whether, apart from any abuse of a dominant position which such arrangements might encourage, such introduction or maintenance in force is also likely to affect trade between Member States.

3. Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products. On the other hand, rules in a Member State whereby a fixed price is imposed for the sale to the consumer of either imported or home-produced tobacco products, namely the price which has been freely chosen by the manufacturer or importer, constitute a measure having an effect equivalent to a quantitative restriction on imports only if, taking into account the obstacles inherent in the different methods of fiscal control which are used by the Member States in particular to ensure collection of the taxes on those products, such a system of fixed prices is likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

4. Article 5 of Council Directive No 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco does not aim to prohibit the Member States from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer.

In Case 13/77

Reference to the Court under Article 177 of the EEC Treaty by the Belgian Hof van Cassatie (Court of Cassation) for a preliminary ruling in the action pending before that court between

NV GB-INNO-BM

and

VERENIGING VAN DE KLEINHANDELAARS IN TABAK (ATAB) (Association of Tobacco Retailers),

on the interpretation of Article 3 (f), the second paragraph of Article 5 and Articles 30, 31, 32, 86 and 90 of the EEC Treaty and of Council Directive No 72/464/EEC (OJ, English Special Edition 1972 (31 December), p. 3) on taxes other than turnover taxes which affect the consumption of manufactured tobacco,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The main action brought by the limited liability company GB-INNO-BM against the non-profit-making association Vereniging van de Kleinhandelaars in Tabak (hereinafter referred to as 'ATAB') arises out of Article 58 of the Belgian Law of 3 July 1969 (Value-added tax Code) which provides:

'In respect of manufactured tobacco which is imported into or produced within this country the tax shall be levied whenever excise duty has to be paid in accordance with the relevant provisions of tax laws or regulations. The tax shall be calculated on the basis of the price stated on the tax label which must be the compulsory selling price to the consumer, or, if no price is specified, on the basis adopted for the imposition of excise duty'.

2. On 7 February 1972 ATAB arranged for a 'gerechtsdeurwaarder' (a court official) to record the finding that the 'GB Enterprises' company (to which GB-INNO-BM is the legal successor) was offering for sale and selling cigarettes at a price lower than that specified on the tax label. By a writ of 24 February 1972 it brought proceedings, under Chapter IV of the Law of 14 July 1971 on commercial practices, before the President of the Rechtbank van Koophandel (Commercial Court), Brussels, with the intention of obtaining an order that the practice complained of be discontinued and that the decision to be taken be officially announced.

3. By an order of 24 April 1972 the President of the Rechtbank van Koophandel, Brussel, ordered the sale of cigarettes at cut-prices to be discontinued, on the grounds that such sale infringed Article 58 of the Value-added tax Code and that observance of the law forms part of proper commercial practice. On the other hand he refused to order that the decision be officially announced.

4. GB-INNO-BM lodged an appeal against this decision by notice of appeal

of 24 Mai 1972. Its submissions cover *inter alia* the incompatibility of Article 58 of the Value-added tax Code with certain provisions of the Treaty dealing with competition and the free movement of goods and also with the provisions of the Treaty relating to the objectives of the Community and with Directive No 72/464/EEC of the Council of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, (OJ, English Special Edition 1972 (31 December) p. 3). In the alternative it invites the Hof van Beroep (Court of Appeal) to apply the procedure for obtaining a preliminary ruling under Article 177 of the EEC Treaty.

5. The Hof van Beroep, Brussels, by its judgment of 24 December 1974 rejected all the submissions based on Community law put forward by GB-INNO-BM and the application for a reference for a preliminary ruling on the ground that no doubt arises as to the interpretation of the relevant provisions of Community law.

6. GB-INNO-BM challenged this judgment by appeal to the Hof van Cassatie. Before delivering judgment the Hof van Cassatie has stayed proceedings by order of 7 January 1977 until the Court of Justice of the European Communities has given a preliminary ruling on the following questions:

1. (a) Must Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty be interpreted as meaning that a Member State is prohibited from introducing into or maintaining in force in its legislation *inter alia* a provision whereby, for the sale to consumers of both imported and home-produced goods, a selling price is fixed by the manufacturers or importers if the provision is of such a nature as to encourage the abuse by one or more undertakings of a dominant position within the Common Market within the meaning of Article 86 of the EEC Treaty?
   In this respect does the prohibition cover *inter alia* the introduction of the maintenance in force of a national legislative provision which encourages the abuse by one or more undertakings of a dominant position which exists because the manufacturers and importers of manufactured tobacco can oblige the retailers in a Member State to comply with the selling prices to the consumer fixed by the former?
   (b) Is the introduction or the maintenance in force of a national provision such as that referred to under (a) prohibited even if it is general in scope in that it relates to manufacturers and importers in general, that is, even those which have no dominant position or make no abuse thereof and *a fortiori* if the abuse of a dominant position was neither its aim nor its object nor its effect?
   In such a case must not the provisions of the EEC Treaty referred to under (a), possibly in conjunction with others, be interpreted as meaning that the introduction or maintenance in force of such national legislative provisions is by no means prohibited but simply that that provision can have no effect on the scope of application of Article 86 of the EEC Treaty in the sense that abuse of a dominant position remains unlawful even if it is encouraged by this legislative provision in the particular circumstances?
2. Must Article 90 of the EEC Treaty be interpreted as meaning that 'undertakings to which Member States grant special or exclusive rights' exist where, as distinct from manufacturers and importers of other products who must notify the Minister for Economic Affairs of any increases in price which they introduce but are

not able to fix the compulsory selling price to the consumer, the State imposes the same obligation to notify any price increases they introduce on manufacturers and importers of certain products but, by means of a legislative provision which after notification makes the increased price for sale to the consumer of these products compulsory, gives to them indirectly the possibility of themselves fixing the compulsory selling price to the consumer?

If this question is answered in the affirmative can the retention of the above-mentioned special or exclusive rights be contrary to the provisions of the EEC Treaty namely those referred to in Article 7 and Articles 85 to 94 inclusive?

3. Must Articles 30, 31 and 32 of the EEC Treaty be interpreted as meaning that a 'measure having equivalent effect' within the meaning of the above-mentioned Article 30 includes rules in a Member State whereby a fixed price is imposed for the sale of certain products to the consumer, namely the price stated on tax labels and which, according to the particular case, is determined by the manufacturers of these products who are established in the State or by the importers of the same products in particular from other Member States? Or should these articles be interpreted as meaning that such rules only constitute such a measure when it is in fact certain that it can hinder intra-Community trade directly or indirectly, actually or potentially, a matter which must be determined by the national court in each case?

Is the position different if, after notification of a price increase and after compliance with a specified waiting period the Member State permits the producers and importers to fix freely the prices including the retail prices, but publishes the prices and, by means of the above-mentioned measure, ensures compliance with them?

4. (a) Do the provisions of Directive No 72/464 of 19 December 1972 of the Council of Ministers, in particular Article 5, have direct effect with the result that, *inter alia,* individuals have the right to rely on them before national courts?

   (b) Must Article 5 of Directive No 72/464 of 19 December 1972 of the Council of Ministers on taxes other than turnover taxes which affect the consumption of manufactured tobacco be interpreted as meaning that the Member States are prohibited from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, that is to say, where it is not possible to exceed the maximum and it is not permissible to sell the product at a lower price?

7. Concurrently with the main action GB-INNO-BM on 2 April 1974 lodged two complaints with the Commission.

The first complaint was directed against the Belgisch-Luxemburgse Federatie der tabakverwerkende industrieën (The Belgo-Luxembourg Federation of Tobacco Industries) (Fedetab), the Nationale Federatie van de groothandel in tabakswaren (The National Federation of Wholesale Traders in Tobacco Products) (NFGT) and ATAB and requested the Commission to initiate a procedure against these three associations in order to compel them to put an end to various infringements of Articles 85 and 86 of the EEC Treaty.

The second complaint was directed against the Belgian State. It alleged that Article 58 of the VAT Code is incompatible with Articles 85, 86, 90, 30, 31 and the second paragraph of Article 5 of the Treaty and with Council Directive

No 72/464/EEC and it requested the Commission to initiate the procedure specified in Article 169 of the Treaty.

8. As far as concerns the first complaint the Commission on 29 July 1974 initiated a procedure pursuant to Regulation No 17 of the Council. On 18 July 1975 it notified the associations of undertakings concerned of its objections. In this notification it gave its view that certain agreements, decisions and practices of Fedetab and its members contravened Article 85 of the EEC Treaty. On 22 October 1975 a full hearing took place. Since then nothing has been heard of this complaint.

9. As far as concerns the complaint directed against the Belgian State, GB-INNO-BM has only received a written acknowledgement of receipt thereof and a provisional reply dated 15 December 1975. This is the only communication that it has received relating to the action taken on its complaint.

10. Finally GB-INNO-BM commenced proceedings in the Raad van State (Administrative Court of last instance) on 11 June 1974 for annulment of the Ministerial Order of 9 April 1974. The purpose of this order was to harmonize the provisions of the regulation annexed to the Ministerial Order of 22 January 1948 governing the collection of excise duty on tobacco with the text of Article 58 of the VAT Code. The Raad van State has not yet delivered judgment in this action.

Procedure

The order making the reference was registered at the Court Registry on 26 January 1977. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by GB-INNO-BM, ATAB the Council of the European Communities, the Commission of the European Communities, the Belgian, Netherlands, Luxembourg and Italian Governments.

