JUDGMENT OF THE COURT (Fifth Chamber)
10 December 1985 *

In Case 260/82

Nederlandse Sigarenwinkeliers Organisatie, a Netherlands tobacco retailers' organization, whose registered office is in Haarlem, represented by T. R. Ottervanger, of the Rotterdam Bar, practising in Brussels, with an address for service at the Chambers of E. A. Arendt, rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by B. van der Esch, acting as Agent, assisted by C. E. M. van Nispen tot Sevenaer, of the Bar of The Hague, practising in Brussels, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission decision of 15 July 1982 in Cases IV/29.525 and IV/30.000 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, L 232 of 6 August 1982, p. 1) is void,

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 29 January 1985,

* Language of the Case: Dutch.

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Contents

I — First submission: the conditions for the application of Article 85 1) of the EEC Treaty were not met 3817
A. The argument that the prohibited agreements had neither the object nor the effect of restricting competition 3817
1. The decisive influence of the legislative context on the applicants' conduct 3817
(a) Description of the legislation 3817
(b) The alleged impossibility of competition on margins 3819
(c) The pressure allegedly exerted by the authorities 3820
2. The absence of an appreciable restriction of competition 3821
(a) The absence of restriction of competition between the manufacturers who were parties to the bonus scheme 3821
(b) The effect on third parties of the bonus scheme 3822
(c) The absence of an appreciable restriction of competition 3824
B. The absence of an effect on trade between Member States 3825
II — Second submission: failure to comply with Article 85 (3) of the EEC Treaty 3827

Decision

1 By application lodged at the Court Registry on 24 September 1982, the Nederlandse Sigarenwinkeliers Organisatie brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision of 15 July 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.525 and IV/30.000 SSI, Official Journal, L 232, p. 1), in particular Articles 1, 3 and 4 of that decision in so far as they relate to a bonus scheme regarding discounts granted to specialist shops.

2 By an interlocutory order made by the President of the Court on 14 December 1982, the operation of Article 4 of the decision was suspended in so far as it required the persons to whom the decision was addressed to cease to apply the bonus scheme regarding discounts granted to specialist shops (hereinafter referred to as the 'bonus scheme').

3 The Nederlandse Sigarenwinkeliers Organisatie (hereinafter referred to as the 'NSO') is an association governed by the law of the Netherlands which promotes the interests of retailers of manufactured tobacco products in the Netherlands. Its aim is to improve the social and economic circumstances of its members, mainly by means of consultation with the Netherlands authorities and with the tobacco industry. The NSO has more than 1 500 members.

4 This action was brought at the same time as those of the Stichting Sigarettenindustrie (hereinafter referred to as the 'SSI') and a number of Netherlands tobacco manufacturers in Joined Cases 240 to 242, 261, 262, 268 and 269/82).

5 Like most of the agreements and concerted practices held illegal by the Commission in the decision referred to, the bonus scheme was adopted within the SSI, a foundation of which almost all the tobacco manufacturers and importers established in the Netherlands are members. A first version of the bonus scheme was signed by the members of the SSI on 4 December 1974. That scheme was amended on 24 January 1977. The amended version was notified to the Commission on 20 September 1977.

6 In 1976 the members of the SSI entered into a master agreement under which they designated the SSI as their sole representative for the purpose of negotiations with the authorities regarding, in particular, selling prices to the consumer and wholesalers' and retailers' margins. The master agreement expressly provides that the members of the SSI are bound by the bonus scheme concluded in 1974.

7 The bonus scheme provides for the grant to certain 'specialist' traders of an annual rebate of a fixed amount per 1 000 cigarettes bought by them from the contracting parties. The amount of the bonus has been increased regularly, and in 1978 was 75 cents per 1 000 cigarettes. The bonus is granted upon the submission by retailers at the end of each year to a special committee established for the purposes of the agreement of an application for the bonus and a statement of their cigarette purchases over the year. The sums necessary for the payment of the bonuses

applied for in that manner are paid to the SSI by the manufacturers in proportion to their sales through specialist traders, as calculated by an independent organization specialized in such matters. The SSI then distributes those sums among the retailers eligible for the bonus. The bonus is normally paid during the first three months of the year following the year for which the bonus is paid.

