OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 29 January 1985 *

Mr President,
Members of the Court,

1. Introduction

1.1. *Subject of the action*

This case deals only with one part of Commission Decision 82/506/EEC of 15 July 1982, of which the applicants in Joined Cases 240/82 *et seq.* sought as their main claim the annulment in whole or in part. In this case the Nederlandse Sigarenwinkeliers Organisatie (NSO) seeks primarily a declaration that Articles 1 (1), 1 (2) and 4 of that decision are void in whole or in part. Those articles provide respectively that the specialist retailers' bonus scheme of 4 December 1974 and the Stichting Sigarettenindustrie (SSI) master agreement of 20 December 1976, in so far as it requires the parties to observe the specialist retailers' bonus scheme, constitute infringements of Articles 85 (1) of the Treaty establishing the European Economic Community (Article 1 (1)) and that the Stichting Sigarettenindustrie and the undertakings listed in Article 1 (the members of the Stichting Sigarettenindustrie, Tabaksfabriek Gruno BV and Imperial Tobacco (Holland) BV) are ordered to cease to apply the agreements referred to in Article 1 without delay (with regard in particular to the specialist retailers bonus scheme and the arrangements regarding its observation (Article 4)). According to the application Article 1 (2) of the decision, whose (partial) annulment is also sought and in which the agreements made in connection with the increase in excise duty and prices on 1 January 1980 are held to be infringements of Article 85 (1) of the EEC Treaty, is important only in so far as those agreements envisage the continuation without change of the bonus scheme (see point 52 of the decision). For a proper understanding of this main claim it should also be stated that Article 3 of the decision refuses exemption for the agreements in question under Article 85 (3) of the EEC Treaty. In the alternative the applicant claims that the Court should declare Articles 3 and 4 of the decision void in whole or in part.

1.2. *The specialists retailers' bonus scheme*

The content of the specialist retailers' bonus scheme and the part played by the Netherlands authorities in its establishment are extensively described and assessed in paragraphs 41 to 49, 98 to 105 and 132 to 138 of the contested decision. Under the bonus scheme specialist retailers who are eligible under the conditions laid down are paid a fixed bonus each year for every 1 000 cigarettes bought from contracting parties. That bonus has been regularly increased and in 1978 amounted to 75 cents per 1 000 cigarettes; that amount remained unchanged in 1980. The total amount necessary for the payment of the bonus is borne by manufac-

* Translated from the Dutch.

turers and importers *pro rata* according to their sales through specialist retailers. The scheme contains a number of conditions which must be met by specialist retailers in order to be eligible for the bonus, such as a minimum range of brands 'without any discrimination between the parties', cooperation in the introduction by parties of new brands, a minimum sales figure and obligations regarding advertising and administration.

1.3. *The relevant provisions of Community and national law*

For a brief summary of the relevant Community directives and of the Netherlands excise legislation and price measures reference may be made to my Opinion delivered today in Joined Cases 240/82 *et seq.*

1.4. *The main objections of the Commission*

For an outline of the principal discriminatory effects (between retailers) and effects restrictive of competition (between manufacturers, importers and wholesalers) attributed in the decision to the scheme, reference may be made to paragraph 99 (a) and (b) of the decision. The remainder of that paragraph provides further details of those main objections together with a number of other effects restrictive of competition attributed to the scheme. Exemption under Article 85 (3) of the EEC Treaty was refused in particular because in the Commission's view the scheme does not contribute to improving the distribution of the products in question (paragraphs 133 to 137 of the decision) and because the scheme's possible advantages mainly benefit manufacturers and importers of cigarettes and cannot be regarded as indispensable for the attainment of the objectives envisaged. Furthermore, the disadvantages resulting from the scheme, which fall mainly on retailers, are of such a nature that on the one hand they outweigh its benefits and on the other hand they do not allow consumers to derive a fair advantage so as to compensate for those disadvantages (paragraph 138).