II — Summary of the written observations

Observations submitted by NV GB-INNO-BM

GB-INNO-BM recounts the history of Article 58 of the VAT Code, the original text whereof in the draft law introduced by the Government provided that VAT should be calculated 'on the basis of the maximum price stated on the tax label'. The present text which states that this price 'must be the compulsory price to the consumer' originated in an amendment by Mr Goeman who, as well as being a member of the Kamer van volksvertegenwoordigers (Chamber of Representatives) and of the Finance Committee of this Chamber was secretary of NFGT. Notwithstanding the Government's opposition the result, which could be regarded as extraordinary, was that a provision which was more likely to be found among the rules governing trade practices or prices and which, in so far as it imposed a compulsory selling price, was out of place in existing price regulations which primarily make use of the concepts 'normal price' and 'maximum price', was incorporated in an instrument dealing with taxation. Furthermore the fact that the compulsory consumer price of manufactured tobacco may be determined by the person who affixes the tax label — that is to say either the manufacturer or the importer — and not by the competent governmental authority is itself also an anomaly.

Nevertheless, Belgian case-law requires that Article 58 of the VAT Code be applied in accordance with its ordinary meaning, that is to say, as a provision fixing mandatory retail prices which must be adhered to.

Proposed answer to the questions referred to the Court

A — Compatibility of Article 58 with the rules of competition (in conjunction with Article 3 (f) and the second paragraph of Article 5 of the EEC Treaty)

1. The origin of Article 58 of the VAT Code

GB-INNO-BM gives an outline of the circumstances in which Article 58 of the VAT Code was adopted.

For many years Fedetab and NFGT have made every endeavour to regulate the distribution of tobacco products in Belgium.

On 9 January 1967 Fedetab entered into an agreement with NFGT under which the members of NFGT undertook not to buy or sell cigarettes with which gifts of any kind were offered; the penalty for failing to comply with this undertaking was the loss of wholesale terms. This agreement was implemented by means of separate agreements concluded by Fedetab with individual wholesalers.

This agreement was supplemented on 22 May 1967 by a new agreement between Fedetab and NFGT under which wholesalers with their own retail outlets undertook to sell all their cigarettes to the consumer at the price indicated on the tax label without any discount. On the same day a circular was sent to 'small cigarette-distributors' inviting each of them to enter into a contract whereby it undertook on the same conditions not to sell at a price less than the one indicated on the label.

On 5 October 1967 by 'an interpretative agreement on cut-price selling' NFGT agreed on behalf of its members with Fedetab not to supply retailers who 'cut' their prices. Individual wholesalers were informed of this agreement by circulars from Fedetab and NFGT of 6 and 26 October 1967. By letter of 26 October 1967 NFGT notified the wholesalers that the manufacturers would discontinue deliveries to wholesalers who supplied the 'price-cutters'.

On 30 October 1967 Fedetab informed cigarette wholesalers that the industry had decided to suspend deliveries of cigarettes to all large distributive undertakings including the limited companies Grand Bazars d'Anvers, Super-Bazars, Supermarkten GB. However some of the undertakings managed to obtain their supplies from certain wholesalers and to continue to grant discounts on the sale of cigarettes.

On 19 and 20 February 1968 an agreement was concluded by an exchange of letters between Fedetab and the three companies mentioned above.

This was the position when the Law of 3 July 1969 laying down the VAT Code was drawn up.

Thus there was a definite link between the attempts by Fedetab and NFGT to make all the retailers enter into the same agreements which they had concluded relating to compulsory selling prices and the provisions of Article 58 of the VAT Code as modified by Mr Goeman's amendment.

2. Evaluation of the agreements and acts of Fedetab and NFGT in the light of the rules of competition of the EEC Treaty

GB-INNO-BM evaluates the agreements of Fedetab and NFGT and concludes that the prohibition set out in Article 85 (1) of the Treaty applies to them. The Commission proceeded on the basis of the same view in its notification of objections of 18 July 1975 and gave notice that it intended to fine the undertakings concerned.

The acts of Fedetab are also an abuse of a dominant position prohibited by Article 86 of the Treaty.

It can hardly be denied that Fedetab had a dominant position within the manufactured tobacco market if account is taken of its large share of that market. This dominant position was strengthened even more by the close links which it

had established with NFGT which allowed these two organizations to regulate the distribution of manufactured tobacco right down to the retail stage. Furthermore Fedetab fixed the distributors' profit margins and in the last resort decided in which category (wholesaler Class I, wholesaler Class II, duly appointed distributor, ordinary distributor) the individual distributors were to be classified.

Fedetab's dominant position on the Belgian and Luxembourg markets is in 'a substantial part of the Common Market'.

The pressure exerted by Fedetab, in co-operation with NFGT, on wholesalers and retailers to force them to align their sales policy on the one which it had adopted is an abuse of a dominant position.

This abuse affects trade between Member States, since some of the products sold by members of Fedetab are imported from other Member States and the obligations to sell on the terms laid down by Fedetab, in concert with NFGT, not only applies to the members of Fedetab but also to foreign manufacturers who want to sell their products in Belgium.

3. Connexion between Community rules of competition and national law on competition

Relying on the judgment of the Court in Case 14/68 (judgment of 13 February 1969, *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1 et seq.) GB-INNO-BM submits that it would not be in keeping with the particular system introduced by the Treaty to allow Member States to take, or maintain in force, measures capable of preventing effect being given to the purpose of the Treaty. The authors of the Treaty who looked into this question were unanimously of the opinion that a Member State cannot compel its private undertakings to behave in a way which, were it not for a State measure, would contravene Article 85 or 86. This opinion is shared by those authors of the Treaty who looked into the question of the compatibility with the Treaty of national measures making certain agreements mandatory.

If it was not open to question whether Article 85 and 86, considered separately, applied solely to undertakings, it is no less true that under the Treaty Member States must not adopt measures which might jeopardize the proper functioning of the rules of competition. The legal justification for imposing this obligation upon Member States can be found either in the general obligation set out in the second paragraph of Article 5 or in Article 90 of the Treaty.

The Court has already held that the second paragraph of Article 5 lays upon Member States a general obligation the specific nature of which depends in each particular case on the provisions of the Treaty or the rules derived from the general system thereof. It follows from this that if a national measure prevents effect being given to the purpose of any of the Treaty provisions, which are sufficiently clear and unambiguous — for example Articles 85 and 86 — the nature of the consequent infringement of Article 5 is such that it can be the subject-matter of proceedings brought directly before national courts.

(a) The effectiveness of Article 85

The effect of Article 58 of the VAT Code and of the agreements is exactly the same. The aim of the latter is to compel retailers when selling to the public to charge the price stated on the tax label. Article 58 contains provisions similar to the stipulations in the agreements contravening Article 85 of the Treaty, prevents effect being given thereto and consequently infringes the second paragraph of Article 5 of the Treaty.

Article 58 of the VAT Vode made the beforementioned agreements between

Fedetab and NFGT unnecessary. What was previously stipulated in the agreements is now in fact law.

It is perhaps unfortunate that the Hof van Cassatie has not raised any question on the interpretation of Article 85 read together with the second paragraph of Article 5 especially as a similar question is raised in the case of Article 86. An answer on this point by the Court of Justice would be of interest to the Hof van Beroep to which the Hof van Cassatie will refer the case back at a later date.

(b) The effectiveness of Article 86

As far as the first question referred by the Hof van Cassatie is concerned GB-INNO-BM submits that the question for consideration is not whether Article 58 of the VAT Code contravened Article 86 *as such,* but whether it was a breach of the Member States' duty not to prevent effect being given to Article 86. It was inevitable that by giving manufacturers and importers the opportunity to force retailers to charge the selling price shown on the tax label, Article 58 in fact permitted and controlled an abuse of a dominant position in a substantial part of the Common Market (in this case Belgium). The previous abuses by Fedetab are therefore not only made 'possible' but 'covered' by the law.

Nor can it be accepted that Article 58 'simply can have no effect on the scope of application of Article 86 of the Treaty' to quote the words of the Hof van Cassatie in the second part of this question. That would in fact mean that Article 58 only applies in the case of manufacturers and importers who do not have a dominant position but does not apply in the case of undertakings having a dominant position because it infringes the Treaty. Such an interpretation would in practice create endless confusion and difficulties.

Therefore the only possible conclusion is that a legal provision which encourages abuses is prohibited *in its entirety,* even if it can also be applied in cases where there is no dominant position.

For these reasons GB-INNO-BM proposes that the first question should be answered in the following terms:

'Article 3 (f), the second paragraph of Article 5 and Article 86 of the Treaty must be interpreted as meaning that a Member State is prohibited from introducing or maintaining in force any national legislative provision which encourages abuse of a dominant position by one or more undertakings or associations of undertakings in that such a law enables such undertakings or associations of undertakings to obtain the same results — *inter alia* that of being able to force retailers to charge the consumer selling prices fixed by the manufacturers or importers — as those which they sought to obtain by abusing their dominant position'.

(c) The second question (Article 90)

GB-INNO-BM calls attention to the fact that the expression 'undertakings to which Member States grant special or exclusive rights' in Article 90 must be interpreted in the light of the rôle which the Treaty assigns to this article.

It emphasizes that in legal writings it is an established fact that Article 90 is intended to make the obligations laid upon undertakings applicable to Member States in that Member States cannot shield their undertakings from the effects of the Treaty. Similarly it is unanimously accepted that a measure might be 'contrary' to the rules contained in the Treaty, in particular to those provided for in Article 86 if it induces the undertakings referred to in Article 90 to act in such a way that they infringe the Treaty. Moreover in legal writings there is unanimous agreement that the 'measure' covers laws passed by the legislature.

There is no doubt that, having regard to the actual wording of Article 90, the expression 'undertakings to which Member States grant special or exclusive rights' can also refer to private undertakings. On the other hand the meaning of the words 'special or exclusive rights' should be determined with reference to the purpose of Article 90 and its place in the system of the Treaty.

