JUDGMENT OF THE COURT
3 FEBRUARY 1976 [1]

Pubblico Ministero v Flavia Manghera and Others (preliminary ruling requested by the Giudice Istruttore presso il Tribunale di Como)

Case 59/75

Summary

Quantitative restrictions — Elimination — National monopolies of a commercial character — Adjustment — Transitional period — Expiry — Discrimination — Abolition — Subjective rights — Protection
(EEC Treaty, Article 37)

Article 37 (1) of the EEC Treaty must be interpreted as meaning that as from 31 December 1969 every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States.

When the transitional period ended Article 37 (1) was capable of being relied on by nationals of Member States before national courts.

In Case 59/75

Reference to the Court under Article 177 of the EEC Treaty by the Giudice Istruttore presso il Tribunale di Como (Investigating Judge at the Tribunale di Como) for a preliminary ruling in the criminal proceedings pending before that court between

PUBBLICO MINISTERO

and

FLAVIA MANGHERA AND OTHERS

on the interpretation of Article 37 (1) of the EEC Treaty,

1 — Language of the Case: Italian.

THE COURT

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

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference 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

Article 37 (1) of the EEC Treaty provides:

'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.'

By resolution dated 21 April 1970 (JO C 50 of 28. 4. 1970) the Council of Ministers of the EC agreed as follows:

'The French and Italian Governments undertake to take all necessary measures for the abolition of discrimination arising out of national monopolies of a commercial nature.

The abolition of exclusive rights relating to importation and wholesale marketing must be achieved by 1 January 1976 at the latest.'

The Italian Law No 907 of 17 July 1942 established a State monopoly for 'the manufacture, preparation, import and sale of tobacco'.

The defendants in the main proceedings, Manghera and Others, subsequent to 1 January 1970 imported tobacco manufactured abroad and, at least in part, in Member States of the Community, into Italian territory without passing through the State monopoly and without paying the duties on these products then in force.

Under Article 66 (5) of the aforesaid Law these facts constitute an offence for which Article 1 of Law No 27 of 3 January 1951 prescribes a fine which is increased when, as in the present case, cigarettes are involved which have not been manufactured in Italy.

Pursuant to these provisions criminal proceedings were brought against the parties before the Tribunale di Como.

Since the facts with which the accused were charged occurred after the exclusive rights enjoyed by the monopoly came to an end under Article 37 of the EEC Treaty, the investigating judge at the Tribunale di Como decided by order dated 30 June 1975 to stay the proceedings and to refer the following questions to the Court for a preliminary ruling under Article 177 of the Treaty:

(1) Is Article 37 (1) of the Treaty to be interpreted as meaning that, with effect from 31 December 1969 (the date when the transitional period expired), the trade monopoly should have been reorganized in such a way as to eliminate even the possibility of any discrimination being practised against Community exporters, with the consequential extinction, with effect from 1 January 1970, of the exclusive right to import from other Member States?

(2) Is Article 37 (1) of the Treaty directly applicable within the Community States and has it created individual rights which the national judicial bodies must protect?

(3) Was it in consequence possible for parties other than the monopoly, after 1 January 1970, to import into Italian territory products subject to the tobacco monopoly system embodied in Law No 907 of 17 July 1942 and coming from Community countries, subject to their paying the charges imposed on these types of product?

(4) Can the Resolution of the EEC Council of Ministers of 21 April 1970 published in the Journal Officiel of the European Communities No C 50 of 28 April 1970 vary the effect of the provisions of Article 37 (1) of the Treaty and, if the answer is in the affirmative, is it, so far as the Member States are concerned, binding in such a way as immediately to remove all restrictions on the importation of products covered by the monopoly without need for further Community legislation, thus extinguishing the exclusive rights of the tobacco monopoly?

The order making the reference was registered at the Court Registry on 7 July 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 8 September 1975 by the Council of the European Communities, on 11 September 1975 by the Commission, on 20 September 1975 by the defendants in the main proceedings, Flavia Manghera and Others, and on 23 September 1975 by the Government of the Italian Republic.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preparatory inquiry.

II — Summary of the written observations submitted to the Court

(a) The first question

The *defendants in the main proceedings, Flavia Manghera and Others,* point out that Article 37 is designed to abolish even the possibility of any discrimination.