1.5. *The submissions made*

The applicant's main submission is that the conditions for the application of Article 85 (1) were not met. First, effective competition was impossible, owing to the effects of the Netherlands legislation and of the pressure exerted on SSI by the Netherlands authorities. Secondly, competition is not significantly restricted by the scheme, since it applies only to a specific group of retailers who account for only about 20% of total sales. Thirdly, the scheme has no effect on trade between Member States.

In its alternative submission the applicant alleges infringements of Articles 85 (3) and 190 of the EEC Treaty, inasmuch as the Commission refused to grant an exemption, did not consider the applicant's arguments, and made mistakes and drew incorrect conclusions in establishing the facts.

During the oral procedure the applicant laid particular emphasis on its argument that, because of their weak position, retailers are caught between on the one hand the fixed retail price set under the excise duty legislation and on the other the manufacturers and wholesalers who try to keep that retail price as low as possible (because of the multiplier effect of high *ad valorem* duties) and to earn as much as possible

themselves. The encouragement of the scheme by the authorities was intended to protect retailers in those circumstances. The conditions of the bonus scheme do not affect competition and differ fundamentally from systems involving discounts on total sales, against which the Commission adopted a number of decisions in the early 1970s. Finally, it was again disputed that the scheme had any significant effects on competitive positions.

2. Assessment of the submissions

2.1. *The main submission*

2.1.1. With regard to the argument that the relevant Community and national fiscal and price regulations and the pressure exerted on Stichting Sigarettenindustrie by the authorities left no room for effective competition it is sufficient to refer to my Opinion delivered today in Joined Cases 240/82 *et seq.* As I have already stated in that Opinion, the Netherlands tax and price legislation does in fact permit effective competition on margins, particularly on retail margins, important from the point of view of competition. With regard to a particular form of competition on margins, that is also indirectly confirmed by the bonus scheme in issue (in excluding that form of competition by means of a uniform scheme it presupposes the possibility of competition on margins).

The influence of the Netherlands authorities on the bonus scheme is recognized by the Commission (see paragraphs 41, 42, 91 and 93 of its decision). As the Commission correctly points out, the applicant has however failed to prove that the Netherlands authorities also pressed for the establishment of a collective scheme of such a nature. The Commission also points out that it has not been shown that the Netherlands authorities insisted on the maintenance of the scheme after the Commission's objections became known in 1979, although the scheme was in fact maintained.

To the Commission's argument it may be added that, objectively speaking, it seems unlikely that the Netherlands authorities would have pressed for a scheme of such nature and effect, inasmuch as that scheme, although providing advantages for the retailers concerned, discriminates against the many specialist retailers not covered by it (half of the total number) and contains conditions favourable to the manufacturers and importers which took part. Finally, the fact that pressure was exerted by the authorities cannot relieve the persons concerned of their responsibility for the scheme which was established. That first argument must therefore be rejected.

2.1.2. In a second argument regarding the importance of the alleged restrictions of competition, the applicant argues that even if the relevant legislation and its application do not hinder competition, the bonus scheme is not nearly of such far-reaching significance as the agreements dealt with in the *Fedetab* case. The bonus scheme relates exclusively to the retail trade and in fact applies only to a specific group which according to the applicant accounts for about 20% of total sales. Furthermore, the extra discounts granted according to the scheme amount to no more than about 0.6% of the retail price and 7% of the margin.

In so far as the conditions for the grant of the bonus are concerned, the minimum sales figure required is not at all unusual and is not objectionable from the point of view of competition law, since large buyers present more interest for suppliers, *inter alia* as a

channel for advertising. The restriction of the scheme to the specialist retailers described in Article 1 does not prevent businesses not covered by the scheme from negotiating individually or collectively with suppliers.

With regard to the Commission's view that the scheme relieves the specialist retailers concerned of any incentive to attempt individually to obtain extra discounts, the applicant argues that the system introduced by the bonus scheme cannot be compared with schemes granting discounts on total sales, which have repeatedly been declared unlawful by the Commission (see for example the decision of 29 December 1970, 'ceramic tiles', Official Journal 1971, L 10). Differences lie in particular in the fact that (a) the specialist retailers' bonus scheme permits individual discounts and (b) the amount of the bonus is neither progressive nor cumulative.