Article 90 (1) is designed to make it impossible for Member States to enable their undertakings to restrict competition. In order to determine whether a legal position gives rise to 'special or exclusive rights', it must be compared with the legal position of undertakings to which the rules of competition apply. If a Member State gives undertakings the right to restrict competition in whole or in part, it grants those undertakings special or exclusive rights within the meaning of Article 90 (1).

Since Article 58 of the VAT Code allows manufacturers and importers of manufactured tobacco to fix the compulsory selling price at which their products are sold to the consumer, it quite clearly grants them special or exclusive rights within the meaning referred to above. No such power is granted under Belgian law to any other category of undertakings.

The second question can therefore be answered in the following terms:

'Article 90 of the Treaty must be interpreted as meaning that "undertakings to which Member States grant special or exclusive rights" exist where, as distinct from manufacturers and importers of other products who are not able to fix the compulsory selling price to the consumer, the State gives the manufacturers and importers of certain products the possibility of themselves fixing the compulsory selling price to the consumer.

The retention of such a special or exclusive right is "contrary to the rules contained in Articles 85 and 86" within the meaning of Article 90 (1) of the Treaty.'

B — The third question (compatibility of Article 58 of the VAT Code with Articles 30, 31 and 32 of the Treaty)

GB-INNO-BM, relying on the case-law of the Court and especially on its judgment of 11 July 1974 in Case 8/74, *(Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837) and its judgments of 26 February 1976 in Case 65/75 *(Riccardo Tasca* [1976] ECR 291) and in Joined Cases 88 to 90/75 *(Societa SADAM and Others* v *Comitato Interministeriale dei Prezzi and Others* [1976] ECR 323) stresses that, as Article 58 of the VAT Code applies both to home-produced and imported products, the question arises whether this provision could hinder intra-Community trade, directly or indirectly, actually or potentially.

The effect of Article 58 is that retailers can only fix their selling prices themselves if they import manufactured tobacco direct. Now, since Belgian manufacturers market more than half the cigarettes imported into Belgium, foreign manufacturers cannot be expected to sell to a Belgian retailer, especially if the latter sells his products at a price lower than the normal Belgian price. Furthermore if a Belgian trader wanted to import into Belgium manufactured tobacco he would have to request the foreign manufacturer to affix the tax labels himself in order to avoid the cost of the special equipment required to affix them. This means that the foreign manufacturer has the right to control the prices which the retailer wishes to charge. The obligation to charge the price on the tax label makes it therefore quite impossible in practice for retailers to import direct.

Consequently retailers are not free to fix the price level of the imported products.

Finally GB-INNO-BM suggests that the third question be answered in the following terms:

'A legislative provision of a Member State, which, in the case both of imported and home-produced products provides that the selling price to the consumer shall be the price fixed by the manufacturers or importers which is stated on the tax labels and which, according to the particular case, is determined by the manufacturers of these products who are established in the State or by importers of the same products from other Member States, is a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty, if the said provision can hinder intra-Community trade directly or indirectly, actually or potentially. This occurs *inter alia* if, having regard to the special circumstances of the market for the products in question, this provision prevents retailers from importing these products direct from other Member States or from being free to fix the prices of these products'.

C — The fourth question (compatibility of Article 58 of the VAT Code with Council Directive No 72/464/EEC of 19 December 1972)

1. Incompatibility of Article 58 with the said directive

GB-INNO-BM takes the view that the directive is designed to ensure that the application of national taxes affecting the consumption of manufactured tobacco does not distort the conditions of competition and impede the free movement of the products within the Community. To this end it harmonizes the taxation rules and also lays down in Article 5 (1) provisions for fixing the selling prices of these products.

Article 5 (1) provides that:

'Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices'.

The GB-INNO-BM company points out that the Council did not adopt an amendment of this provision which was tabled during the debates in the European Parliament on a proposal for a Council Directive drawn up by the Commission and was designed to replace the words 'maximum prices' by the words 'fixed prices'. The Council therefore wanted to show that it was resolved that the system of free prices be accepted by the Member States. This interpretation is confirmed by the eighth recital which states that 'the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco'.

The reservation in the second sentence only applies to the systems of imposed prices which are *compatible with the Treaty.* It is impossible to agree that the Council has made collective systems of imposed prices lawful. Otherwise it would have to be inferred that the directive itself contravenes the Treaty and is invalid. The Council cannot in fact legalize national measures prohibited by the Treaty by means of a harmonizing directive.

2. The direct effect of the directive

The first sentence of Article 5 (1) of the directive sets out an explicit and unqualified obligation on Member States to introduce a system of free price fixing. This obligation has had direct effect since 1 July 1973 the latest date stipulated in Article 12 of the directive by which Member States shall bring it into force.

The GB-INNO-BM company suggests that the fourth question be answered in the following terms:

'(a) Article 5 of the Council Directive of 19 December 1972 has direct effect.

(b) Article 5 of the Council Directive of 19 December 1972 must be interpreted as meaning that Member States are forbidden from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the customer of imported or home-produced tobacco products, that is to say, where it is not possible to exceed the maximum and it is not permissible to sell the product at a lower price'.

Observations submitted by ATAB

Before commencing its legal discussion of the questions referred by the Hof van Cassatie, ATAB engages in an examination of the history of the fixed price at which manufactured tobacco is sold to the consumer. After pointing out that this price is not peculiar to Belgium it then gives an account of the system of imposed selling prices in the other original EEC Member States. Finally it considers the essential socio-economic requirements and demands of real and effective competition in the sector in question and also of the protection of the consumer against certain abuses.

It draws the following conclusions from its analysis of these questions.

1. The fixed price of manufactured tobacco stems from the special system of taxation applicable in this sector. It secures for the particular State the collection of the large revenue duties to which it is entitled and which are assessed on a consumer price fixed in advance and shown on the tax label.
2. The admissibility of a fixed price for manufactured tobacco which is explicitly incorporated in the Council Directive of 19 December 1972 confirms the rules governing this matter in the national laws of the various Member States.
3. The disappearance of tobacco retailers due to the abolition of a fixed price undoubtedly has serious socio-economic consequences.
4. The abolition of an imposed price means the disappearance of genuine competition based on a large number of brands in favour of competition which is unreal and presupposes that a large number of brands have been eliminated.
5. The continuance in business of retailers who are specialists, which thanks to the fixed price is still possible, constitutes, for economic and public health reasons, a guarantee for the consumer.

Observations on the first question

ATAB submits that, since Article 86 of the EEC Treaty gives effect to Article 3 (f), if should only be interpreted in the light of the latter article. Attempts to attain the general objectives of the Treaty are dependent on *political* measures and do not impose any obligations other than those provided for in other articles of the Treaty.

Article 5 of the Treaty does not mean that a Member State is forbidden to do anything which it is clearly not forbidden to do by a specific article of the Treaty.

According to ATAB Article 86 of the Treaty only prevents acts of undertakings and not acts of a Member State. Article 86 does not prohibit a legislative provision but the *abuse* of a dominant position and it makes no difference whether this dominant position is consolidated by a legislative provision. Consequently in relation to Article 86 the introduction of a legislative measure has a neutral effect: even if the measure in question is bound to lead to the establishment of a dominant position, it is the behaviour of the undertaking which, occupying a dominant position,

takes advantage of the situation thus established by abusing it and not the measure which is caught by the prohibition in Article 86.

There can be no question of a dominant position because of the strength of one undertaking if *all its competitors* are equally strong. The system introduced by Article 58 of the Belgian VAT Code puts all manufacturers and all importers on the same footing by imposing the same obligations on them. In no way does it eliminate competition by laying down that the sale price freely chosen by them shall be adhered to by the distributors.

In making that choice the manufacturer or importer so far from abusing a dominant position, is merely exercising his rights as a competitor.

ATAB mentions incidentally that in the case giving rise to the reference for a preliminary ruling an association of retailers is in dispute with a large supermarket which, compared to them, is in a dominant position and is abusing that position by selling manufactured tobacco at a smaller profit margin or even at loss thereby harming the retailers.

ATAB accordingly suggests that the first question should be answered in the following terms:

'(a) Article 3 (f), the second paragraph of Article 5 and Article 86 do not prohibit a Member State from introducing into or maintaining in force in its legislation a provision whereby, for the sale to consumers of both imported and home-produced goods, a selling price is fixed by the manufacturers or importers even if the provision envourages the abuse by one or more undertakings of a dominant position, but rather penalize the undertaking guilty of such abuse.

(b) In any event a national provision such as that referred to in (a) is not prohibited if it is general in scope in this sense that it applies to any manufacturer or importer including therefore those who do not have a dominant position or do not abuse one and *a fortiori* if the abuse of a dominant position was neither its aim nor its object nor its effect'.

Observations on the second question

Article 90 of the Treaty does not forbid Member States to grant undertakings 'special or exclusive rights'. This emerges from the judgment of the Court of 30 April 1974 in Case 155/73 *(Giuseppe Sacchi* [1976] ECR 409).

A 'right' granted to all competing undertakings, in this case to all competing manufacturers and importers, is obviously neither a special nor an exclusive right.

However in this case the manufacturer or importer far from enjoying any special rights is on the contrary *under an obligation* to pay excise duty and VAT on the figures shown on the tax label and this obligation is not imposed on any other manufacturer or importer of other products.

ATAB, while acknowledging that 'in the case of these undertakings' the Member States cannot adopt any measure contrary to Articles 7 and 80 to 94 inclusive, submits that a measure such as Article 58 of the VAT Code is in no way incompatible with these articles and certainly not with:

Article 7 of the Treaty, since there has been no discrimination on the ground of nationality;

or Article 86, as has been shown above.