Since the monopoly was at the centre of the variety of obstacles to the free movement of goods the authors of the Treaty had put the prohibitions relating

thereto among the rules which ensure this free movement.

Above all they directed their attention to the restrictions created by the legislative measures establishing the monopoly and it was only then that they concerned themselves with the restrictions which are the consequence of the particular and actual authority of the monopoly.

The desire to abolish also and above all the discriminatory provisions is not unconnected with the fact that to achieve this result the Member States, instead of having to abolish them, were required to 'adjust' their monopolies by structurally altering them in such a way that they could no longer practise discrimination.

This interpretation of Article 37 was adopted by the Commission in Case 82/71, *SAIL*, Rec. 1972, p. 119, where it was recognized that the exclusive right of sale *(a fortiori* of production) which national monopolies enjoy is in any event 'intrinsically likely to cause discrimination within the meaning of Article 37'. Only the abolition of the exclusive right of sale could therefore rule out any possibility of discrimination.

The obligation to restructure the monopoly before 31 December 1969 so as to avoid any discrimination follows unequivocally from Article 37 of the Treaty. If this time-limit were not observed the trade of States which did not have a monopoly would suffer a burden which this article did not authorize. The period in question was not extended under the provisions of Article 90. To accept that the tobacco monopoly is not a purely commercial monopoly is not to admit that it is governed at the same time by two different rules if these are in certain respects imcompatible *inter se.* Since the criterion of predominance is essential for the purpose of delimiting the respective spheres of application of the two seemingly concurrent rules, there can be no doubt that in the present case it is Article 37 which is applicable.

Even assuming that Article 90 could be opposed to Article 37 (1) in the present case, the overlapping between these two rules should nevertheless be construed so as to ensure that they are mutually observed. Applying the distinction employed by the Court in its case-law devoted to Articles 9 and 12 and 95 of the Treaty the less significant rule should not limit but on the contrary should supplement the prohibition contained in the basic rule. The scope of Article 90 would thus be defined in terms compatible with the prohibition in Article 37 in respect of monopolies which have not from the outset had a commercial character and also those which, when the transitional period expired, were reduced to having purely fiscal functions.

Even if Article 37 (4) in fact allowed, as regards agricultural products in general, an extension of the time prescribed in paragraph (1) and the tobacco monopoly in Italy constituted a national organization of the market, the basic Regulation No 727/70 of 21 April 1970 on the common organization of the market in raw tobacco (OJ English Special Edition, 1970 (I), p. 206) does not contain any such extension but on the contrary in its fifteenth recital declares that quantitative restrictions which formed part of a national organization of the markets in this sector are abolished.

The *Commission* is of the opinion that apart from the literal interpretation of Article 37 (1) according to which, when the transitional period has ended, no discrimination regarding the conditions under which goods are procured and marketed must existe between the nationals of Member States, the *raison d'être* of the said article is the abolition of the possibility of any discrimination.

Even in the absence of discriminatory provisions a national monopoly of a commercial character is in a position to burden and to restrict imports, for example, in order to protect national

production or in the interests of the balance of payments. The abolition of such discrimination thus requires a special provision applicable to national monopolies of a commercial character enabling such discrimination to be prevented by removing the possibility thereof.

Does this answer involve as such the abolition of the monopoly's exclusive right to import?

Article 37 provides for 'adjustment' or 'adaptation' and not abolition. Further, this exclusive right does not in itself constitute discrimination contrary to Article 37 and may continue to exist in so far as it is ensured that 'no discrimination regarding the conditions under which goods are procured and marketed exist between the nationals of Member States'. In accordance with this analysis the Commission has been led, in all its recommendations to Member States made under the provisions of Article 37 (6) before the end of the transitional period in respect of monopolies other than the French and Italian monopolies of manufactured tobacco, to regard the abolition of exclusive rights as 'the best solution because it is immediately effective in attaining the objective laid down by Article 37'.

As regards national monopolies of manufactured tobaccos of a commercial character the Commission submitted to the Council, without prejudice to the application of Article 37, a proposal based on Article 235 which treated the maintenance of exclusive rights with which it was concerned as likewise unjustified.