8 Article 3 of the bonus scheme sets out the conditions which traders must fulfil in order to qualify for the bonus. First, they must stock at least 60% of the brands supplied to the Netherlands market, without discriminating between the contracting parties. Secondly, they must reserve a quarter of their window and counter space for displaying cigarettes and cigarette advertising material. Thirdly, they must cooperate in the launching of new brands. Finally, they must achieve minimum annual sales of 1.5 million cigarettes supplied, directly or through wholesalers, by manufacturers and importers who are party to the agreement. It is also provided that parties cannnot withdraw unilaterally from the scheme.

9 The bonus scheme is one of a number of agreements and concerted practices adopted by the members of the SSI concerning retailers' margins (that is to say, their share of the retail price). In late 1979 the members of the SSI entered into an agreement setting the maximum margin for retailers in the case of direct supplies. That agreement also provided for the continuation of the bonus scheme.

10 During the same period the scheme was complemented by a concerted practice between the members of the SSI relating to the grant of a fixed margin for direct supplies and by concerted practices with wholesalers relating to the grant of a maximum margin in deliveries from wholesalers to specialist retailers.

11 Finally, the effects of the agreements and practices described above were reinforced by another agreement entered into by the members of the SSI on 23 April 1975. That agreement, laying down rules of conduct in the sale of cigarettes,

provides that no discount may be granted other than those agreed upon by the members of the SSI.

12 In its decision, the Commission considered that all those agreements and concerted practices were contrary to Article 85 (1) of the Treaty since they made competition on margins impossible.

13 With particular regard to the bonus scheme, the Commission considered first of all that it had the effect of significantly restricting competition in the form of extra discounts to retailers. Since the amount of the bonus is based on the total volume of purchases from parties to the agreement, any effort on the part of the retailer to obtain an extra discount by concentrating his custom on one or more suppliers or by rendering them special services becomes pointless. Furthermore, the grant of the bonus constitutes discrimination against retailers who do not fulfil the conditions laid down by the agreement. The joint requirements laid down in the scheme which retailers must meet in order to qualify for the bonus constitute appreciable restrictions on their freedom of action. Finally, the virtually general coverage of the bonus scheme had the practical effect of obliging manufacturers and importers entering the Netherlands market to grant retailers a better rebate than that given by the parties to the scheme.

14 The Commission refused to exempt the scheme under Article 85 (3) of the Treaty. In its view such a scheme does not improve distribution because it prevents retailers from earning a rebate based not on their total sales but on benefits provided to each manufacturer individually. Furthermore, the various conditions which retailers must fulfil in order to become entitled for the bonus do not contribute to improving distribution. Finally, the hypothetical benefits deriving from those various conditions mainly benefit cigarette manufacturers and importers and cannot be considered indispensable to the attainment of the objectives in view. Fines could have been imposed for participating in the bonus scheme between 1974, when it was entered into, and 1977, when it was notified. The Commission considered, however, that it was not appropriate to impose fines on the undertakings concerned.

15 The Commission also considered that the SSI master agreement of 1976 was contrary to Article 85 (1) of the Treaty and could not be exempted under Article 85 (3) of the Treaty in so far as it required SSI members to comply with the bonus scheme.

16 The NSO, an addressee of the Commission's decision makes two submissions in support of its application: its primary submission is that the conditions for the application of Article 85 (1) of the Treaty were not met; in the alternative it contends that Article 85 (3) of the EEC Treaty was not correctly applied.

I — First submission: the conditions for the application of Article 85 (1) of the EEC Treaty were not met

17 The arguments put forward by the NSO in support of this submission are intended in the first place to show that since no real competition was possible in the Netherlands, the bonus scheme and the SSI master agreement, in so far as it requires compliance with the bonus scheme, cannot have had either the object or the effect of restricting competition. It claims that competition is made impossible in this sector by the legislative context and by pressure exerted by the authorities. It goes on to argue that the agreements could not have significantly restricted competition. Finally, it argues that the agreements were not likely to affect trade between Member States.

A. *The argument that the prohibited agreements had neither the object nor the effect of restricting competition*

1. *The decisive influence of the legislative context on the applicants' conduct*

(a) Description of the legislation

18 It appears from the documents before the Court that in accordance with Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition 1972 (31 December), L 303, p. 1) the Netherlands legislature has chosen to levy primarily a high *ad valorem* excise duty (calculated as a percentage of the maximum sale price) on tobacco products, rather than a specific duty (the amount of which is fixed per unit of the product).

19 Duty is collected by means of tax stamps which manufacturers and importers buy from the tax authorites. The manufacturers and importers first determine the retail selling price of their products, including tax. They then pay the taxes included in that price. Finally, they affix to their products tax stamps showing the retail selling price.