A statutory system of fixed prices — not imposed prices — under which:

it is not the manufacturer or importer who imposes a price on retailers, but the Member State which prescribes that the

price fixed by the manufacturer or importer is binding on all concerned;

the manufacturer or importer far from enjoying any special rights is on the contrary forced to pay the excise duty and VAT in advance;

the reason why the price shown on the tax label is binding arises directly out of the system of collection does not come within Article 90.

Furthermore Article 90 does not have direct effect and does not create individual rights which the national court must protect. The Court has already held without any reservations that Article 90 (2) does not have direct effect (judgment of 14 July 1971 in Case 10/71, *Ministère Public of Luxembourg* v *Madeleine Hein, née Muller, and Others* [1971] ECR 719 at p. 730 and p. 731).

The same argument applies to Article 90 (1).

ATAB therefore suggests that the second question might be answered in the following terms:

'Article 90 of the EEC Treaty has not to be interpreted as meaning that "undertakings to which Member States grant special or exclusive rights" exist where the State imposes on manufacturers and importers of certain products a general obligation to notify proposed price increases but by means of a legislative provision of a fiscal nature which after notification makes the increased price for the sale to the consumer of these products compulsory and thus gives to them indirectly the possibility of themselves fixing the compulsory selling price to the consumer.

The retention of these special or exclusive rights cannot be contrary to the provisions of the EEC Treaty, namely those referred to in Articles 7 and 85 to 94 inclusive'.

Observations on the third question

According to ATAB, in order to answer the questions referred by the Hof van Cassatie, it is necessary to define: on the one hand the concept in Community law of a measure having an effect equivalent to a quantitative restriction; on the other hand the effect of the measure introduced by Article 58 of the Belgian VAT Code.

In order to define a measure having an effect equivalent to a quantitative restriction reference can be made to the consistent case-law of the Court to date, starting with the judgment of 11 July 1974 in Case 8/74 *(Procureur du Roi* v *Benoît and Gustave Dassonville [1974] ECR 837 at p. 852) and going right up to its two judgments of 26 February 1976 in Case 65/75 (Riccardo Tosca* [1976] ECR 291 at p. 308) and in Cases 88 to 90/75 *[Società SADAM and Others* v *Comitato Interministeriale dei Prezzi and Others* [1976] ECR 323 at p. 339), which show that a 'measure having equivalent effect' means any measure which is capable of hindering directly or indirectly, actually or potentially, imports between Member States.

The Commission defined the concept 'measure having equivalent effect' in its Directive No 70/50/EEC of 22 December 1969 [based on the provisions of Article 33 (7) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty] (OJ, English Special Edition 1970 (I), p. 17), in which it expressed the opinion that unlike discriminatory measures, measures which apply equally to domestic and imported products are only prohibited 'if their restrictive effects on the free movement of goods exceed effects intrinsic to trade rules'.

If it is true that the Court of Justice has not followed this distinction, that does not mean that the two kinds of measures

must be placed on exactly the same footing.

The Court in fact in its judgment of 30 April 1974 in Case 155/73 *(Giuseppe Sacchi* [1974] ECR 409) referred specifically to the Commission's directive. It emerges from the judgments in the *Tasca* and *SADAM* cases, where a maximum price was at issue, that not every fixing of a maximum price by the authority concerned is a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 but that each time the specific effect of the disputed measure on the economic situation has to be ascertained.

ATAB considers that the recitals to Council Directive No 72/464/EEC of 19 December 1972 clearly indicate that the obstacles to the free movement of manufactured tobacco are created mainly by the differences between the fiscal systems of the various Member States.

Under the rules specified in Article 58 of the Belgian VAT Code each manufacturer is free to choose the price at which his product will in due course be sold to the ultimate consumer, so that all the Community's decided cases on the legality, under Article 30, of national rules on maximum prices apply in their entirety to this case.

Unlike the facts in the *Dassonville* case where the competitors were not on equal terms the affixing of the tax label is a perfectly normal requirement, having regard to the system which the Belgian State has introduced. This formality with which every person using the product must comply and which is required for the purpose of collecting the tax at source is in proportion to the objective pursued by the State, since tobacco is essentially a revenue-producing product.

ATAB suggests therefore that the third question be answered as follows:

'Articles 30, 31 and 32 of the EEC Treaty are not to be interpreted as meaning that fixed prices imposed by the State which are equally applicable to home-produced or imported products are not a measure having an effect equivalent to a restriction on imports, UNLESS there is nevertheless discrimination in practice. This latter situation cannot arise in this case, since it is expressly provided that manufacturers and importers are free to fix the prices of their goods. This is always the case if the State allows manufacturers and importers, after notification of a price increase which is only to come into effect after a certain waiting period, to be free to fix retail selling prices and if it imposes this price after publication.

It is in any event for the national court trying the main action to determine the effects of such national rules; if they apply to all products of the same kind, whatever their origin may be, they are not such as to hinder intra-Community trade, directly or indirectly, actually or potentially. The situation is no different if after notification of a price increase and after compliance with a specified waiting period, a Member State permits manufacturers and importers to fix freely the prices including the retail prices when that Member State publishes the prices and by means of the measure referred to above ensures compliance with them'.

Observations on the fourth question

ATAB is of the opinion that viewed as a whole Council Directive No 72/464/EEC of 19 December 1972 does not appear to have direct effect.

However, even if this directive has direct effect, under the second sentence of Article 5 (1) thereof freedom to fix the maximum selling price would not hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices. ATAB refers in support of this argument to a letter of 28 March 1973 which it received from Mr Vogelaer,

Director General for Financial Institutions and Taxation of the Commission.

When the draft of Article 5 was being prepared the European Parliament proposed an amendment to replace the expression 'maximum retail selling prices' by 'fixed retail selling prices'. The only reason why this proposal was not adopted is that the system of fixed prices did not apply in the three new Member States. The purpose of the second sentence of Article 5 is therefore to avoid any dispute as to the validity of the system of fixed prices. That is a very clear indication that national laws which provide for imposed prices for manufactured tobacco remain in force and are not therefore incompatible with the EEC Treaty, nor *a fortiori* with the directive itself.

Consequently ATAB suggests the following answer to the fourth question:

'(a) The provisions of Directive No 72/464 of 19 December 1972 of the Council of Ministers, in particular Article 5, do not produce direct effect.

(b) Article 5 of this directive must be interpreted as meaning that Member States are not prohibited from introducing or maintaining in force a specific measure which, for the sale to the consumer of imported or home-produced tobacco products, imposes a selling price stated on the lax label'.

In a supplemental pleading ATAB puts forward additional observations on the question referred by the Hof van Cassatie. Its examination begins with the fourth question.

The fourth question

ATAB points out that this is first and foremost concerned with the question whether the directive, and in particular Article 5 thereof, is directly applicable or not. It then asks whether in the case of manufactured tobacco the introduction or the maintenance in force of fixed prices determined by law is forbidden under this article or not.

Article 5

ATAB proceeds to examine Article 5 and takes the view that the provisions, of which this article is one, under the heading 'General Principles' may be directly applicable in so far as they fulfil the requirements laid down by the Court, namely that they must be *clear and specific and not be subject to any condition.*

It must be borne in mind that Article 5 comprises three provisions which must be considered together for the purpose of these requirements.

1. Manufacturers and importers shall be free to determine the maximum retail selling price of their products (first sentence of paragraph (1));
2. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices (second sentence of paragraph (1));
3. Member States may limit the theoretical number of possible retail selling prices. Such a limitation may not however involve any discrimination (subparagraph 2).

Although there is no doubt that Article 5 (2), which moreover is of secondary interest in answering the question referred, satisfies the criteria laid down by the Court for it to have direct effect, it is more difficult to decide whether paragraph (1) of this article does so. The first sentence of this paragraph is absolutely vital for attainment of the first stage of the process of harmonization, since under Article 4 (1) the proportional excise duty on cigarettes is to be calculated in each Member State on the maximum retail selling price. If it is borne in mind on the other hand that in all Member States this tax is levied on

the manufacturer or importer, it is that much easier to grasp the actual meaning of this first sentence. It is necessary for the purpose of calculating and collecting the tax that manufacturers and importers themselves determine the retail selling price. This requirement, which is inherent in the system is established as a norm by the first sentence of Article 4 (1).

The first sentence is however more difficult to understand, because it mentions 'free' price fixing by the manufacturer and importer in contrast to the following sentence according to which this provision may not hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices. The second sentence therefore states clearly what the Hof van Cassatie wants to know: the words of the first sentence do not deprive Member States of the right to introduce or maintain in force legislative provisions regarding the control of price levels or the observance of imposed prices.

Article 5 (1) creates rights which are directly applicable but it certainly does not have the meaning given to it by the question referred.

ATAB nevertheless takes the view that the question can also be understood in this sense that the second sentence of Article 5 (1) may limit the rule laid down in the first sentence. The concepts of 'control of price levels' and of 'imposed prices' are then given what can be called as it were a *Community meaning.* ATAB cannot accept this view. Nevertheless, if these concepts are to be given a Community meaning, the inevitable conclusion must be that Member States have some discretion as far as concerns implementating measures which have to be taken on a national level. This discretion limits the direct effect of the directive to the review of this discretion.

In whatever manner the discretion left to the Member States by the second sentence of Article 5 (1) is evaluated the system of imposed retail selling prices of manufactured tobacco, which is mentioned in the question referred, clearly does not come within the scope of such a review, if only because this system does not interfere with the right reserved to manufacturers and importers to be free to determine their prices. Only prices which have been freely determined can be converted into imposed prices. A fixed price imposed in this way complies in principle with the Community definition of an imposed price within the meaning of the second sentence of Article 5 (1) of the directive.