The development of the various monopolies confirmed this assessment. When measures ensuring the application of Article 37 were taken by the Member States with regard to the monopolies or organizations coming under the said article they related to the abolition of the exclusive rights, whereas when there was no such abolition, no adjustment in accordance with Article 37 was achieved.

In any event the maintenance of exclusive rights to import and market is contrary to the objective of the said article when such rights are held by the State, in the wide sense, which itself produces the goods in question since the monopoly cannot but prefer its own products to those of its competitors. Such a preferential system amounts to a measure having an effect equivalent to a quantitative restriction on imports. This is precisely the position in the main proceedings.

These considerations explain why the Commission has initiated numerous procedures for infringement.

Finally, for there to be a fiscal monopoly it is necessary that the objective should go beyond the simple imposition of a tax on consumption and that it cannot be achieved without the maintenance of the monopoly. The fiscal revenue from the sale of tobacco is as large if not larger in Member States where import and marketing monopolies do not exist as in those States where such monopolies do exist.

The *Italian Government* observes first of all that under national law the tobacco monopoly constitutes the very model of fiscal monopolies. Its task is, moreover, imposed on it expressly by law. It is therefore surprising that the national court limited its examination to Article 37 and dit not perceive the necessity of extending it to Article 90 (2). The task of the tobacco monopoly, which is to achieve a maximum fiscal return on the sale of cigarettes, could not be fulfilled if the monopoly were abolished for it would then become impossible to ensure sufficient control. The maintenance of the monopoly does not jeopardize the development of intra-Community trade since Italy imports tobacco manufactured in other Member States and its exports

are practically nil. Accordingly the interpretation of Article 37 is irrelevant in the present case. In any event Article 37 assumes that national monopolies of a commercial character are to continue; it further provides for the removal of any discrimination between the nationals of Member States regarding the conditions under which goods are procured and marketed. Therefore the exclusive right to import (or at least the possibility of regulating imports in order not adversely to affect the monopoly), which is an essential factor in the concept of a monopoly of commercial character, is not in itself contrary to the Treaty. This right may exist provided that its exercise does not give rise to any such discrimination. If a national of another Member State were treated with regard to the conditions of supply in the same way as an Italian, there would be no discrimination. In any event the exclusive right to import was abolished by Article 4 of the Law No 825 of 13 July 1965 which authorizes 'subject to permission from the State Administration, the importation into the territory of the Republic subject to the monopoly of quantities of manufactured tobacco in excess of 4 kg'.

(b) The second and third questions

The *defendants Flavia Manghera and others* stress that the Court has not yet had to rule expressly on the question of the direct applicability of Article 37 (1) although the Advocate-General took a favourable view of this in the case of *SAIL*. There is moreover general agreement among writers.

Article 37 should be read as follows: (a) 'when the transitional period has ended any discrimination shall be prohibited ...'; (b) 'to this end the Member States shall progressively adjust ...'. Proposition (a) has the clarity and precision which the case-law of the Community considers necessary before recognizing the direct applicability of the rules of the Treaty.

Article 37 is likewise 'clear' from the point of view of the strictness of its contents. Of course, unlike the provisions which it lays down for the abolition of the other obstacles to the free movement of goods, the Treaty does not envisage any compulsory measures to secure observance of the time-table for the abolition of the restrictions which the monopoly involves. The Treaty is based on a 'maximum limitation period'.

Article 37, moreover, has not conferred any specific legislative power on the Commission which can only make 'recommendations'.

A close examination reveals that the prohibitions relating to monopolies are as strict and as mandatory as those in Articles 9 to 35.

The very wording of the rule reveals a particularly clear political intention (no discrimination) expressing a 'strict imperative' according to the language of the Advocate-General in the case of *SAIL*. This strictness may be judged by the fact that Article 37 (2) covers a set of very diverse situations.

The *Commission* observes that the Court has already found that Article 37 (2) has a direct effect (Case 6/64 [1964] ECR 585). The only difference between this paragraph and the first paragraph is the date on which the obligation in question became absolute.