20 Under Article 30 of the Netherlands Excise Duty Law (Wet op de accijns van tabaksfabrikaten of 25 June 1964, Staatsblad 208, hereinafter referred to as the 'Excise Duty Law'), tobacco products may not be sold at a price higher or lower than that indicated on the tax stamp. Furthermore, Article 28 of the Law provides that a given tobacco product may not be sold at more than one retail price, unless a distinction is clearly made within one brand or by means of the brand indicated on the cigarette packet. There is however provision for the making of exceptions.

21 With a view to combating inflation the Netherlands authorities have established a system of price regulation on the basis of the Prices Law (the Prijzenwet of 24 March 1961, Staatsblad 135), in the form of a Ministerial Order adopted each year under the name 'Prijzenbeschikking Goederen en Diensten' (hereinafter referred to as the 'Prices Order'). That order lays down criteria for the calculation of increases in retail prices where costs rise and reductions in retail prices where costs decline.

22 Article 2 of the Prices Order prohibits manufacturers from selling their products at a price higher than that at which the product was sold on a specified date (reference date), adjusted in accordance with increases or reductions in manufacturing costs for the product since that date. Article 3 of the Prices Order prohibits dealers from selling any product at a price higher than its purchase price together with a maximum profit margin. However, a manufacturer or dealer may exceed the maximum laid down in the Prices Order with the authorization of the Minister for Economic Affairs. Infringement of the Prices Order is a criminal offence by virtue of the Economic Offences Law of 22 June 1950 (Staatsblad K 258).

(b) The alleged impossibility of competition on margins

23 The NSO considers that the Netherlands legislation has removed any possibility of competition on dealers' margins.

24 On this point the NSO's argument is based on a contradiction between two provisions of that legislation: Article 3 of the Prices Order, founded on the Prices Law, and Article 30 of the Excise Duty Law. Article 3 of the Prices Order obliges retailers to reduce their prices if costs decrease. Where a manufacturer grants a rebate to certain retailers and thus reduces their purchase prices to that extent, those retailers are obliged by Article 3 of the Prices Order to reduce their retail selling prices. The NSO calls that mechanism the 'domino effect'. However, that 'domino effect' puts the retailers in breach of Article 30 of the Excise Duty Law, which prohibits them from selling cigarettes at a price different from that indicated on the tax stamp. By increasing retailers' profit margins any rebate would therefore necessarily cause them to infringe a legislative provision. Consequently, the manufacturers and importers had no choice but to negotiate rebates collectively in cooperation with the authorities so that retailers might be assured that they would not be prosecuted.

25 In its defence, the Commission asserts primarily that the Prices Order functions in a special manner in the manufactured tobacco sector. The domino effect described by the NSO operates to its full extent only in sectors in which retailers themselves retain the power to set selling prices. In those circumstances it is necessary to ensure that benefits granted to them are passed on in retail prices. That is the role of the domino effect. In the manufactured tobacco sector, on the other hand, where the manufacturers themselves fix retail prices, it is not necessary to oblige retailers to pass on reductions in their costs. When ministerial authorization for a price increase is given, the authorized increase includes the whole of the margin which the resulting price leaves for the manufacturers and distributors. The allocation of that margin among the various economic interests concerned may however provide an opportunity for competition between manufacturers. Furthermore, the Commission rejects the NSO's argument to the effect that the authorities implicitly authorized infringement of the Prices Order. In the Commission's view, the contacts which took place between the industry and the authorities do not justify the conclusion that the authorities implicitly authorized retailers to infringe a legislative provision.

26 The NSO's argument cannot be accepted. By entering into an agreement to grant a special rebate to certain retailers the manufacturers did collectively what the NSO argues they could not do individually. The collective nature of the rebate would not have prevented its beneficiaries from being penalized if the Netherlands legislation had the scope attributed to it by the NSO. That cannot be the case, since it has not been proved that a single retailer was successfully prosecuted for failing to pass on to consumers a benefit granted to him by the members of the SSI. Nor can the NSO assert that the authorities implicitly authorized retailers to infringe a legislative provision since the authorities merely informed the industry of their desire that the situation of specialist retailers should be improved.

27 Furthermore, the Commission has convincingly explained in what respect the Prices Order functions in a special way in the manufactured tobacco sector. It appears from its explanation that the domino effect operates only in sectors in which each of the traders concerned is free to fix his selling prices, which is not true in the case of tobacco products because of the obligation placed on retailers by the Excise Duty Law to comply with the price on the tax stamp affixed by the manufacturer or importer.