All the Member States which are at the present time applying the directive have thought it necessary to introduce measures along these lines.

Whatever meaning is given to Article 5 (1) the conclusion is invariably reached that in the two interpretations examined above it satisfies the requirements of being clear, specific and not subject to any condition. The persons concerned can therefore invoke it with reference to Member States before the national courts. However the direct effect of the directive viewed as a whole can be questioned. As far as the rest of the question referred is concerned it must be answered in the negative.

The third question (Articles 30, 31 and 32)

Article 30

Article 30 prohibits any quantitative restriction on imports and any measure having equivalent effect in trade between Member States.

The Court has consistently held in its decided cases that for the measure in question to be caught by the prohibition it is sufficient that it is capable of hindering *directly or indirectly, actually or potentially,* imports from one Member State to another (judgment of 11 July 1974 in Case 8/74, *Procureur du Roi* v

Benoît and Gustave Dassonville [1974] ECR 837).

As these conditions are sufficient but also necessary the reply to the first two paragraphs of the third question is therefore in the affirmative.

ATAB then gives the main reasons which led the Belgian legislature to maintain in force the system of the imposed price for manufactured tobacco.

It takes the view that national legislative provisions which for social and political reasons have some effect on competition in the retail trade do not and are not likely to have an effect equivalent to a restriction on imports within the meaning of Articles 30, 31 and 32 of the Treaty when they are applied equally to domestic and imported products.

Finally ATAB submits that Articles 30, 31 and 32 are to be understood as meaning that *fixed* prices which are imposed by a Member State equally on home-produced and imported products are not measures having an effect equivalent to a restriction on imports, unless it is shown that in practice they somehow or other have a discriminatory effect. The latter situation cannot arise in this case, since it has been expressly provided that manufacturers shall be free to determine the price of their products. This is always the case when a Member State allows manufacturers and importers, after notification of a price increase after compliance with a specified waiting period, to be free to determine the retail selling price and when it imposes such a price after publication.

The second question (Article 90)

According to ATAB the answer to this question can only be in the negative.

Article 90 (1) forbids Member States from introducing or maintaining in force provisions contrary to the Treaty for the benefit of public undertakings and undertakings to which they grant special or exclusive rights.

In reliance on the judgment of the Court of 30 April 1974 in the *Giuseppe Sacchi* Case 155/73 ([1974] ECR 409) ATAB submits that Article 90 (1) allows Member States to do something for which an undertaking having a dominant position on the market would be blamed. This is why Article 90 (1) distinguishes between the granting of rights by a Member State and the exercise of those rights by the undertakings concerned.

The expression 'undertakings to which Member States grant special or exclusive rights' must be given the narrowest possible interpretation. The minimum requirement without any doubt is that the granting of rights is necessary. This requirement is not fulfilled if a Member State uses legislative provisions to compel in a general way certain undertakings to behave in a particular way. In such a case the undertakings concerned may enjoy *preferential treatment,* but they are certainly not granted rights within the meaning of Article 90 (1).

A direct intervention by a Member State on a large scale in economic affairs is not covered by Article 90 (1). This consideration alone may be a sufficient answer to the question referred.

The first question (Articles 3 (f)), the second paragraph of Article 5 and Article 86

ATAB takes the view that this question comes down to an examination of the meaning of Article 3 (f) and the second paragraph of Article 5 in conjunction with Article 86. It considers first of all whether these articles have the meanings which the questions give them and whether they have direct effect on the national legal order of the Member States.

Article 3 (f) is designed to ensure that competition within the market is not distorted. This objective is stated in several provisions including Article 86.

Article 3 (f) considers the attainment of this objective as one of the inescapable obligations of the Community. If it governed in principle the activities of the Community no legal effect could however be inferred from it as far as the activities of the Member States are concerned as is suggested by the question referred.

The question arises whether the effects which are sought are not derived from the second paragraph of Article 5. ATAB, in reliance on the case-law of the Court, which Mr Advocate General Reischl summarized in Case 155/73, *Giuseppe Sacchi,* submits that it must be made clear that owing to the general nature of its wording Article 5 does not give rise directly to subjective rights in favour of individuals.

In the view of ATAB this interpretation, which in the question referred is given to the principle of the supremacy of Community law, goes too far. Neither the legislative power of the Member States nor the actual way in which they apply their legal norms depends upon the question whether one or more undertakings have a dominant position on the market or whether they are abusing it.

ATAB stresses that the question referred cannot be properly examined unless the infringement of Article 86 is regarded *a priori* as an irrefutable fact. This applies to the dominant position and its abuse and also to restrictions on inter-State trade. It is not for the Court when it is dealing with a reference for a preliminary ruling to check whether this assumption is correct.

In short the question must be answered in the negative.

Observations of the Commission

1. Preliminary observations

The *Commission* first of all gives a broad outline of the tobacco sector including not only distribution but also the industrial stage and explains how excise duty is levied on manufactured tobacco in Belgium and it then considers the legal nature of Article 58 of the Belgian VAT Code. It takes the view that this provision is only an ostensible price measure. Indeed because in the case of manufactured tobacco it in fact eliminates competition at the distributive stage it belongs to the kind of interventions by public authorities in competition which are sometimes called compulsory cartels.

The Commission concludes its preliminary observations with a short statement on the social aspect of the retail trade in manufactured tobacco in Belgium.

The Commission then proceeds to consider the questions referred and makes the following observations:

2. Interpretation of Article 3 (f), the second paragraph of Article 5 and Article 86 of the Treaty

The first question is concerned with what the Hof van Cassatie calls encouraging the abuse of a dominant position in the Common Market. The Commission has serious doubts whether a system of imposed prices derived from a law such as the one at issue encourages the abuse of a dominant position. It is true that the national measure imposes a specific *system* of price fixing but this system does not create the same degree of subjection as a dominant position does.

On the other hand it is perfectly true that under the Belgian tax system the tax label can in practice only be affixed by the manufacturer. As far as this aspect of the matter is concerned the manufacturer certainly has a dominant position vis-à-vis importers and possibly vis-à-vis the other persons and undertakings concerned at the marketing stage. Any person or undertaking who has either in law or in fact exclusive technical rights

on the market by comparison with his purchasers abuses those rights from the moment when he attempts to influence the conduct of those purchasers on the market, especially if he refuses to supply them. The Commission refers in support of its argument to the judgment of the Court of 13 November 1975 in Case 26/75, *General Motors Continental NV* v *Commission of the European Communities* [1975] ECR 1367 at p. 1378 et seq.).

On the question whether national measures creating exclusive technical rights likely to cause an abuse are incompatible with Article 3 (f), the second paragraph of Article 5 and Article 86 of the Treaty the Commission is of the opinion that in those cases, where such exclusive rights are not as such incompatible with Articles 30 to 37, their compatibility with the second paragraph of Article 5 may be considered and that the effect of observance of the obligation therein contained is that Member States must, as soon as exclusive rights have been created, adopt reasonable protective measures against foreseeable abuses of the dominant position inherent in any exclusive rights. In connexion with the end of Question 1 (b) the possibility of justifying any abuse of a dominant position on the ground that it is based on a national provision can be ruled out.

3. Interpretation of Article 90

The Commission takes the view that the special or exclusive rights mentioned in Article 90 (1) relate to the production or marketing of goods (and *mutatis mutandis* of services) by the person entitled to exercise the rights concerned himself, in other words to access to the market. This is how the Court interpreted Article 90 in paragraph 14 of the judgment delivered in Case 155/73 *Giuseppe Sacchi* ([1974] ECR 409 at p. 429).

The Belgian measure does not have the effect described in this paragraph at all. Access to the manufactured tobacco market is free at all stages. The only special rôle assigned to manufacturers and importers is that their choice of the basis of assessment of excise duty also determines the price level in respect of which the legislature has taken away the retailer's freedom of action. It is neither a 'right' within the meaning of Article 90 (1) nor is it 'exclusive' or 'special'. This measure does not fall within the *ratio legis* of Article 90.

4. Interpretation of Article 30

According to the Commission the predominant factor in checking whether a system of imposed prices having legal force is compatible with Article 30 is whether owing to its nature it affects competition. In this field both the Community and the Member States have powers and the determinative factor in defining their limits is whether there is any interference with intra-Community trade as provided for in Article 85 of the Treaty. Agreements which may affect this trade fall within the jurisdiction of the Commission. Agreements which are not capable of having this effect fall within the national jurisdiction and agreements between undertakings of the same Member State may come within this category of agreements.

Therefore it is for the competent national authorities to apply any national provisions to agreements or practices which in fact restrict competition and do not affect trade between Member States even potentially. In the field of national competition policy it is the duty of the national legislature to decide whether or not public authorities are to make use of restrictions on competition having legal force that is to say compulsory agreements governed by public law. However when Member States intervene in this way they must abide by the division of powers between themselves and the Community.

In the light of these considerations the Commission goes into the question

whether a system of imposed prices based on an agreement and covering a single Member State may affect trade between Member States.

According to the Commission *collective* agreements for imposed prices, to which manufacturers, importers and dealers of the same Member States are parties, unlike *individual* agreements for imposed prices between a manufacturer and a certain number of dealers of the same Member State, in general come within Article 85 (1). The intervention of importers inevitably affects trade between Member States, especially if it was the main importers who are parties to the agreement.

The reaction of the Commission, in accordance with this view, to the agreements for imposed prices entered into earlier between Fedetab and the Belgian association of wholesalers of manufactured tobacco, was to notify its complaints to the parties concerned. This procedure is taking its normal course.