If Article 37 (1) did not have a direct effect there would be a serious disequilibrium, in the field of the free movement of goods, between the products coming under Article 30 and those coming under Article 37. Member States could, therefore, by establishing new monopolies enjoying exclusive rights, deprive individuals of the guarantees given by the direct effect of the provisions of Article 30. Regard should be had to recent developments in the case-law (Case 48/74 [1974] 1383) which show that it was not upon the

coming into effect of the common organization relating to raw tobacco, which occured after the end of the transitional period, that the French and Italian manufactured tobacco monopolies had to be adjusted (as the Commission had conceded on referring to the provisions of Article 34 (4)), but at the latest on 1 January 1970, that is to say, at the end of the transitional period.

Further it must be borne in mind that since 1 January 1970, when a monopoly has not been adjusted in an original Member State in accordance with Article 37, the exclusive right to import can no longer be employed against individuals as regards products originating in or coming from other Member States of the Community.

According to the *Italian Government,* the obligation to adjust monopolies of a commercial character is clearly in the nature of a time-table in so far as the article does not even prescribe the manner in which this adjustment has to be effected. It is whithin the limits of this interpretation that the prohibition on discrimination seems to be directly applicable and on the same basis as that on which the prohibition against introducing any new discriminatory measures is prescribed in Article 37 (2). The maintenance of the exclusive right to import does not constitute a prohibited discrimination. Any different interpretation would mean the abolition of the monopoly itself which would be contrary to the letter and the spirit of Article 37 (1).

(c) The fourth question

The *defendants Flavia Manghera and Others* observe that to understand Article 37 (1) reference must be made to Article 8 of the Treaty. To extend, therefore, the time-limit in the first of these provisions beyond the normal expiration of the transitional period it would have been necessary to amend the second provision by recourse to the procedure laid down in Article 236, which none of the legislative measures provided for by Article 189, and *a fortiori* the Resolution of the Council of 21 April 1970, could replace.

As regards the nature of this resolution it should be noted that the two proposals mentioned in the Official Journal of the European Communities originates solely from the two States concerned and the Council decided to include these declarations in the minutes of 21 April 1970. It is thus a promise by two States in default to make good the situation within a certain period. The agreement of the other States means at the most the acquiescence of a Community institution.

The *Council* observes that there are in fact two questions contained in one.

The first consists in asking whether the Resolution of the Council of 21 April 1970 amended the provisions of Article 37 (1) of the Treaty. By adopting the said resolution the Council neither could have amended nor sought to amend in any way the scope of these provisions. The powers of the Council have their origin only in the Treaty itself. Article 37 confers no power to take decisions. It is precisely for this reason that, basing itself on Article 235 of the Treaty, the Commission submitted to the Council on 4 July 1967 a proposal for a regulation and then on 18 July 1969 an amended proposal relating to national monopolies of a commercial nature in manufactured tobacco. The Council did not adopt the regulation which was proposed to it but passed the Resolution of 21 April 1970 the second paragraph of which provides for the abolition of exclusive rights to import on 1 January 1976.

The Council, when adopting this resolution, decided to include in the minutes a declaration stating that 'the provisions of the present resolution in no way prejudice the application of Article

37 of the EEC Treaty' thus ruling out any intention of affecting in any way the application and thus the interpretation of this article.

The second question consists in asking whether the effect of the resolution of the Council is to abolish the monopoly's exclusive rights to import as from 1 January 1976. The resolution cannot have this effect both by reason of its nature and its subject-matter. The resolution is a measure of a political nature not intended to have legal effects and incapable of producing any. By measures of this nature (cf. Judgments of the Court in Joined Cases 90 and 91/63 [1964] ECR 625 and Case 9/73 [1973] ECR 1135, 1160 and Case 10/73 [1973] ECR 1175, 1194) the Council expresses its intentions with regard to possible future action which it might itself pursue in the exercise of the powers which the Treaty confers on it or with regard to action to be taken by the Member States or by some of them. Such a measure may involve, as in the present case, undertakings of a political nature entered into by the Member States or imposed on them by the Council; it can, however, in no way alter the legal position in Community law, *a fortiori* in the national law of the Member States.

The first paragraph of the resolution consists in an undertaking by the Governments of the two Member States which have national monopolies of a commercial character to take all necessary measures for the abolition of discrimination arising out of these monopolies. The second paragraph states that the abolition of exclusive rights relating to importation must be achieved by 1 January 1976 at the latest.