(c) The pressure allegedly exerted by the authorities

28 The NSO contends that the initiative for the bonus scheme came from the Netherlands Minister of Economic Affairs, who insisted that the industry establish and maintain the scheme. The intervention of the authorities was prompted by their desire to supplement retailers' incomes. That objective could be achieved only by means of a collective agreement between the manufacturers. In the absence of such a collective agreement, the only way for a retailer to conclude an individual rebate agreement with a manufacturer would be by agreeing to comply with rigorous requirements with regard to the layout of his shop or the promotion of that manufacturer's products. Those requirements would be such that the retailer could not at the same time fulfil them with regard to another manufacturer. Again, if no collective agreement had been concluded, in order to enable the authorities to check whether a sufficient rebate had been granted to retailers each manufacturer would have had the difficult task of compiling a list of individual agreements concluded with all retailers.

29 The Commission accepts that the Netherlands authorities insisted that the industry should improve the situation of specialist retailers. In the Commission's view, however, the NSO has not shown that the Netherlands authorities approved or encouraged the conclusion of a horizontal collective agreement in restraint of competition. Nor is it established that the authorities raised objections with regard to a system of individual fixing of rebates granted to retailers.

30 In these proceedings it is not necessary to consider to what extent pressure or encouragement on the part of the authorities may have the effect of removing agreements between undertakings from the ambit of Article 85 of the Treaty. It has certainly been established that the Netherlands authorities had discussions with the manufacturers and importers concerned during which the authorities indicated a number of objectives which they wished to see achieved with a view to benefiting the retail trade. However, it has not been proved that the authorities indicated that those objectives should be achieved by the conclusion of an agreement restrictive of competition such as that held to be illegal by the contested decision.

2. *The absence of an appreciable restriction of competition*

(a) The absence of restriction of competition between the manufacturers who were parties to the bonus scheme

31 The NSO argues in the first place that the bonus scheme does not limit the ability of retailers to make efforts in favour of particular suppliers and that competition between manufacturers and importers is therefore not restricted.

32 The Commission considers that in this case the real restriction of competition results not so much from limitations on the freedom of action of retailers as from the obligations agreed to by the manufacturers and importers. By agreeing to the bonus scheme manufacturers and importers have restricted competition in the form of rebates, since retailers no longer have any incentive to concentrate their purchases on one or several manufacturers or to perform other services for them.

33 Regard must first be had to the way in which the rebate provided for by the bonus scheme is paid. On the one hand, retailers inform the special committee established for that purpose of the total volume of their cigarette purchases from manufacturers who are parties to the scheme, without specifying the number of cigarettes purchased from each supplier. On the other hand, the cost of the rebates granted to the beneficiaries under the bonus scheme is borne by manufacturers and importers in proportion to their total sales to all the specialist retailers.

34 In a system of that kind the rebate is thus paid to retailers without regard to particular services provided to one manufacturer or to the volume of purchases from him. A retailer may even receive a rebate contributed to by all manufacturers even though he has bought nothing at all from some of them. Consequently, under the bonus scheme there is no incentive for a retailer to give specially favourable treatment to the products of a specific manufacturer because in any event the rebate which he will receive does not depend on his particular business relations with that manufactuer.

35 Such a system prevents the granting of a rebate to specialist retailers from giving rise to real competition between manufacturers and importers and limits the amount of supplementary individual rebates. Since the grant of a rebate influences selling prices, the manufacturers and importers have in any event concluded an agreement covered by Article 85 (1) (a) of the Treaty.

(b) The effect on third parties of the bonus scheme

36 The NSO argues first of all that, contrary to the Commission's assertion in paragraph 99 (h) of its decision, the bonus scheme does not affect the position of manufacturers who are not parties to it. The latter, it says, remain free to set the amount of any rebate granted to a retailer selling their products.

37 In the Commission's view, the bonus scheme encourages retailers to concentrate their cigarette purchases on manufacturers who are parties to the scheme. That effect stems largely from the obligation placed on retailers to achieve a fairly high

level of sales of products of manufacturers who are parties to the scheme in order to become entitled to the rebate.

38 In that regard certain aspects of the bonus scheme must be borne in mind. In the first place, only retailers who achieve a minimum level of sales of products of manufacturers who are parties to the scheme are entitled to a rebate. The NSO itself admits that that sales figure is quite high and that quite a large number of retailers do not achieve it. Secondly, the sales figure is calculated at the end of each year. Finally, if the sales figure is achieved, the rebate is calculated on the basis of all purchases made.