If a collective system of imposed prices having legal force and such as to cover not only *all* importers as well as *all* manufacturers is considered from this point of view, the conclusion which must be drawn is that such a system may affect trade between Member States and for this reason comes under the jurisdiction of the Commission.

It is the Commission's view that to this conclusion must be added the fact that for technical reasons, which it gives, arising out of the tax system introduced for excise duties, the tobacco sector scarcely provides any opportunity for possible mitigation of the effect which this system has on intra-Community trade by means of parallel imports.

Consequently the Commission is of the opinion that a collective system of imposed prices having legal force, especially if it was combined with a tax system of this kind, which is normally applied to the products of manufactured tobacco, has an appreciable effect on trade between Member States in a way which may be detrimental to the attainment of the objectives of a single market between Member States and constitutes also therefore an obstacle to this trade.

Such a system creates a situation in which the share of the market taken by imported goods depends solely on the importers' sales policy. The dealers carrying on business in the importing country cannot in any way influence this share of the market. This latter situation is an obstacle to Community trade.

To sum up the Commission takes the view that a system of imposed prices having legal force impedes the free movement of imported goods within the meaning of the Court's definition of a measure having equivalent effect in its judgment of 11 July 1974 in Case 8/74 (*Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837), especially in a sector where, owing to tax provisions, parallel imports present more problems than normal imports.

It is not for the Commission to set out here how this effect might be avoided. Nevertheless it goes on to suggest some possible solutions.

It is also possible according to the Commission to show that collective systems of imposed prices having legal force are compatible with Article 30 by putting forward the argument which the Commission usually applies to measures presumed to have equivalent effect and is based on the principles laid down in Directive No 70/50/EEC (OJ, English Special Edition 1970 (I), p. 17) of 22 December 1969 supplemented by passages from the Court's decided cases and especially from the *Dassonville* judgment. This approach leads to the same conclusion.

Under the collective system of imposed prices having legal force the *importer* is

free to apply his own price policy. There is no direct obstacle to imports.

Nevertheless, since it is impossible to sell at a lower price, the existence of an indirect obstacle must be regarded as likely. If such a prohibition applied also to imported products, it would in practice be impossible to prevent it from having an effect on patterns of trade within the Community.

The actual circumstances surrounding a collective system of imposed prices having legal force play an important part. Such a system would be much more likely to hinder trade between Member States if the imported products were not freely available on the other Community markets, so that parallel imports cannot normally be an alternative source of supply. As has already been mentioned above this is the situation in the tobacco sector because of the taxation system to which these products are subjected in all the Member States.

The Commission gives a brief outline of the technical and practical obstacles to parallel imports and concludes that the taxation system to which manufactured tobacco is subjected considerably reduces the opportunity of effecting such imports which in general exists in the case of other products. According to the Commission it follows that the probable obstacle to trade between Member States becomes a certainty even if it is difficult to quantify.

These complaints directed against the system of imposed prices having legal force are confirmed and further substantiated by raising the question whether the objective aimed at could not be attained with the help of a less restrictive measure. As the Commission considers that the answer to this question is that it could, at least if the objective consists in protecting the traditional retail trade against the aggressive sales techniques of large stores, it puts forward some solutions which are less restrictive.

The Hof van Cassatie at the end of the third question considers what may happen if the producers and importers continue to fix retail price levels which are made mandatory by a method other than Article 58 of the VAT Code, namely by publication of these prices combined with the obligation to apply them. Now this supposition only modifies the form of the Belgian measure and not its content, so that it is unlikely to alter the result of the examination of the compatibility of the system with Article 30.

The Commission ends its observations on the interpretation of Article 30 by stressing that, if this article is given a more restrictive interpretation, the second paragraph of Article 5 read together with Article 85 of the Treaty could become a matter of some importance. It may be asked whether encroachment by Member States upon a field where the Community alone has jurisdiction, which affects potentially trade between Member States but cannot be proved to be a potential obstacle to such trade is caught by the prohibition laid down in the second paragraph of Article 5 of the Treaty.

The Commission relying on paragraph 30 of the judgment of 23 January 1975 in Case 31/74 *(Mr Filippo Galli* [1975] ECR 47 at p. 64) and on paragraph 51 of the judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *(Cornelius Kramer and Others* [1976] ECR 1279 at p. 1312) is tempted to answer this question in the affirmative.

It is the Commission's view that even if those restrictions on competition which may be exempted under Article 85 (3) have been voluntarily accepted by undertakings, they may not be made obligatory by Member States. In the case of restrictions on competition laid down by law not only is the requisite consensus of the parties concerned to enter into a voluntary agreement replaced by the intervention of the

public authorities but an element of national interest comes into play over and above the private interests which normally are the subject-matter of agreements. The formal application of Article 85 would be impossible while from the practical point of view the problem would become complicated and these are two factors each of which on its own is enough to jeopardize attainment of the objectives of the Treaty within the meaning of the second paragraph of Article 5 thereof.

The same reasoning can be applied to this case in which the potential obstacle to trade between Member States has more than one source, since it stems partly from Article 58 of the VAT Code and partly from the whole of the tax rules applicable to the tobacco sector.

If Article 30 had to be applied to these circumstances, it would be no less true that the national measure creates a situation which although based on an agreement does not qualify for exemption under Article 85 (3). The prohibition in the second paragraph of Article 5 applies *a fortiori* to an intervention of this kind. The application of this provision therefore produces the same results as does the test of compatibility with Article 30 of the Treaty, with this difference that it is impossible to plead that the Treaty provisions have direct effect.

5. Interpretation of Council Directive No 72/464/EEC

The Commission confines its observations to Article 5 (1) of the directive.

This provision cannot be considered independently of Article 4 of the directive which provides that excise duty must be calculated 'on the maximum retail selling price'. Article 5 (1) broadly enunciates two principles: in the first place that those who introduce manufactured tobacco to the market are free to determine the maximum retail selling price mentioned in Article 4 and in the second place that this freedom is subject to any national price control exercised by Member States.

Article 5 (1) was adopted for a specific purpose indicated in the recitals in the preamble to the directive. The last recital reads as follows: 'Whereas the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco'.

Article 5 (1) gives effect to this intention. The collection of excise duties requires certain rules. They must however not be used to restrict competition indirectly. Subject to this reservation national powers in the field of prices remain intact.

Viewed in this way Article 5 (1) of the directive does not prescribe for Member States *any* 'particular course of conduct' within the meaning of the judgment of the Court of 2 February 1977 in Case 51/76 *(Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113), so that it can be inferred from this that this provision is not directly applicable.

The Commission summarizes its observations as follows:

'1. The prohibition of any measure having an effect equivalent to a quantitative restriction on imports set out in Article 30 of the Treaty must be understood as meaning that it applies to national rules restricting competition on a domestic market and affecting trade between Member States in a way which may be detrimental to the attainment of a single market.
2. National rules which place, in law or in fact, some of the persons or undertakings carrying on business on a particular market in a dominant position compared with the others are incompatible with the second paragraph of Article 5 of the Treaty,

if at the same time reasonable precautions are not taken against foreseeable forms of abuse of this dominant position.

3. A national measure whereby some of the undertakings carrying on business on the market may indirectly influence the conduct of the others vis-à-vis third parties does not make them undertakings within the meaning of Article 90 of the Treaty.
4. Article 5 of Council Directive No 72/464/EEC of 19 December 1972 does not have direct effect and does not grant the natural and legal persons to whom it applies rights which national courts must protect.

Observations of the Council

The Council observations are confined to the fourth question relating to Directive No 72/464/EEC and in particular to the meaning of Article 5 (1). The Council takes the view that Article 5 (1) constitutes an obligation subject to reservations and does not therefore have direct effect. The Council then gives an outline of how the provisions of the directive were drawn up and suggests that they are to be interpreted as meaning that there is nothing in them to prevent Member States from imposing by means of a legislative measure fixed prices which retailers must apply.

Observations of the Belgian Government

The starting-point of the Belgian Government's observations is the submission that tobacco products — and especially cigarettes — have nothing in common with commercial products. They are the only products subjected to a system of excise duties, to which an *'ad valorem'* excise duty calculated on the retail selling price 'including VAT' is applied. It is therefore forbidden to sell tobacco to the consumer at a *higher* price than the retail selling price shown on the tax label, since excise duty and VAT are assessed on this price. There is nothing to stop a manufacturer or importer from lowering the selling price *erga omnes* by affixing a tax label showing the reduced price, provided that all the requirements of tax law are fulfilled.

As far as the questions referred are concerned the Belgian Government takes the view that a measure adopted by a Member State imposing a price fixed by the manufacturers or importers on the sale to the consumer of a product which is imported into or manufactured within the Member State concerned does not contravene Article 3 (f), the second paragraph of Article 5 and Article 86 of the Treaty. Such a measure does not however preclude the application to undertakings of Article 86 of the Treaty.

The Belgian Government submits that Article 58 of the VAT Code does not in fact grant any rights within the meaning of Article 90 (1) of the Treaty but imposes obligations. For this particular reason which is in itself sufficient Article 90 (1) cannot be said to apply to the national measure.

Articles 30, 31 and 32 must be understood to mean that rules imposing fixed prices on the consumer, which are shown on the tax labels and which national manufacturers or the importers of the products from other Member States freely determine do not contravene the abovementioned articles of the Treaty. These rules do not have an unfavourable effect on the prospects of selling the imported products and cannot therefore affect trade between Member States.

In order to determine whether the rules at issue comply with Articles 30, 31 and 32 of the Treaty it is sufficient to be able to infer from the function and effects of the national measure that there is an obstacle to imports coming from Member States without having to establish that imports have in fact been hindered.

The same applies if a Member State allows producers or importers after the latter have given notice of a forthcoming price increase and complied with a specified waiting period to be free to fix prices, which include retail selling prices, and at the same time to publish these prices and make their application mandatory on the basis of the abovementioned rules.

The Belgian Government concludes its observations by proposing an interpretation of Council Directive No 72/464/EEC similar to that suggested by the Council.

Observations of the Netherlands Government

The Netherlands Government explains that there is in Netherlands law a provision similar to the Belgian law at issue. According to the Netherlands Government the relevant considerations are more social and economic than legal. The retail tobacco sector consists on the one hand of a large number of small specialist retailers who are encountering serious economic difficulties. The profit margins for manufactured tobacco are less than those for other retail articles, if account is taken of the fact that the tax element in the price of manufactured tobacco is large. The removal of the prohibition can only benefit supermarkets.

Observations of the Luxembourg Government

The Government of Luxembourg the laws whereof also include similar provisions submits in the main similar social and economic considerations.

Observations of the Italian Government

The Italian Government emphasizes that in Italy consumer prices are fixed for tax reasons by state law and that Article 86 does not apply to Member States when they legislate. Under the Italian system manufacturers or importers cannot in any circumstances fix consumer prices. Such a system does not hinder intra-Community trade. Further the need for taxation purposes to maintain in force a system of imposed prices is acknowledged by the directive.

III — Oral procedure

At the hearing on 16 June 1977, NV GB-INNO-BM, represented by Mr Van Bunnen, Mr Waelbroeck and Mr Dassesse, Advocates of the Brussels Bar, ATAB, represented by Mr Bayard, Mr Goffin, Mr Braun and Mr Thys, Advocates of the Brussels Bar and by Mr Kemmler, Advocate of the Frankfurt am Main Bar, the Council of the European Communities, represented by its Agents, Mr Fornasier and Mr Brautigam, the Commission of the European Communities, represented by its Agent, Mr van der Esch, the Luxembourg Government, represented by its Agent, Mr Emringer and by Mr Arendt, Advocate of the Luxembourg Bar, and the Italian Government, represented by its Agents, Mr Maresca and Mr Braguglia submitted their oral observations.

During the public hearing ATAB put forward the specific submission that Article 58 of the Belgian VAT Code is not subject to Article 30 et seq. of the Treaty. It is in fact a tax provision and forms part and parcel of the Belgian system of taxation. Article 99 of the Treaty determines what is to happen to national legislation concerning tax, turnover taxes and other forms of indirect taxation. It follows logically that until tax legislation has been harmonized the whole of it continues in force.

In rejecting this argument the Commission made the particular point that, if it were adopted, it would lead to the unacceptable result that if a Member State wishes to secure its fiscal revenue and at the same time considers that the profitability of undertakings must be

encouraged and that for this purpose competition must be eliminated, the fiscal reasons for such legislation allow the rules of competition in the Treaty to be evaded. This would amount to an infringement of Article 30 which would have very serious repercussions on Community trade.

The Advocate General delivered his opinion at the hearing on 21 September 1977.

Decision

1 By an order of 7 January 1977 which was received at the Court on 26 January 1977, the Belgian Hof van Cassatie (Court of Cassation) referred under Article 177 of the EEC Treaty four questions on the interpretation of Article 3 (f), the second paragraph of Article 5, Articles 30, 31, 32, 86 and 90 of the Treaty, and of Council Directive No 72/464/EEC (OJ, English Special Edition 1972 (31 December), p. 3) on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

2 These questions were raised in the context of an action between the Belgian limited liability company GB-INNO-BM, which runs several supermarkets in Belgium, and the non-profit-making association Vereniging van de Kleinhandelaars in Tabak (Association of Tobacco Retailers) (hereinafter referred to as 'ATAB').

3 It emerges from the file on the case that, by an order of 24 April 1972, following proceedings brought by ATAB, the President of the Rechtbank van Koophandel (Commercial Court), Brussels, ordered the company to which GB-INNO-BM is the legal successor to discontinue the selling or offering for sale of cigarettes at a price lower than that stated on the tax label, on the grounds that such practice was an unfair competitive act and infringed Article 58 of the Belgian Law of 3 July 1969 (Value-added tax Code), which is in the following terms:

'In respect of manufactured tobacco which is imported into or produced within this country, the tax shall be levied whenever excise duty has to be paid in accordance with the relevant provisions of tax laws or regulations. The tax shall be calculated on the basis of the price stated on the tax label which must be the compulsory selling price to the consumer or, if no price is specified, on the basis adopted for the imposition of excise duty'.

4 The appeal lodged by GB-INNO-BM against that order was dismissed by the Hof van Beroep (Court of Appeal), Brussels, by a judgment of 24 November 1974, and the company then appealed to the Hof van Cassatie (Court of Cassation).

The national legislation

5 In Belgium manufactured tobacco is subject to a system of excise duties which is characterized by the imposition of an *ad valorem* excise duty calculated on the retail selling price 'including VAT'.

6 The aggregate amount of these two charges is paid by the manufacturer or importer when he buys the tax labels which will be affixed to the various manufactured or imported tobacco products and which state the retail selling price.

7 It is prohibited to sell tobacco products to the consumer at a price higher than the retail selling price appearing on the label.

8 With regard to excise duties, the same prohibition is formally laid down in paragraph 12 of the regulation annexed to the Ministerial Order of 22 January 1948 governing the imposition of excise duties on manufactured tobacco.

9 As regards VAT, the prohibition results from the fact that Article 58 (1) of the said Law of 3 July 1969 refers to the principles governing liability to and imposition of excise duties.

10 It is also prohibited to sell tobacco products to the consumer at a price lower than the one appearing on the tax label.

11 If, at the material time, that prohibition was not in force as regards excise duties, nonetheless it was in force as regards VAT, by virtue of Article 58 (1) of the Law of 3 July 1969, which is quoted above.

12 The questions referred by the Hof van Cassatie for a preliminary ruling must enable that court to assess the compatibility with Community law of Article

58 (1) of the Belgian Law of 3 July 1969, in so far as under those provisions a selling price determined by the manufacturers or importers is imposed for sales to the consumer.

General observations

13 In all the Member States, taxes on manufactured tobacco are an important source of revenue, so that the competent authorities must possess effective means of ensuring that they are collected.

14 In the present state of Community law, it is for each Member State to choose its own method of fiscal control over manufactured tobacco on sale in its territory.

15 Because of the need to satisfy the demands of the rigorous and often complicated controls — which differ moreover from one Member State to another — the import and export of manufactured tobacco at present come up against inevitable obstacles and in these circumstances trade between States in this product requires considerable resources and skill.

16 Taking into account the large tax element in the selling price to the consumer, the profit made by the wholesaler and by the retailer is relatively small.

17 In a system in which, as in Belgium, the basis of assessment to excise duty and to VAT is the retail selling price, a prohibition on selling tobacco products to the consumer at a price higher than the retail selling price appearing on the tax label constitutes an essential fiscal guarantee, designed to prevent producers and importers from undervaluing their products at the time of paying the taxes.

18 On the other hand, a prohibition on selling to the consumer at a price lower than that which appears on the tax label is not necessarily imposed for fiscal reasons, but rather, according to certain governments which intervened in this case, for socio-economic purposes, in that, by eliminating the possibility of any kind of discounts on sales to the consumer, it aims to support a certain retail selling structure and prevent that structure from becoming concentrated to the disadvantage of small retailers.

19 It has also been argued that maintaining a fixed retail price is essential in order to ensure that the Member State is certain of actually obtaining the revenue from taxes on manufactured tobacco.

20 However, since in a system such as the one at issue collection is effected when the tax labels are obtained, that argument cannot be accepted.

21 Finally, it should also be noted that in a system such as the one which applies in Belgium, there is in theory nothing to prevent a retailer from being able to determine his own price for sale to the consumer, by obtaining tobacco products bearing appropriate tax labels.

22 However, in practice such a transaction is possible only with the co-operation of the manufacturer or importer on the one hand, and of the national tax authorities on the other, and such co-operation may often be difficult to obtain.

23 The questions referred by the national court have to be answered after taking all these considerations into account.

The first question

24 In the first part of the first question the Hof van Cassatie asks whether Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty must be interpreted as meaning that Member States are prohibited from introducing into or maintaining in force in their legislation a provision whereby, for the sale to consumers of both imported and home-produced goods, a selling price is fixed by the manufacturers or importers if the provision

— is of such a nature as to encourage the abuse by one or more undertakings of a dominant position within the Common Market within the meaning of Article 86 of the EEC Treaty;

— encourages the abuse by one or more undertakings of a dominant position which exists because the manufacturers and importers of manufactured tobacco can oblige the retailers in a Member State to comply with the selling prices to the consumer fixed by the former.

25 In the second part of the question it is asked first whether the introduction or maintenance in force of such a provision is prohibited even if it is general in scope in that it relates to manufacturers and importers in general, that is, even those which have no dominant position or make no abuse thereof and *a fortiori* if the abuse of a dominant position was neither its aim nor its object nor its effect.

26 It is asked secondly whether in such a case the Treaty provisions referred to in the first part of the question must not be interpreted as meaning that the introduction or maintenance in force of such a provision is by no means prohibited but that the provision can have no effect on the scope of application of Article 86 in the sense that abuse of a dominant position remains unlawful even if it is encouraged by this provision in the particular circumstances.

27 The different parts of this question should be dealt with together.

28 First, the single market system which the Treaty seeks to create excludes any national system of regulation hindering directly or indirectly, actually or potentially, trade within the Community.