According to the applicant the obligation to stock a minimum range of brands has in practice only very restricted financial consequences for retailers (for brands which are not in demand a stock of two or three packets is adequate). Retailers are moreover free to build up a large stock of a particular brand in order to benefit from discounts paid on it. Similarly, the obligation to cooperate in the introduction of new brands is simple to fulfil.

The obligation to reserve a quarter of its display and counter space for the display of cigarettes is nothing out of the ordinary for a specialist tobacconist. Sufficient room is left over for the concentration of efforts on a particular product.

The obligation to buy a minimum quantity of cigarettes each year is only a condition of admission to the bonus scheme, and has no effect at all on relations with suppliers.

On that basis the applicant denies that the scheme significantly restricts competition between participating suppliers. With regard to the situation of suppliers who do not participate in the agreement, the NSO is unable to see how the bonus scheme can be disadvantageous for them. Those third parties are free to conclude individual agreements for the payments of discounts of the same amount or more. Here again the Commission has incorrectly regarded the effects of the scheme as equivalent to those of a system for the grant of discounts on total sales.

2.1.2. (continued) *The defence of the Commission and assessment of the submissions*

In the Commission's view the restriction of competition lies in particular in the fact that the scheme makes it pointless for a retailer to make efforts for a particular supplier, since the bonus is paid on the basis of total sales, regardless of the supplier and the brand purchased. I think this argument is well founded. Since, as the applicant itself points out, pressure on the part of the authorities to do 'something extra' for retailers was necesary, it must be assumed that the implementation of the authorities' desire in a collective and uniform manner leaves little room for additional individual discounts for extra efforts with regard to particular brands. In that respect the Commission has also stated without contradiction that it was two years after the Commission had opened the proceedings in this case that the first individual discount arrangement came into effect. The scheme established by manufacturers and importers therefore does restrict to a significant degree the possibility for suppliers, by means of individual discounts for extra efforts (individual margin competition), to increase their market share at the cost of their competitors.

That conclusion with regard to the internal effects of the scheme is not affected by the fact that the scheme in question does, as the applicant argues, differ in some respects from the classic 'total sales rebate agreement' [Gesamtumsatzrabattkartell] as initially developed above all in the Federal Republic of Germany. The scheme differs in particular from the 'closed' type of total sales rebate agreement [1] inasmuch as it restricts the opportunity of other suppliers to compete by offering the same or even higher discounts only by imposing additionalobligations such as minimum sales of cigarettes bought from suppliers who are party to the agreement, the obligation to carry a range of brands and the display obligation. Other suppliers will not therefore, by offering discounts, even discounts higher than those provided for in the scheme, be able to induce specialist retailers covered by the scheme to substitute their brands for the brands of one or more of the suppliers described in Article 1 (1) of the decision, who constitute the great majority of suppliers. That first distinction between the scheme and the closed type of total sales rebate agreement is reinforced by the fact that the discount scheme in question, unlike many total sales rebate schemes, does not provide for progressive rebates which increase according to the volume of purchases from participating suppliers. As has been pointed out, the scheme does provide for an obligation, unassailable by other suppliers, to achieve a minimum level of sales of the brands of participating suppliers, the effect of which may be compared with the cumulative effect of total sales rebate agreements. In its internal effects the scheme in question therefore does not differ significantly from a total sales rebate agreement, and because of the additional obligations the scheme, in spite of significant differences in the discount system itself, has very similar effects with regard to other suppliers.

As a result of my assessment of the first part of the second argument I am of the view that the Commission is correct to regard the obligations to carry a minimum assortment of brands, to reserve display and counter space for the brands of participating suppliers and to achieve a minimum level of sales of their brands as substantial restrictions of competition. That is certainly the case if the effect of those obligations is considered in conjunction with the effects of the collective and uniform discount scheme, as I have indicated above.

I would be less severe than the Commission in attributing effects restrictive of competition to the obligation to cooperate in the introduction of new brands. The freedom of the retailers concerned with regard to their sales policy is indeed limited by that obligation, but it seems to me to restrict competition with other suppliers to a lesser degree than the obligations referred to above.

Finally, I should point out that the applicant does not in fact dispute the fact that, as appears from paragraphs 43 and 99 (b) of the decision, the bonus scheme discriminates against about half of the total of some 4 000 specialist retailers in the Netherlands, along with grocers, chain stores and supermarkets, which account for a substantial share of consumer sales of cigarettes in the Netherlands. The economic justification offered by the applicant for that discrimination, which it admits exists, is relevant only in the context of Article 85 (3).

In conclusion I therefore think that the Commission is correct to hold that a scheme such as this, to which almost all manufac-

1 — In the 'closed' type of agreement purchases from non-participating undertakings are not included in the calculation of the discount.

turers and importers (together commanding more than 90% of the total turnover in the Netherlands) are party and the implementation of which affects 20% of the total domestic turnover, significantly restricts competition between undertakings. In my view the second argument of the applicant must therefore also be rejected.

2.1.3. *The (possible) effect on trade between Member States*

With regard to the third argument put forward by the applicant in its first submission I can again refer for the most part to my Opinion in Joined Cases 240/82 etc., since the applicant in this case also refers to the argument made by the applicants in those cases.

With reference to the bonus scheme in particular, in its application the applicant points out in the first place that cigarettes imported by manufacturers and importers 'benefit' from the bonus scheme in the same way as cigarettes manufactured in the Netherlands, and repeats its argument, which I have already stated to be erroneous, that extra discounts are not permitted under Netherlands law. In reply to the argument that the bonus scheme applies equally to imported cigarettes, the Commission correctly points out that the applicant thereby implicitly admits that the bonus scheme also restricts competition in imported cigarettes, which it had denied.

The applicant argues secondly that if the bonus scheme has any effect at all on imports, that effect is in any event not 'perceptible', as is required for the application of Article 85 (1). Its remarks on this point are based primarily on the argument which I held to be unsound in my Opinion in Joined Cases 240/82 etc., to the effect that foreign cigarettes brought on to the Netherlands market by way of 'intra-group' imports cannot be regarded as imported cigarettes. If such intra-group imports are included, it follows from the figures given in paragraph 11 of the decision that, accepting the other estimates given in the application, [2] the scheme affects 20% of all imports, and not merely 2%, as the applicant asserts, and the imports affected by the scheme amount not to about 0.5% (as the applicant asserts) but to about 5% of total sales in the Netherlands. [3] In financial terms that level of sales of imported cigarettes represents a few thousand million guilders. In my view such an effect must unquestionably be regarded as perceptible. In its defence the Commission refers to the NSO's incorrect basis of calculation and goes on to point out that the applicant's argument also ignores the potential effects of the bonus scheme on imports. Under Article 85 (1) a potential effect on trade between Member States is in fact sufficient, and the Commission correctly points out that the collective bonus agreement would prevent more specific bonuses from affecting the market share of imported cigarettes. I have already dealt with this point at length in discussing the restriction

2 — Those estimates indicate in particular that sales to consumers by specialist retailers covered by the bonus scheme account for about 20 % of the total sales of cigarettes in the Netherlands. The applicant puts intra-group imports at about 90 % of total imports, and 'inter-group' imports at about 10 %.

3 — On the basis of the figures given in paragraph 11 of the decision, which are not disputed by the applicant, I think that this last figure should in fact be somewhat higher.

of competition resulting from the scheme. In my view this argument must therefore also be rejected.

2.2. *The alternative submission* (Infringement of Articles 85 (3) and 190 of the EEC Treaty)

2.2.1. In its alternative submission the applicant states in the first place that it is not true that the bonus scheme prevents retailers from obtaining extra rebates (paragraph 133 of the decision). The scheme is only intended to guarantee to retailers a minimum bonus. In this Opinion I have already explained in another context why that argument must be considered economically unsound.

