable terms of supply due to the discounts.

In reply the *Commission* states that the French Government is disregarding the content of the decision and the detailed evidence which it has provided therein. The fact is that since Michelin NV's European and American competitors had no equal opportunity as regards independent dealers because of Michelin NV's discount system, their position was undermined by Japanese competitors pursuing a different commercial policy based upon exclusive distributorships. Michelin NV, however, was in a position to protect itself because it had the upper hand over the independent dealers. Michelin NV thus weakened its European competitors on the Netherlands market and made access by Japanese manufacturers easier.

5. Infringement of the rights of the defence

Michelin NV contends that the administrative procedure of the Commission was irregular in so far as it infringed the rights of the defence.

Despite two requests from Michelin NV the Commission has not provided it with a single document from its file apart from the complaint lodged by Frieschebrug BV. In particular it has not disclosed various statements obtained by the Commission from various dealers, users and competitors of Michelin NV. The results of such inquiries ought to have been communicated to Michelin NV; as they were not, the applicant was prevented from effectively expressing its views on the accuracy and scope of the information on which the Commission relied.

Furthermore, in its decision the Commission made no mention of the results of the hearing and the statements made on that occasion by witnesses and technical experts.

The *Commission* stresses that it made inquiries of a certain number of dealers only and not of Michelin NV's dealers, users and competitors, as the applicant claims. Michelin NV knew about the inquiries of dealers from its commercial

network and even knew the questions being asked. The inquiries verified what the Commission already knew from the information it had obtained from Michelin and confirmed that the discount systems of Michelin's competitors were different from the applicant's. The investigation results which Michelin NV requested the Commission to disclose mainly concerned its competitors' discount practices. The Commission decided however that Article 20 of Regulation No 17 gave no justification for disclosing the results of the investigation to Michelin NV since it had not used them either to determine Michelin NV's and its competitors' market shares or to define the abuse. The findings of the investigation were not therefore vitally important for Michelin NV's defence and the Commission was entitled to put in the forefront its duty not to disclose business secrets.

The Commission was never asked by the applicant to disclose any other information.

In any case the Commission devoted a large number of paragraphs in its decision to refuting the applicant's arguments. It took into account all the evidence and witnesses' statements submitted by Michelin NV during the administrative procedure.

Michelin NV's view is that if the Commission did not address inquiries to the persons concerned, there is no guarantee that its findings were objective. It also denies that the results of the investigation merely verified the information obtained from the complainant and itself and that the decision was not based upon the findings of the investigation. The Commission has no right to decide for itself what is necessary for the defence of the undertaking concerned.

In reply the *Commission* states that it may either obtain authority to disclose facts protected by Article 20 and use them in the statement of objections and decision or decide not to use such facts; in this case it chose the latter course. Even if Michelin NV could prove that its competitors' practices were the same as its own, this would not assist it since the principle underlying Article 86 is that what is lawful for an undertaking having no dominant position is not necessarily lawful for a dominant undertaking.

6. The fine

Michelin NV considers that it cannot be charged with having acted intentionally or negligently since the abuses of which it stands accused by the Commission constitute a fresh interpretation of Article 86 which it could not have foreseen. That interpretation departs in particular from the Court's decision on loyalty rebates in *Hoffmann-La Roche* [1979] ECR 461 as none of the characteristics of loyalty rebates are present in this case. It does not therefore plead ignorance of the law but that it was impossible to foresee a reversal of administrative case-law. Moreover, even the Commission waited nearly three years before drafting the statement of its objections to the discount system of which it had been informed by Michelin NV in 1977.

As Michelin NV provided a detailed description of its discount system in 1977 and the Commission raised no objections at that time, it is also unfair to fix the duration of the infringement at five years, from 1975 to 1980, when the Commission itself could have shortened that period and prevented the payment of the special bonus of 0.5%, which was not effected until the end of 1977.

The criteria for fixing the amount of the fine, as set out in the last subparagraph of Article 15 (2) of Regulation No 17, make no reference to turnover and are confined to the gravity and duration of the infringement. The Commission should not therefore have taken turnover into account. The most basic rules of fairness also require that only turnover on the market concerned by the decision should be taken into account and not the total turnover of the undertaking in question.

Furthermore the Commission took no account of the exemplary cooperation shown by Michelin NV throughout the administrative procedure. The fine should therefore be considerably reduced in any case.

Finally, the imposition of the fine amounts to a breach of the rights of the defence inasmuch as during the administrative procedure the Commission did not disclose the criteria on which it planned to fix any fine.

The *Commission* points out first that since Michelin NV deliberately adopted the conduct in question and intended it to have or must have been aware of the effects which it had on the market, it acted intentionally or negligently and cannot plead ignorance of the law. The Commission considered the discount system in question an abuse not because of its technical peculiarities — which were different from those at issue in the *Hoffmann-La Roche* case — but because of its objects and anti-competitive effect of which Michelin NV was aware.