In adopting this resolution the Council obviously assumed that the abolition of the exclusive rights to import, which it contemplated as taking place at the latest on 1 January 1976, had not automatically occurred under the Treaty as early as 1 January 1970.

The resolution was adopted on the one hand in the context of an examination of a proposal by the Commission based on Article 235 of the Treaty and on the other hand without prejudice to the application of Article 37. The objective of paragraph 2 of the resolution was therefore not to regulate the question of monopolies (either in accordance with or by way of amendment of Article 37 of the Treaty) but to indicate on a political level the action to be taken by the two Member States concerned in this matter and if appropriate by the Council itself. The resolution thus contains a political undertaking by the Italian Government to take all necessary measures for the abolition of discrimination arising from the monopoly and expresses the will of the Council and, in so far as it concerns it, the undertkaing of the Italian Government to abolish exclusive rights relating to importation by 1 January 1976 at the latest. The second paragraph does not have and could not have an immediate effect on the monopoly system in Italy and does not require any subsequent Community measure to achieve it, but national measures within the Italian legal order which the Italian Government has politically undertaken to take in good time.

The *Commission* observes that, by virtue of the second paragraph of Article 4 (1) and Articles 145 and 236 of the Treaty, the resolution in question can in no way amend the scope of the provisions of Article 37 (1).

The *Italian Government* also stresses that both for considerations of an institutional character based on Articles 4 (1), 145 and 236 of the Treaty and becuase Article 37 of the Treaty does not itself confer any special power on the Council, the latter has no power to amend the scope of this article. Nor does it have the power to enforce the abolition of the exclusive right to import as from 1 January 1976.

The Resolution of 21 April 1970 and the undertakings entered into in this by

the French and Italian Governments constitute acts of a political nature which have no legal effects of their own. An additional argument in support of the Italian Government's case lies in the fact that the reason why the Council and the Governments concerned agreed to abolish the exclusive rights to import before 1 January 1976 was that they considered that there was no obligation to abolish these rights before 1 January 1970 on the basis of Article 37 (1).

The defendants in the main proceedings, Flavia Manghera and Others, represented by Messrs Ubertazzi and Capelli, Advocates of the Milan Bar, the Italian Government, represented by Mr Braguglia, Vice Avvocato dello Stato, the Council of the European Communities, represented by Mr Fornasier, acting as Agent and the Commission of the European Communities represented by its Legal Adviser, Mr Marchini-Camia, acting as Agent, submitted oral observations at the hearing on 26 November 1975.

The Advocate-General delivered his opinion at the hearing on 13 January 1976.

Law

1 By order dated 30 June 1975, received at the Court the following 7 July, Il Giudice Istruttore presso il Tribunale di Como (Investigating Judge at the Tribunale of Como) requested the Court in accordance with Article 177 of the EEC Treaty to give a preliminary ruling on the interpretation of Article 37 (1) of the EEC Treaty and the Resolution of the Council of 21 April 1970 concerning national monopolies of a commercial character in manufactured tobacco (JO C 50 of 28. 4. 1970, p. 2).

2 The national court is concerned with the application of the Italian criminal law to facts described as constituting an infringement of the legal provisions granting an exclusive right of import to the State monopoly in manufactured tobacco.

3 The first question asks whether Article 37 (1) of the Treaty is to be interpreted as meaning that, with effect from 31 December 1969 (the date when the transitional period expired), the trade monopoly should have been reorganized in such a way as to eliminate even the possibility of any discrimination being practised against Community exporters, with the consequential extinction, with effect from 1 January 1970, of the exclusive right to import from other Member States.

4 Under Article 37 (1) Member States must progressively adjust any State monopolies of a commercial character so as to ensure that when the

transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between the nationals of Member States.

5 Without requiring the abolition of the said monopolies, this provision prescribes in mandatory terms that they must be adjusted in such a way as to ensure that when the transitional period has ended such discrimination shall cease to exist.

6 For the purposes of interpreting Article 37 as regards the nature and scope of the adjustment prescribed it must be considered in its context in relation to the other paragraphs of the same article and in its place in the general scheme of the Treaty.