2.2.2. The applicant argues in the second place that in paragraph 134 of its decision the Commission fails to appreciate that the obligation to obtain at least 60% of turnover from sales of tobacco products relates not to cigarettes alone but to all tobacco products. That reproach finds no support in the wording of paragraph 134. The applicant's argument that that requirement does not in itself discriminate against small retailers may be correct. That, however, is not asserted in the paragraph of the decision referred to. The applicant does not deny that as a result of the minimum sales requirement small retailers cannot in fact benefit under that criterion of the specialist retailers' bonus scheme.

2.2.3. The applicant argues in the third place that the obligation to stock a minimum range of brands, dealt with in paragraph 135 of the decision, is inherent in any specialization. Contrary to what the Commission suggests in that paragraph, retailers are also entirely free to decide how many cigarettes of each brand to carry in stock. The resulting increase in costs referred to by the Commission is only a small one (but the applicant thus does not deny that it exists). With regard to this argument I think it is sufficient to state that in paragraph 135 of its decision the Commission simply asserts that the obligation referred to does not necessarily contribute to improvement in the distribution of the products concerned. The applicant's argument that this obligation, like that dealt with in paragraph 134 of the decision, is inherent in any specialization does not permit the inference that in the exercise of its discretion in the application of Article 85 (3) the Commission could not come to the conclusion indicated in paragraph 135.

2.2.4. In its application the applicant argues in the fourth place that retailers do not consider the display obligations and obligations to introduce new brands discussed in paragraph 136 of the decision to be particularly onerous. If the collective bonus scheme were replaced by individual arrangements retailers would have to accept much more extensive display obligations. Furthermore, it is in fact such display conditions and obligations to introduce new brands (which are only possible under a collective scheme) which permit a business to attain the status of a specialist retailer of cigarettes. In this connection the Commission has adopted an attitude different from that which it displays in dealing with selective dealer networks and exclusive dealing agreements. In its defence the Commission correctly states that in the application of Article 85 (3) it is irrelevant that an arrangement is not onerous for the

retailers concerned. It also points out that comparison with exclusive dealing agreements is not appropriate since they are vertical bilateral agreements (and deal moreover with the products of a single manufacturer), while this case concerns a collective horizontal agreement with vertical effect (covering the products of all participating manufacturers and importers). [4]

2.2.5. Fifthly, the applicant states that the minimum yearly turnover requirement corresponds to the policy of the Netherlands authorities to encourage viable retail trade. Here too, they say, the Commission's point of view in this case differs in particular from that displayed in the regulation granting block exemption for exclusive dealing agreements. On this point I should first observe that the Commission has correctly argued in another context that the applicant has not shown that the Netherlands authorities in fact endorsed the discriminatory effects of that turnover requirement. I have already discussed that aspect above. The Commission also points out that comparison with its views on exclusive dealing agreements is inappropriate. This argument must therefore also be rejected.

2.2.6. More generally (point 40 of its application), the applicant's sixth argument is that the bonus scheme helps to maintain a network of specialist retailers offering a variety of tobacco products, to the advantage both of manufacturers and importers and of consumers, while its members do not consider themselves prejudiced. In the first place that argument ignores the Commission's objections to the detailed implementation of the scheme, which I have already held to be well founded. Secondly, the Commission points out in this respect too that in the application of Article 85 (3) it is not sufficient that the retailers do not consider the bonus scheme to be onerous. Thirdly, in my view the applicant has not shown that the Commission could not in the exercise of its discretion reasonably decide that it did not appear that the scheme, with all its inherent drawbacks referred to above, was indispensable for the continued existence of specialist retailers. In that respect the Commission also correctly refers to the exclusion by the scheme of about half of the specialist retailers.