39 Such a system acts to the detriment of manufacturers who are not parties to the scheme. In the course of the year it is in the interests of retailers to concentrate their purchases on manufacturers who are parties to the scheme so as to achieve the minimum sales figure, admitted to be high, and thus to become entitled to a rebate of 75 cents per 1 000 cigarettes. By buying from a third party a retailer runs the risk of not achieving that sales figure at the end of the year and thus of losing the benefit of the rebate. In order to compensate for that risk of loss the third party must offer a rebate at least equal to that which would be obtained from the manufacturers who are parties to the scheme in respect of 1.5 million cigarettes, even where he seeks to sell a smaller quantity.

40 Furthermore, it is only at the end of the year that the retailers know whether or not they have achieved the minimum sales figure. Until that time they are in a situation of uncertainty, and that uncertainty will tend to induce all retailers, including those who will not in the end be entitled to the rebate, to concentrate their purchases on the parties to the scheme.

41 The NSO goes on to argue that retailers who do not participate in the bonus scheme do not suffer any loss since they may individually or collectively negotiate rebate agreements with manufacturers and importers.

42 For the Commission, the grant of a rebate to certain retailers amounts to discrimination, falling under Article 85 (1) (d) of the Treaty, against retailers excluded from the scheme. The fact that the latter may negotiate individual agreements is irrelevant to the fact that they are in any event refused entitlement to the rebate.

43 Since the Court has come to the conclusion that the Commission was right in finding that the bonus scheme restricted competition between manufacturers and importers, there is no need to examine whether the Commission was also right in relying on the discriminatory nature of the scheme as a basis for its decision.

(c) The absence of an appreciable restriction of competition

44 The NSO first argues that there was no appreciable restriction of competition between manufacturers and importers who were parties to the bonus scheme since they remained free to grant extra individual rebates to some retailers.

45 For its part, the Commission considers that the bonus scheme made it impossible in practice to obtain extra rebates from a manufacturer or importer.

46 The argument of the NSO cannot be accepted. In this case it matters little whether or not the bonus scheme itself left the parties legally free to grant extra individual rebates, since in practice it inevitably reduces the amount of such rebates. Furthermore, in order to assess whether or not the restriction of competition is appreciable it is necessary to take into account the context. In that regard it must be pointed out that the manufacturers and importers have entered into a number of agreements almost completely eliminating competition between them on margins and that they have agreed to refrain from granting any rebate other than those agreed between them.

47 The NSO goes on to argue that the restriction of competition caused by the bonus scheme is not appreciable because the scheme benefits only a specific group of retailers who acount for only 20% of cigarette sales in the Netherlands. Further-

more, the extra rebate granted to the beneficiaries of the scheme is trifling, since it represents only about 0.6% of the final selling price and 7% of the retailers' profit margin.

48 The Commission, on the other hand, points out that the agreement establishing the bonus scheme was signed by firms which together account for more than 90% of the total sales of manufactured tobacco products in the Netherlands. In those circumstances, having regard to the type of agreement, the restriction of competition cannot be considered insignificant.

49 In that respect it is sufficient to hold that an agreement which restricts competition between most manufacturers and importers carrying on business in a particular sector and establishes a rebate amounting to 7% of retailers' profit margins must be assumed to result in an appreciable restriction of competition.

B. *The absence of an effect on trade between Member States*

50 The NSO considers that the bonus scheme does not affect trade between Member States as referred to in Article 85 (1) of the Treaty. In the first place, once a tax stamp has been affixed to them tobacco products can no longer be imported or exported to another Member State. Secondly, tobacco products to which tax stamps have not yet been affixed are indeed transferred between undertakings belonging to the same group. However, since in that case they have not yet been placed on the market in a Member State agreements concerning them are not likely to affect trade between Member States. Thirdly, retailers also received a rebate for cigarettes imported by members of the SSI, since such cigarettes are included in the calculation of the volume of sales of cigarettes. Finally, even if there is any effect on trade between Member States, it is not an appreciable one since the sales of retailers participating in the scheme are relatively low.