7 This article comes under the title on the free movement of goods and in particular under Chapter II on the abolition of quantitative restrictions between Member States.

It applies to any body through which a Member State either directly or indirectly supervises, determines or appreciably influcences imports or exports between Member States.

8 Furthermore, Article 37 (2) refers to the obligation on all Member States to refrain as from the beginning of the transitional period from introducing any new measures likely to restrict the scope of the articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

Article 37 (3), moreover, provides that the time-table for adjustment provided for in paragraph (1) must be harmonized with the abolition of quantitative restrictions on the same products provided for in Articles 30 to 34.

9 It follows from these provisions and their structure that the obligation laid down in paragraph (1) aims at ensuring compliance with the fundamental rule of the free movement of goods throughout the common market, in particulary by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States.

10 This objective would not be attained if, in a Member State where a commercial monopoly exists, the free movement of goods from other Member States similar to those with which the national monopoly is concerned were not ensured.

11 The Council's Resolution of 21 April 1970 on national monopolies of a commercial character in manufactured tobacco itself refers to the obligation to abolish exclusive rights to import and market manufactured tobacco.

12 The exclusive right to import manufactured products of the monopoly in question thus constitutes, in respect of Community exporters, discrimination prohibited by Article 37 (1).

13 The answer to the first question should therefore be that Article 37 (1) of the EEC Treaty must be interpreted as meaning that as from 31 December 1969 every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States.

14 The second question asks whether Article 37 (1) of the Treaty is directly applicable and whether it has created individual rights which the national judicial bodies must protect.

15 The fact that at the end of the transitional period no discrimination regarding the conditions under which goods are procured and marketed must exist between nationals of Member States constitutes an obligation with a very precise objective subject to a clause postponing its operation.

16 Upon the expiry of the transitional period this obligation is no longer subject to any condition nor contingent, in its execution or in its effects, upon the introduction of any measure, either by the Community or by the Member States, and by its nature is capable of being relied on by nationals of Member States before national courts.

17 The third question asks whether in consequence it was possible for parties other than the monopoly, on the basis of Article 37 (1) of the Treaty after 1 January 1970, to import, into Italian territory products subject to the tobacco monopoly system embodied in Law No 907 of 17 July 1942 and

coming from Community countries, subject to their paying the charges imposed on these types of product.

18 This question relates to the application of Community law rather than to its interpretation and is therefore a matter for the national court.

19 The fourth question asks whether the Council Resolution of 21 April 1970 can vary the effect of the provisions of Article 37 (1) of the Treaty and, if the answer is in the affirmative, whether it is, so far as the Member States are concerned, binding in such a way as immediately to remove all restrictions on the importation of products covered by the monopoly without any need for further Community legislation, thus extinguishing the exclusive rights of the tobacco monopoly.

20 Under the terms of the said resolution 'the French and Italian Governments undertake to take all necessary measures for the abolition of discrimination arising out of national monopolies of a commercial nature. The abolition of exclusive rights relating to importation and wholesale marketing must be achieved by 1 January 1976 at the lates'.

21 The said resolution which basically expresses the political will of the Council and the French and Italian Governments to put an end to a state of affairs contravening Article 37 (1), cannot engender effects which can be used against individuals.

In particular the time-scale referred to in the resolution cannot prevail over that contained in the Treaty.

22 The fourth question must therefore be answered in the negative.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings 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 Giudice Istruttore presso il Tribunale di Como by order dated 30 June 1975, hereby rules,

1. **Article 37 (1) of the EEC Treaty must be interpreted as meaning that as from 31 December 1969 every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States.**
2. **When the transitional period ended Article 37 (1) was capable of being relied on by nationals of Member States before national courts.**
4. **The Council Resolution of 21 April 1970 does not alter the scope and the provisions of Article 37 (1).**

Lecourt Kutscher Donner

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 3 February 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 13 JANUARY 1976

My Lords,

This case arises from the circumstance that there exists in Italy a State tobacco monopoly. That monopoly is in the hands of a body called the 'Amministrazione Autonoma dei Monopoli di Stato' (or 'AAMS'). The statute creating the monopoly, Statute No 907 of 17 July 1942, conferred on the AAMS exclusive