2.2.7. Finally, in point 41 of its application the applicant further argues that in any event 'economic progress' as referred to in Article 85 (3) is furthered by the bonus scheme. In particular the scheme contributes to the prevention of further socio-economic deterioration through job losses in a particular sector, which according to the judgment of the Court in the *Metro* case (Case 26/76 [1977] ECR 1875, in particular at paragraph 43) falls within the meaning of the term 'economic progress'. Assuming that argument to be well founded with regard to the specialist retailers covered by the scheme, the scheme in fact increases the danger of job losses in the 50% of specialist retailers who are excluded from the scheme and the Commission did not therefore in my view have to deal expressly with that aspect in its decision. The Commission is moreover correct to regard the stabilizing effect of the scheme, on which the applicant relies in

4 — Clarifications in brackets added by me.

another connection, as confirmation that the scheme in question is intended to consolidate the market share of a restricted group of undertakings.

2.2.8. In concluding my discussion of the applicant's alternative submission I should add that it is striking that its arguments are directed above all towards showing that the scheme is not onerous for the retailers themselves and that the concomitant obligations are inherent in its nature and therefore indispensable. The applicant makes virtually no serious attempt to show that the scheme does in fact fulfil the first two (positive) conditions for exemption laid down in Article 85 (3), contrary to the Commission's view. Its most important arguments in that respect are merely subsidiary in nature and not fully developed. They are to the effect that the favourable treatment of half of all specialist retailers on the condition that they stock a broad range of brands contributes to the stabilization of the retail trade, promotes employment and, in the interests of the manufacturers and importers concerned and of consumers, ensures the continued existence of an adequate number of sales outlets with a broad variety of stock. The fact that the scheme thus promotes stabilization by tending to freeze out specialist retailers not covered by it, endangers employment in those businesses and impedes the access of other suppliers to the market certainly justified the Commission in deciding, in the exercise of its discretion, that the scheme did not fulfil the positive conditions for exemption. In view of the fact that a large number of specialist retailers have remained in existence in spite of their exclusion from the bonus scheme the Commission was also justified in drawing the subsidiary inference that the scheme was not in fact indispensable for the continued existence of specialized retailers. The basis of the whole argument, that specialist retailers obliged to carry a broad range of stock (including all the brands of the participating suppliers) are necessary for optimal cigarette distribution, is not really discussed by the applicant and seems to be contradicted by the much greater market share held by retailers who do not specialize in tobacco products. The only point which seems to be established by the documents before the Court is the fact that the scheme is to the advantage of the participating suppliers and retailers. Under Article 85 (3), however, the existence of such advantages for certain undertakings associated in a cartel is not sufficient to justify exemption. With regard to the requirement that consumers be allowed a fair share of the alleged benefits of the scheme the Commission correctly refers to the Court's statement in the *Fedetab* judgment that 'the number of intermediaries and brands is not necessarily an essential criterion for improving distribution within the meaning of Article 85 (3)'. According to the Commission it may be doubted whether consumers derive any such benefits where they themselves must bear the costs of the maintenance of an extensive distribution network (of large specialist retailers with a broad assortment of stock): manufacturers will certainly pass on those costs in retail prices (which although fixed are as a rule freely set by them). In the Commission's view consumers must be free to decide where they wish to buy cigarettes.

3. Summary and conclusion

In summary it appears from my analysis of the application that to a large extent it raises the same arguments as were put forward by

the applicants in Joined Cases 240/82 etc. In my Opinion in those cases I have already found those arguments to be unsound. In so far as the applicant, in its application, has raised specific arguments in favour of the specialist retailers' bonus scheme at issue here, after a full analysis I have rejected each of them as unfounded.

I therefore propose that the Court:

(1) Dismiss the applicant's main and alternative applications for the annulment in whole or in part of Article 1 (1) and (2) and Article 4 or of Articles 3 and 4 of Commission Decision 82/506/EEC of 15 July 1982 (Official Journal, L 232, p. 1);

(2) Order the applicant to pay the costs of the case, including the costs of the application for the adoption of interim measures.

The order that the applicant pay the costs of the application for adoption of interim measures, in which it was successful, is in accordance with the Court's interpretation of Article 69 (2) of the Rules of Procedure. On that point I may refer by way of example to the judgment of the Court of 17 January 1984 in Joined Cases 43 and 63/82, at paragraphs 63 and 64.