29 Secondly, the general objective set out in Article 3 (f) is made specific in several Treaty provisions concerning the rules on competition, including Article 86, which states that any abuse by one or more undertakings of a dominant position shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States.

30 The second paragraph of Article 5 of the Treaty provides that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

31 Accordingly, while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness.

32 Thus Article 90 provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary *inter alia* to the rules provided for in Articles 85 to 94.

33 Likewise, Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty.

34 At all events, Article 86 prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision.

35 In any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect.

36 In assessing the compatibility with the Treaty of a system for fixing retail selling prices, a national court must take into account all the conditions for the application of the provisions of Community law which have been referred to.

37 In this connexion, the Hof van Cassatie has taken into consideration, first, the possibility that the fact that manufacturers and importers of tobacco products can oblige retailers in a Member State to adhere to the prices for sale to the consumer fixed by them could constitute a dominant position, and, secondly, that the measure regarded as possibly infringing Article 86 in conjunction with the second paragraph of Article 5 is a provision whereby on a sale to the consumer those prices must be adhered to.

38 In order to assess the compatibility of the introduction or the maintenance in force of such a measure with those provisions of Community law, the national court must also determine, taking into account the obstacles to trade in manufactured tobacco between States which may result from the nature of the fiscal arrangements in question, whether that measure as such is capable of

affecting trade between Member States, for this condition has to be satisfied for the prohibitions laid down in Article 86 to be applicable.

The second question

39 In the second question, the Hof van Cassatie asks whether undertakings to which Member States grant special or exclusive rights within the meaning of Article 90 of the Treaty exist where, by means of a legislative provision, the State indirectly gives manufacturers and importers of certain products, as distinct from manufacturers and importers of other products, the possibility of themselves fixing the compulsory selling price to the consumer, and, if that question is answered in the affirmative, whether the retention of such special or exclusive rights is contrary to the provisions of Article 7 and Articles 85 to 94 of the Treaty.

40 It should be pointed out that the fiscal system in question leaves the manufacturer or importer free to fix for his products a retail selling price lower than the selling price of competing products of the same kind and quality and which have the same characteristics.

41 Since that possibility is open to all those, including retailers, who become producers or importers of manufactured tobacco, and consequently to an indefinite class of undertakings, it is questionable whether those undertakings can properly be described as having been granted 'special', and at all events 'exclusive', rights.

42 However, since it has already been indicated in the reasons given for the answer to the first question that in any case Article 90 is only a particular application of certain general principles which bind the Member States, it does not appear necessary to give an answer to the second question.

The third question

43 This question, which is subdivided into three parts, asks first whether Articles 30, 31 and 32 of the EEC Treaty must be interpreted as meaning that a measure having an effect equivalent to a quantitative restriction includes rules in a Member State whereby a fixed price is imposed for the sale of tobacco products to the consumer, namely the price stated on the tax labels and

which, according to the particular case, is determined by the manufacturers of these products who are established in the State or by the importers of the same products, in particular from other Member States.

44 Next it is asked whether such rules only constitute such a measure when it is in fact certain that it can hinder Community trade directly or indirectly, actually or potentially, a matter which must be determined by the national court in each case.

45 Finally the question asks whether the position is different if, after notification of a price increase and after compliance with a specified waiting period, the Member State permits the producers and importers to fix freely the prices, including the retail prices, but publishes the prices and, by means of the above-mentioned measure, ensures compliance with them.

46 Article 30 of the Treaty prohibits in trade between Member States all measures having an effect equivalent to quantitative restrictions.

47 For the purpose of this prohibition it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

48 It should be pointed out that, as stated in Commission Directive No 70/50 of 22 December 1969 (OJ, English Special Edition 1970 (I), p. 17), 'measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production' are measures which have an effect equivalent to a quantitative restriction on imports.

49 However, the 'measures having equivalent effect' referred to in the directive do not include measures which by having such effect hinder trade between Member States but which are specifically referred to elsewhere in the Treaty, in particular as fiscal measures, or are *per se* permitted as being the visible or hidden expression of powers retained by the Member States.

50 Article 99 of the Treaty, which imposes on the Commission the duty to look for ways of harmonizing the legislation of the Member States on this point in the interest of the Common Market, in conjunction with Article 100 on the approximation of laws, relates to the obstacles to trade resulting from indirect taxes.

51 On the basis of the aforementioned articles, the Council adopted Directive No 72/464, which is the subject of the fourth question, precisely because it considered that it was in the interest of the Common Market that the rules for taxes affecting the consumption of manufactured tobacco should be harmonized, in order progressively to eliminate from the national systems those factors which were likely to hinder free movement and distort the conditions of competition.

52 Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products.

53 On the other hand a system whereby the prices are freely chosen by the manufacturer or the importer as the case may be and imposed on the consumer by a national legislative measure, and whereby no distinction is made between domestic products and imported products, generally has exclusively internal effects.

54 However, the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-Community trade.

55 As has already been stated, imports and exports of manufactured tobacco are subject to obstacles inherent in the different methods of fiscal control which are used by the Member States in particular to ensure collection of the taxes on those products.

56 Accordingly, in order to assess whether rules in a Member State whereby a fixed price is imposed for the sale to the consumer of manufactured tobacco, namely the price which has been freely chosen by the manufacturer or

importer, may constitute a measure having an effect equivalent to a quantitative restriction, the national court must establish, taking into account the fiscal obstacles affecting the sector of the products in question, whether such a system of fixed prices is in itself likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

The fourth question

57 This question asks, first, whether the provisions of Article 5 of Council Directive No 72/464 have direct effect, so that individuals can rely on them before national courts, and, secondly, whether the Member States are prohibited from introducing or maintaining in force a legislative measure whereby a selling price, stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, in that it is not possible to exceed the maximum and it is not permissible to sell the product at a lower price.

58 The second part of this question must be considered first, since if it was answered in the negative, there would be no need to answer the first part.

59 Council Directive No 72/464, based on Articles 99 and 100 of the Treaty, as were the directives of 11 April 1967 on the harmonization of turnover taxes (OJ, English Special Edition 1967, pp. 14 and 16), sets out the basic rules for the first stage of the harmonization of excise duties on manufactured tobacco.

60 In the preamble to the directive, the Council first of all states as a matter of principle that, as regards manufactured tobacco, achievement of an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market, presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Community.

61 Article 1 of the directive lays down the principle that the structure of the excise duties on manufactured tobacco shall be harmonized in several stages and Article 4 lays down a system of excise duties comprising a proportional component and a specific component.

62 Article 5 (1) of the directive provides that:

'Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices'.

63 Taking the view that the essential requirements of competition imply a system of freely formed prices for all groups of manufactured tobacco, the Council provided in Article 5 (1) of the directive that manufacturers and importers shall be free to determine the maximum retail selling price for each of their products.

64 Taken in context, the second sentence of Article 5 (1) cannot be interpreted as aiming to prohibit the Member States from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, always provided that that price has been freely determined by the manufacturer or importer.

65 In view of the answer given to the second part of the fourth question, there is no need to answer the first part thereof.

Costs

66 The costs incurred by the Government of the Kingdom of Belgium, the Government of the Grand Duchy of Luxembourg, the Government of the Kingdom of the Netherlands, the Government of the Italian Republic, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

67 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Belgian Hof van Cassatie by a judgment of 7 January 1977, hereby rules:

1. Article 86 of the EEC Treaty prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision.

2. In order to assess the compatibility with Article 86 of the Treaty, in conjunction with Article 3 (f) and the second paragraph of Article 5 of the Treaty, of the introduction or maintenance in force of a national measure whereby the prices determined by the manufacturer or importer must be adhered to when tobacco products are sold to a consumer, it must be determined, taking into account the obstacles to trade which may result from the nature of the fiscal arrangements to which those products are subject, whether, apart from any abuse of a dominant position which such arrangements might encourage, such introduction or maintenance in force is also likely to affect trade between Member States.

3. Rules in a Member State whereby a fixed price is imposed for the sale to the consumer of either imported or home-produced tobacco products, namely the price which has been freely chosen by the manufacturer or importer, constitute a measure having an effect equivalent to a quantitative restriction on imports only if, taking into account the obstacles inherent in the different methods of fiscal control which are used by the Member States in particular to ensure collection of the taxes on those products, such a system of fixed prices is likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

4. Article 5 of Council Directive No 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco does not aim to prohibit the Member States from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the

consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 16 November 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 21 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

The present proceedings for a preliminary ruling referred by the Belgian Hof van Cassatie (Court of Cassation) concern the interpretation of Article 3 (f), the second paragraph of Article 5, Article 86, Article 90, Articles 30, 31 and 32 of the EEC Treaty and certain provisions of Council Directive No 72/464/EEC (OJ, English Special Edition 1972 (31 December), p. 3) on taxes other than turnover taxes which affect the consumption of manufactured tobacco which entered into force on 1 July 1973.

The following preliminary observations may be made.

In Belgium excise duty and value added tax are imposed on manufactured tobacco. For goods produced in Belgium the producers are liable for the tax whereas for imported products the importers are liable. The tax is levied by means of tax labels which may be obtained from the tax authorities. They may be affixed either by the manufacturer or by the importer; however as they must be affixed under the cellophane cover where such cover exists (and that appears to be the rule for cigarettes) even in the case of imported goods the affixation is usually carried out in practice by the (foreign) manufacturers. The basis of assessment for the tax is the retail price stated on the tax label. In principle it is freely determined by the manufacturers and importers. However it must be noted that because there is State control over maximum trade margins in Belgium price increases must be authorized by the Minister for Economic Affairs. Similarly

1 — Translated from the German.