The procedure took so long because the Commission first concentrated on the complaint lodged about the take-over of the sales network of Actor NV before it thoroughly investigated the discount system. Because the system was so complicated the Commission had to make many inquiries before it had all the facts available. In the course of those investigations Michelin NV realized that its system was likely to be regarded as a variant of a loyalty rebate system. It cannot therefore hold the Commission responsible for the fact that it did not change its system until 1981.

Turnover is expressly referred to in Article 15 (2) of Regulation No 17 and for the purpose of that provision means an undertaking's total turnover and not turnover on a specific market. However, the reason for the reference to turnover in the contested decision was that in an earlier draft the fine envisaged exceeded one million ECU. By virtue of Article 15 (2) of Regulation No 17 the reduction in the amount of the fine ought to have led to the omission of that reference, but inadvertently this was not done.

As to the precise considerations governing the fixing of the amount of

the fine, these depend on the course of the administrative procedure; the Commission cannot therefore prejudge this issue before hearing the undertaking concerned.

As regards the point that Michelin NV cooperated in the administrative procedure, this is no ground for reducing a fine; on the other hand an undertaking which obstructs a proceeding is liable to the fines provided for in Article 15 (1) of Regulation No 17.

The fine in this case was fixed at an extremely small amount in comparison with the scale laid down in Regulation No 17.

IV — Explanations given at the informal meeting

At the informal meeting with the Judge-Rapporteur and the Advocate General on 20 January 1983 the parties gave the following further explanations regarding their previous statements:

1. The relevant product market

The *Commission* stated that in order to *define the market* there is no need in its view to make any distinction between marketing stages. As regards the types of tyre included in the relevant product market, the main point to be borne in mind is that the structure of demand is different on the market in replacement tyres for heavy vehicles from that on the light-tyre market and that the demand curve and price elasticity are also different. On the other hand the criterion of elasticity of supply serves to establish only that there is no need to distinguish between markets for each size and type of tyre in question.

Michelin NV explained that even in the heavy-vehicle tyre category the substitution of machine tools used to make different varieties and categories of tyre is possible only within very narrow limits and that the plant needed to produce different types of tyre is not interchangeable. Different types of heavy-vehicle tyres differ in fact not only in their dimensions and external appearance but also in the way in which they are made. As regards the structure of demand, Michelin NV considers that the number of persons buying light-vehicle tyres for occupational purposes is high in the car-tyre sector too since not only taxi companies but also all companies using cars for business purposes are trade buyers.

As regards *retreads, Michelin NV* explained by way of example that if the reference price level for new Michelin tyres is taken to be 1 000, they are in fact sold at a 25% discount for a price of 750 which makes the price of the "first life" of a new Michelin tyre 600 taking into account a residual value of 150 for the tyre carcass. That price is more or less the same as the purchase price of a retread — for which the cost of retreading may be reckoned at 450 — or as that of a new tyre of poorer quality. It cannot therefore be said that there is a big difference between the prices of new tyres and retreads. The performance of a retread of good quality, particularly in mileage terms, is practically the same as with a new tyre; however, from the point of view of safety and reliability, the value of a retread is not so great. Even where

retreading is done to order, Michelin NV maintains that in 80 to 85% of cases it is done on behalf of the dealer and not of the user.

The Commission contested the figures put forward by Michelin NV which it was unable to verify and argued that the poorer reputation of retreads was in any case justification for regarding the market in retreads as a separate one. What is more, users prefer to have their own carcasses retreated despite extensive efforts by Michelin to stimulate "neutral" retreading. According to the Tecmar reports on the retread market in the Netherlands, "neutral" retreads represent at present only 5 to 20% of the market.

Those figures were, however, contested by *Michelin NV.*

2. The discount system

The operation and trend of the discount system were explained by Michelin NV with the help of the following table:

	1975-77 %		1978 %		1979-80 %	
Invoice discount		15		22.5		30
2% cash discount for payment before due date		1.7		1.55		1.4
Variable component	(10-22)		(4-15)		(0-5)	
Monthly advance bonus (generally 4% less than the variable component)	(for example 18)	15.3	(for example 10)	7.75		—
Four-monthly advance bonus		—		—	(0-3)	
		32		31.8		31.4
					(Four-monthly)	+ 3.0
						34.4
Maximum discount		35		35.675		36.4

The invoice discount was granted unconditionally to every dealer. In addition, every dealer received a cash discount of 2% on the reduced invoice price for payment before the due date.

The monthly advance bonus paid between 1975 and 1978 was paid automatically by credit note in the month following that in which the purchase was made. It remained the same throughout the year and was fixed according to an adjustment on a progressive scale (see Annex 19 to the application) expressed in the dealer's turnover in car, van and heavy-vehicle tyres in the previous year: the total percentage adjustment corresponding to the sales figure for the previous year, reduced by 4 to 6 or more points depending on the case, was received by the dealer in the form of a monthly advance for the year. Even if in the current year the dealer did not attain the turnover corresponding to the monthly advance bonus percentage or his sales targets, in practice he was not

asked at the end of the year to pay back the difference.

The difference betwen the monthly advance and the percentage adjustment resulting from the scale was paid according to the extent to which the sales targets fixed by, or rather agreed with, the *Michelin NV* representative at the beginning of the year were reached. For that purpose three targets, a minimum, maximum and intermediate target, were fixed for car tyres on the one hand and for heavy-vehicle and van tyres on the other. Thus the discount percentage eventually granted at the end of the year depended on the number of tyres sold in each of those categories.

In 1978 the monthly advance bonus was reduced by Michelin NV for administrative reasons and the invoice discount increased by the same amount. As from 1979 the monthly advance bonus was abolished entirely and the invoice discount increased accordingly.

In 1979 Michelin NV introduced a four-monthly advance bonus on the total percentage adjustment. It was dependent on the attainment of a target which was one third of the annual sales target fixed by or agreed with the Michelin NV representative at the beginning of the year.

The adjustment scale was abolished in 1978. That was because of the need to take account of specialization of dealers as a result of which from 1977 garage-owners ceased selling heavy-vehicle and van tyres.

The *Commission* did not challenge that description of the discount system. However, it pointed out that a dealer was unable to consider the monthly advance definitively earned in the event of his not reaching his minimum target. Michelin NV retained absolute freedom to fix the advance just as it did to fix the target. Moreover, the discount system was never published and remained unknown to dealers. Even the targets fixed by the Michelin NV representative at the beginnning of the year were not confirmed in writing. The system therefore enabled Michelin to decide unilaterally the total amount of the discounts granted.

In reply to that point *Michelin NV* stated that the discount system was sufficiently clear and known to its customers because it had been applied for many years and its representatives gave oral explanations on which written notes were taken.

3. The extra bonus in 1977

Michelin NV explained that in order not to penalize dealers whose sales of heavy-vehicle tyres remained low in 1977 through no fault of their own it was decided that an extra bonus of 0.5% to be based on sales in the three categories of car, van and heavy-vehicle tyres might provide compensation. This additional bonus was granted if the dealer had attained his sales target for car tyres fixed at the beginning of the year and thus shown that he was attaining his targets in a category in which sufficient tyres were available.

The *Commission* maintains that the grant of the extra bonus depended upon the

attainment of special higher targets for car tyres, which *Michelin NV* denies.

V — Oral procedure

At the hearing on 27 April 1983 oral argument was presented by I. van Bael, J.-F. Bellis and S. M. Borde for Michelin NV, by A. Carnelutti for the French Republic and by G. Marenco and P. J. Kuyper for the Commission.

The Advocate General delivered his opinion at the sitting on 21 June 1983.

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 second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission Decision of 7 October 1981 relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (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 86 of the EEC Treaty 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 "targets" 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 86 of the Treaty.

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 Community 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 190 of the Treaty 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 Française 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 geographical 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 86 of the Treaty is an application of the general aim of the activities of the Community laid down by Article 3 (f) of the Treaty, namely the institution of a system ensuring that competition in the common market is not distorted.

30 Consequently Article 86 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 interchangeable, 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'Oréal and SA L'Oréal* 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 pre-condition 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 counterpoise 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 counter-

poise 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 86 of the Treaty, 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 suply.

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 86.

(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 86 to a system of target discounts

70 As regards the application of Article 86 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 86 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 86 of the Treaty.

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 "température 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 "température Michelin" on its customers' files and that it was impossible to prove any direct link between the "température 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 "température 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 86 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 86 of the Treaty, 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 86 (c) 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 86 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 86 (d).

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 that 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 86 (d) 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 86 of the Treaty.

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 Community.

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 86 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 86 of the Treaty.

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 under-

taking 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 infringment 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 O'Keeffe Due Everling

Delivered in open court in Luxembourg on 9 November 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

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OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 21 JUNE 1983 [1]

Mr President,
Members of the Court,

1. Introduction

1.1. All the relevant facts in Case 322/81 are clearly summarized in the Report for the Hearing. In the introduction to my Opinion in this case I can therefore simply draw attention to one or two main points and for the many complicated details refer to the Report for the Hearing.

The application lodged by NV Nederlandsche Banden-Industrie Michelin (hereinafter referred to as "Michelin NV"), supported by the French Republic, is for a declaration that a Commission decision of 7 October 1981 is void. Article 1 of that decision declares that during the period 1975 to 1980 Michelin NV infringed Article 86 of the EEC Treaty on the market in new replacement tyres for lorries, buses and similar vehicles by:

(a) binding tyre dealers in the Netherlands to itself through the grant of selective discounts on an individual basis conditional upon sales "targets" 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.

Article 2 of the decision imposes on Michelin NV a fine of 680 000 ECU or HFL 1 833 184.80.

1 — Translated from the Dutch.