51 According to the Commission, Article 85 of the Treaty does not require that trade between Member States should be restricted but merely that the distortion of competition should be likely to affect such trade, if not directly, then at least actually or potentially. The parties to the agreements and practices in question

account for 90% of the Netherlands market and a large proportion of imports between Member States. In those circumstances, and in the light of paragraphs 170 to 172 of the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission* Joined Cases 209 to 215 and 218/78, [1980] ECR 3125), it seems difficult, according to the Commission, to assert that the condition that trade between Member States should have been affected has not been fulfilled. Furthermore, the argument put forward by the NSO shows that there was in fact an effect on trade between Member States since the bonus scheme also covers imported cigarettes.

52 As the Court held in its judgment of 30 June 1966 (*Société technique minière* v *Maschinenbau Ulm GmbH* Case 56/65, [1966] ECR 235), for an agreement to be considered likely to affect trade between Member States 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Therefore, in order to determine whether an agreement . . . comes within the field of application of Article 85, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.' It must be emphasized that the partitioning of the market is only one example of the effects on trade between Member States covered by Article 85 (1) of the Treaty.

53 As a result, even where there is no partitioning of markets an agreement concluded between undertakings established in a Member State and covering only the market of that State affects trade between Member States, within the meaning of Article 85 of the Treaty, if it concerns, even partly, a product imported from another Member State, even where the parties to the agreement obtain the product from a company belonging to their own group.

54 Having regard to that principle, the bonus scheme affects trade between Member States within the meaning of Article 85 (1) of the Treaty, since the rebate is calculated *inter alia* on the basis of cigarettes imported from other Member States.

55 The applicants' argument that the effect on trade between Member States is not appreciable is unfounded. A large proportion of the tobacco products marketed in the Netherlands are imported from other Member States and the manufacturers and importers who are parties to the bonus scheme themselves account for the great majority of such imports. It must also be pointed out that the bonus scheme is likely to hamper the efforts of manufacturers from other Member States who are not parties to penetrate the Netherlands market.

56 The Commission was therefore right to hold that the bonus scheme and the SSI master agreement, in so far as it requires compliance with the scheme, were likely to affect trade between Member States.

57 The first submission must therefore be rejected in its entirety.

II — Second submission: failure to comply with Article 85 (3) of the EEC Treaty

58 The NSO considers in the first place that the Commission's analysis of the conditions of entitlement under the bonus scheme is incorrect. Contrary to the Commission's assertions, the obligation on retailers to make at least 60% of their turnover from tobacco products does not discriminate against small specialist shops because it is a relative figure, not an absolute one. It is not very difficult, according to the NSO, to fulfil the minimum stock obligation, and that minimum stock enables them to meet the specific requests of customers. Furthermore, the obligation to reserve a quarter of their display space for cigarettes presents no inconvenience for retailers, who would certainly be subject to more stringent obligations if they had to enter into individual rebate agreements. Finally, the minimum sales obligation was intended to meet the authorities' concern that only viable retail businesses should be encouraged.

59 The NSO goes on to argue that the bonus scheme should have been granted exemption under Article 85 (3) of the Treaty. First of all, retailers, who are the 'customers' of the scheme, are happy to obtain a rebate. Furthermore, by this means manufacturers contribute to the maintenance of the specialized distribution network which they need. Finally, there is no loss to consumers since the retail

prices of tobacco products set by the manufacturers or importers are compulsory under Article 30 of the Excise Duty Law. On the contrary, the rebates paid to specialist retailers work to the advantage of consumers since they are able to profit from the services of retailers who are thus enabled to survive.

60 With regard to the alleged inaccuracies in its decision, the Commision simply points out that the NSO has not shown in what respect it misrepresented the facts or drew incorrect conclusions.

61 With regard to its refusal to grant exemption, the Commission first points out that in assessing whether or not the bonus scheme improves distribution it is irrelevant that retailers are satisfied with the scheme. Nor is the scheme necessary for the purpose of providing manufacturers with the benefits which they allegedly derive from it. Finally, with regard to consumers, the Commission refers to the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, Joined Cases 209 to 215 and 218/78, referred to above) where the Court held that 'the number of intermediaries and brands is not necessarily an essential criterion for improving distribution within the meaning of Article 85 (3)'.

62 In that respect it is sufficient to state that the Commission is right in considering that the rebate has not been shown to be necessary for the maintenance of a network of specialized retailers or that equivalent rebates could not have been granted without an agreement binding the majority of the manufacturers and importers of tobacco products.

63 It follows from all the foregoing considerations that the application must be dismissed as unfounded.

Costs

64 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application.

(2) Orders the applicant to pay the costs.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 10 December 1985.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber