

COMMISSION DECISION

of 19 December 1974

relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851 —
General Motors Continental)

(Only the Dutch text is authentic)

(75/75/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 86 thereof;

Having regard to Council Regulation No 17⁽¹⁾ of 6 February 1962, and in particular Articles 3 and 15 (2) (a) thereof;

Having regard to the Commission Decision of 26 July 1974, taken under Article 9 (2) and (3) of Regulation No 17, to take proceedings against General Motors Continental NV, Antwerp;

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies, delivered under Article 10 of Regulation No 17 on 28 November 1974;

Whereas :

I

1. Only those vehicles or trailers which satisfy the requirements of the royal decree of 15 March 1968 on technical standards (*arrêté royal* of 15 March 1968 published in the *moniteur belge* of 28 March 1968 as amended by *arrêts royaux* of 14 June and 4 August 1968, 5 January 1970, 14 January 1971 and 9 August 1971) may be used on the public highway in Belgium. To this end, every type of chassis or unit-construction vehicle, manufactured or assembled in Belgium, or imported for use in that country must be approved by the Minister for Transport or his representative, according to the procedure laid down in the above-mentioned decree (*agrément du type*). As soon as a particular type of vehicle has been the subject of an approval (*procès-verbal d'agrément*, PVA), the manufacturer or his sole authorized agent is obliged to issue a certificate of conformity (*certificat de conformité*) in respect of each vehicle of that type in use on the road, to show that the vehicle complies with the standard of that type. The manufacturer or his sole authorized

agent must affix a type-shield (*plaque d'identification*) to each vehicle.

Where the manufacturer is established abroad, an application for recognition as a qualified manufacturer must be accompanied by proof that the manufacturer has authorized a person established in Belgium to undertake the obligations arising from the regulations on the approval of types of chassis or (unit-construction) vehicles. Only one agent may be authorized for each category of vehicle.

These provisions apply to new vehicles. Following instructions from the Belgian Minister of Transport, since 15 March 1973 the state testing stations have no longer accepted vehicles which have been registered abroad for less than six months for the issue of a certificate of conformity (*certificat de conformité*) so that since that time the manufacturer's agent has had the sole responsibility for delivering a certificate of conformity in respect of such vehicles.

2. For the purposes of the abovementioned decree, General Motors Continental NV (GMC), a company incorporated under Belgian law, is the sole authorized agent for Adam Opel Aktiengesellschaft, passenger car manufacturers, and for the other manufacturers belonging to the General Motors group. Whenever a firm belonging to the General Motors Group outside Belgium decides to market one of its vehicles in Belgium, GMC accepts responsibility for applying for type approval (PVA). It obtains general approval for Opel and Vauxhall models. For American models it applies either for low-volume type approval, valid for up to 10 units per year, or for a general type approval. In respect of the costs incurred in granting type approval and in issuing certificates of conformity and typeshields, GMC and its Belgian dealers charge their customers a price which, in relation to the purchase price of vehicles supplied through GMC, is not particularly excessive. Private customers and dealers importing vehicles manufactured within the General Motors group into Belgium otherwise than through GMC's standard distribution system (parallel imports) were obliged by the abovementioned Belgian decrees

(¹) OJ No 13, 21. 2. 1962, p. 204/62.

to resort to GMC for the approval procedures where new vehicles were concerned. This is still the case at present. As regards used vehicles of whatever age, the national testing stations dealt with these matters until 14 March 1973. Since 15 March 1973 this has no longer been possible for vehicles registered abroad for less than six months. Since then, only GMC has been carrying out the procedure in respect of such vehicles.

3. In 1972, GMC made no charges for inspection procedure in respect of parallel imports. In October 1972, following the raising of national requirements for the approval of vehicles, involving increased technical and administrative costs, GMC made its 'Product Engineering' department responsible for this work and for testing conformity. Although for an initial period GMC charged Bfrs 2 500, plus Bfrs 450 VAT, for inspecting parallel imports of GMC vehicles, the rate was raised to Bfrs 5 000 plus Bfrs 900 VAT for all vehicles in respect of which the application for inspection was received later than 1 September 1972. From January to August 1972, 12 applications were received by GMC in respect of Opel vehicles and dealt with free of charge; from September 1972 to 14 March 1973 GMC received no such applications. After GMC acquired sole responsibility for the extended inspection procedure after 15 March 1973, the number of applications rose to 36 by the end of 1973. From then until 20 August 1974, 30 applications were received. There were 24 applications in respect of American models in 1972 and 760 in 1973. Between 1 September 1972 and 14 March 1973 GMC received a considerable number of applications in respect of Opel vehicles from parallel importers of American General Motors models.

4. Between 15 March and 31 July 1973, GMC charged the same rates for the issue of certificates of conformity and typeshields in five cases of parallel Opel imports as it had previously charged exclusively for inspecting particular American models. In these cases GMC charged Bfrs 5 000 plus Bfrs 900 VAT for the issue of certificates and shields. In June and July 1973, GMC charged only Bfrs 1 000 (tax included) for other parallel imports of Opel vehicles. With effect from 1 August 1973 it implemented its new scale of charges of 27 July 1973, in which a difference between vehicles of American and of European manufacture again appeared. Since that time GMC has charged:

(a) for a passenger car manufactured in Europe by an undertaking of the General Motors group and

already type-approved in Belgium ('European passenger car'): Bfrs 1 250, of which Bfrs 123 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle (cost of checking, inspection, typeshield, certificate of conformity, administration cost, 15 % profit);

(b) for a passenger car manufactured in the USA by a General Motors group (US passenger car):

(i) which is already type-approved in Belgium (PVA):

(aa) if GMC expects sales of more than ten vehicles in Belgium ('general type'):

Bfrs 5 300,
of which Bfrs 3 654 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle;

(bb) if GMC expects a smaller volume of sales in Belgium ('low volume type'):

Bfrs 7 000,
of which Bfrs 5 080 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle;

(ii) which is not type approved in Belgium:

Bfrs 30 000.

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

5. 12 Belgian undertakings which, as authorized agents, have carried out the same inspections as GMC, in reply to questions by the Commission, have stated that they have never charged more than Bfrs 2 500 for inspecting passenger cars manufactured within the common market and arriving in Belgium as parallel imports.

6. The findings in this Decision are based on information supplied by GMC, the results of the investigation into GMC pursuant to Article 14 of Regulation No 17, and on the letter from GMC of 6 September 1974, in which GMC replied to the statement of objections notified to it by letter of 1 August 1974 and to which reference was made.

II

The first paragraph of Article 86 of the EEC Treaty prohibits, as incompatible with the common market, any abuse by one or more undertakings of a dominant position within the common market or any substantial part of it in so far as it may affect trade between Member States.

7. By virtue of Belgian law and of the authorization granted to it by Opel, GMC has a dominant position with regard to applications for general type approval and the issue of certificates of conformity and type-shields in Belgium, both for new Opel vehicles and those registered abroad for no longer than six months in a substantial part of the common market. Purchasers of such Opel vehicles are obliged to avail themselves of GMC's services before using the vehicles on the public highways in Belgium if:

- the relevant model has not yet received type approval, or
- no certificate of conformity or typeshield has been issued for the relevant vehicle.

Thus whenever a consumer or dealer in Belgium decides to purchase an Opel vehicle outside Belgium, he becomes completely dependent on GMC.

8. GMC has abused this dominant position, within the meaning of Article 86, in that during the period from 15 March to 31 July 1973, it charged substantially excessive prices to applicants for the issue of certificates of conformity and typeshields for new Opel vehicles.

The fact that the charging of excessive prices was abusive is shown by a number of circumstances:

It should first be borne in mind that in the price which was raised from Bfrs 2 500 to Bfrs 5 000 (excluding tax) on 1 September 1972 and applied throughout the relevant period, GMC incorporated not only cost elements relating to the conformity inspections but also elements relating to non-recurring expenditure on type approval. The average apportioned cost incurred by type approval which determined the Bfrs 5 000 charge, was at that time based exclusively on expenditure relating to General Motors American models. However, the cost of type approving an Opel vehicle was lower than that of type approving an American General Motors vehicle. Indeed, since GMC could expect to sell in Belgium a considerably greater number of Opel vehicles than American General Motors vehicles, the average apportioned cost of type approving Opel vehicles was appreciably lower than that for American vehicles.

If GMC had taken this into account when fixing its charges for the inspection of Opel vehicles, a cost benefit per unit would have resulted amounting to at least half the total inspection fee of Bfrs 5 000. So much is apparent from the cost analysis which GMC itself later carried out, showing that type approval costs for Opel vehicles were only Bfrs 123 as against Bfrs 3 654 for American vehicles, (cf. I (4) (a) and (b)).

GMC could only, if at all, have justified the scale of the inspection fee in the five relevant cases if it had subsequently recalculated the costs and reimbursed part of the sum charged. Only in June and July 1973 was GMC prepared, in a few cases of parallel imports of Opel vehicles, to charge only Bfrs 1 000 (tax included), because a number of applicants had been unwilling to pay Bfrs 5 000 plus Bfrs 900 tax. The new scale of inspection charges, which distinguishes between American and European vehicles, was finally put into operation only on 1 August 1973.

In this regard it should further be borne in mind that at least 12 Belgian firms acting as authorized agents of other manufacturers carried out inspections similar to those provided by GMC but charged on Bfrs 2 500 or less. GMC's situation cannot be regarded as having been so different as to warrant the charging of inspection fees twice as high as those of other Belgian agents for foreign vehicles.

It should finally be observed that, in the period from January to August 1972, GMC carried out 12 inspections of Opel vehicles free of charge, which suggests that the calculation of the high rates for American vehicles after 15 March 1973 and the sudden increase in the inspection charge for Opel vehicles amounted to abusive behaviour. An abuse is further indicated by the fact that government testing stations charged Bfrs 1 140 plus Bfrs 100 on every subsequent and necessary inspection.

The above circumstances demonstrate that, as is evidenced by the extraordinary disparity between actual costs incurred and prices actually charged in the five cases concerned, GMC abused its dominant position within the meaning of the first paragraph of Article 86 and applied unfair prices within the meaning of heading (a) of the second paragraph of Article 86.

The first paragraph of Article 86 is applicable on an additional ground. The difference between the then imposed charge of Bfrs 5 000 and the charge which would show a reasonable and not abusive relationship

between cost and price, was, as shown above, extraordinarily large. The charging of Bfrs 5 000 acts to the detriment and unfairly discriminates against, those dealers who import, or are in a position to import, new Opel vehicles into Belgium as parallel imports and who are able to compete for custom in Belgium with Opel dealers appointed by GMC. Such independent importers are disadvantaged to a disproportionately greater extent than are appointed dealers, since the purchase prices for new Opel vehicles incurred by the latter included only the very low unit cost factor (Bfrs 123 at most) arising from expenditure on the approval of Opel vehicles. The same is true of a comparison between the purchase prices paid by consumers to Belgian appointed dealers, and those which consumers paid for Opel vehicles the subject of parallel imports. Even these prices were differently weighted according to the cost of type approval.

9. The abuse constituted by GMC's inspection charges has in fact affected trade between Member States and furthermore is likely to affect inter-State trade in future cases. The reciprocal economic interpenetration of markets sought under the EEC Treaty by means of the free flow of goods, has in fact been impeded by the abusive inspection charges imposed in the above five cases. The abuse contained in the imposition of excessive charges was further likely to deter consumers and independent dealers in other countries of the common market from purchasing Opel vehicles, or noticeably to impede such sales.

III

Article 15 (2) (a) of Regulation No 17 empowers the Commission to inflict fines of between 1 000 and 1 000 000 units of account upon undertakings which intentionally or negligently infringe Article 86 of the EEC Treaty.

10. GMC knew that persons and undertakings seeking inspection were obliged to apply to it (cf. II (7)). Despite this, it knowingly charged Bfrs 5 000 plus Bfrs 900 tax for inspecting Opel vehicles which had been the subject of parallel imports. It also knew that the essential content of this charge was based on the cost of inspecting an American General Motors vehicle and that this was an excessive amount to charge for the inspection of Opel vehicles (cf. II (8)). In the period from January to August 1972 when GMC had been requested to carry out inspections in respect of 12 parallel imports of Opel vehicles, it had done so free of charge. Since 15 March 1973 on the other hand, it proceeded directly to charge the increased price of Bfrs 5 000, which in fact was only

appropriate for the inspection of American General Motors vehicles. It calculated this price without making allowance for any variations although at that time it had still not assessed the cost of inspecting Opel vehicles. The fact that in June and July 1973, when certain customers were not prepared to pay Bfrs 5 000 for the inspection of Opel vehicles they had imported, GMC charged only Bfrs 1 000 without a prior cost analysis, demonstrates that it had been previously apparent to GMC that the charging of Bfrs 5 000 was excessive and amounted to an abuse. GMC was at the same time aware that the prices charged by state testing stations were far less than the Bfrs 5 000 charged by GMC and that most authorized Belgian agents of other foreign vehicle manufacturers themselves only charged Bfrs 2 500 or even less (cf. II (8)).

11. Finally, GMC, at the very least knowingly accepted the possibility that the parallel import of new Opel vehicles, i.e. a flow of certain goods in trade between Member States during the time in question, was impeded by an inspection charge of abusive proportions which was, moreover, discriminatory. This was at any event the case for the five instances in which trade was actually affected by abusive behaviour. GMC had also made allowance for the fact that dealers and consumers would have been impeded by the excessive charges, had they undertaken such imports from other countries of the common market. GMC furthermore, was not unwilling that consumers and dealers should refrain from making such imports because of the additional burden contained in the inspection charges (cf. II (9)).

It is to be concluded that GMC intentionally and continually infringed Article 86 during the period from 15 March 1973 to 31 July 1973.

IV

12. Following the communication of the statement of objections, GMC stated that, having regard to the market share it held for sales of motor vehicles in Belgium, it could not see on what grounds GMC could be said to have a dominant position. However as we have seen (cf. II (7)), the question in this case is not whether GMC holds a dominant position in a substantial part of the common market for the sale of motor vehicles but whether it has a dominant position in relation to conformity inspections for new Opel vehicles which have been the subject of parallel imports. The facts establishing this dominant position have also been well known to GMC. It is therefore quite irrelevant that receipts for such inspections accounted for less than 0.1 % of the proceeds of sales of motor vehicles to its dealers.

13. GMC further alleges that in 1973 it would not have been worthwhile for dealers and private customers to purchase Opel vehicles in Germany, even allowing for inspection charges, since prices were said to be lower in Belgium than in Germany. However, abusive price fixing for conformity inspections has in fact affected imports in five cases, so that to that extent it remains an open question whether the imports were undertaken in order to benefit from lower prices or for other reasons (e.g. change of residence, preference for foreign dealers and their service). That trade between States was apt to be affected is further evidenced by the fact that GMC, whilst protecting itself and its authorized dealers from parallel imports by imposing high inspection charges, protected its own and their conduct against competition to an even greater extent and thus assumed greater freedom in fixing the price of Opel vehicles.

14. GMC further states that after 15 March 1973, when the state testing stations were relieved of their responsibility for inspecting vehicles which had been registered abroad for less than six months, it very soon realized that its inspection system would have to be reorganized. It also states that at that time it had to review the costs occasioned by such work because applications were once again involving European General Motors vehicles. The above does not, however, answer the objection that between 15 March and 31 July 1973 the abusive price of Bfrs 5 000 was on five occasions charged for conformity inspections; indeed in the circumstances, GMC should in any event only have imposed the charges, based on the inspection of American General Motors vehicles subject to a subsequent internal cost review, which GMC itself recognized as necessary (cf. II (8)).

15. GMC raises the further point that from June 1973, pending an internal financial decision, it charged all applicants Bfrs 1 000 inclusive of tax, with the exception of one of the five cases where it erroneously charged Bfrs 5 000 plus Bfrs 900 tax. It may well be that during the months of June and July 1973 GMC charged all applicants Bfrs 1 000 only. But at any rate in the five cases dealt with here, it fixed and charged the abusive and excessive price. This means the act of infringement was completed. The partial reimbursements which began on 3 August 1973 could not alter the nature of the act. GMC was not able to offer any explanation for its statement that, in the one case where it claims that the Bfrs 5 900 charge was a pure error, the mistake was simply an organizational matter for which it was not responsible and cannot be held liable.

16. GMC further considers Article 86 to be inapplicable because the Bfrs 5 900 charge (inclusive of tax) was never published. But this argument is not tenable because any purchaser of a new Opel vehicle wishing to register it in Belgium would have discovered that GMC charged Bfrs 5 900 for inspection, at least when applying for the certificate of conformity and the type-shield between 15 March and June 1973.

17. The final matter raised by GMC is that none of the requests for inspection received between 15 March and 31 July 1973 was received from dealers not appointed by GMC and who sold new Opel vehicles. Even if these five cases concern only inspections carried out on behalf of final consumers, this in no way excludes the application of Article 86. Indeed the protection provided by Article 86 extends also to purchases made by consumers in inter-state trade.

V

18. The second sentence of Article 15 (2) of Regulation No 17 requires the Commission, when fixing the amount of the fine, to have regard both to the gravity and to the duration of the infringement.

An important factor in the fixing of the fine was the fact that the Commission has regularly made clear that it regards parallel imports as particularly deserving of protection in the interests of competition and of consumers in the common market. From the point of view of the law of competition, measures which have the effect of impeding parallel imports are just as objectionable as contractual export prohibition in distribution agreements.

The Commission has taken account of the following matter in GMC's favour.

The infringement was only of a short duration. GMC rapidly altered its scale of charges; in three of the five cases it reimbursed the difference between the actual charge and the new scale, while in two cases it even reimbursed the excess of Bfrs 1 000. Finally GMC's new scale provides for a much lower price for inspecting European passenger vehicles than for American passenger vehicles. Its calculations of inspection charges are now based on the cost of general type approval (calculated separately for American and European vehicles) in such a way that the number of vehicles used as a reference is determined on the basis of estimates derived from the number of vehicles registered in Belgium in the past and from total sales forecasts for such vehicles, so that parallel imports are

included and the scale is no longer restricted to vehicles sold through the GMC network. Accordingly, GMC has terminated the infringement established by this Decision,

HAS ADOPTED THIS DECISION :

Article 1

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

Article 2

A fine of 100 000 (one hundred thousand) units of account, that is 5 000 000 (five million) Belgian francs,

is imposed on General Motors Continental NV in respect of the abovementioned infringement.

This Decision is enforceable against General Motors Continental NV in accordance with the provisions of Article 192 of the EEC Treaty.

Article 3

This Decision is addressed to General Motors Continental NV, Norderlaan 75, 2000 Antwerp 1, Belgium.

Done at Brussels, 19 December 1974.

For the Commission

The President

François-Xavier ORTOLI