imported products to be marketed in other ways.

2. In order to decide whether legislation of a Member State which, as regards the sale of tobacco products to the consumer, imposes a fixed price freely chosen by the manufacturer or importer constitutes a measure having an effect equivalent to a quantitative restriction, the national court must investigate whether, having regard to the fiscal restraints on trade in the products concerned, such a system of imposed prices is in itself likely to hinder, directly or indirectly, actually or potentially, trade between Member States.

3. Whilst it is true that Member States may not enact measures enabling private undertakings to escape the constraints imposed by Article 85 of the Treaty, the provisions of that article belong to the rules on competition "applying to undertakings" and are thus intended to govern the conduct of private undertakings in the common market. They are therefore not relevant to the question whether national legislation which, as regards the sale of tobacco products to the consumer, imposes a price fixed by the manufacturer or importer is compatible with Community law.

In Joined Cases 177 and 178/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank [District Court], Utrecht, for a preliminary ruling in the criminal proceedings pending before that court against

JAN VAN DE HAAR AND KAVEKA DE MEERN BV

on the interpretation of Articles 5, 30 and 85 of the EEC Treaty,

THE COURT (First Chamber),

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

The main proceedings before the national court are criminal proceedings which were brought before the Arrondissementsrechtbank, Utrecht, by the Public Prosecutor of that town against Kaveka de Meern BV, a company whose business is the wholesale of foodstuffs, and its former general manager, Jan van de Haar. The accused are charged with infringing the prohibition contained in Article 30 of the Wet op de Accijns van Tabaksfabrikaten [Law on the Excise Duty on Tobacco Products, hereinafter referred to as "the Tobacco Excise Law"] 1964.

The part of that article relevant in this case is the first sentence, which reads as follows:

"It shall be an offence to sell, offer for sale or supply tobacco products to persons other than resellers at a price lower than that appearing on the excise label."

The accused are charged with, *inter alia,* offering for sale a number of tobacco products at prices lower than those appearing on the excise labels to persons of whom some may not be resellers.

The customers of Kaveka, which is engaged in particular in the wholesale of tobacco products (cigars, cigarettes and pipe tobacco), are resellers and persons who use the products which they buy from Kaveka for business or trade purposes. The last category of persons includes bulk buyers who are not resellers. It appears that Kaveka's business practice is not to check at the cash-desk whether the customer is a reseller of the tobacco products which he has in his trolley. The company consciously takes the risk that the buyer will not use the goods purchased by him for business or trade purposes. Kaveka operates a system of entrance cards and these may be obtained by businesses and institutions such as old people's homes.

The defence advanced by the accused is that the alleged offences are not punishable since Article 30 of the Tobacco Excise Law is contrary to Articles 5, 30 and 85 of the EEC Treaty. They contend that the abuse of a dominant position entailed by the compulsory price system may affect trade between Member States and impede imports. In addition, the fact that the excise duty is subject to an absolute minimum leads to the formation of an absolute minimum sale price, which is contrary to Article 30 of the Treaty.

Considering that the issue before it concerned the interpretation of Community law, the Arrondissementsrechtbank decided, by judgments of 1 June 1982, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. In several decisions on Article 30 of the EEC Treaty the Court of Justice has declared that any commercial provision adopted by the Member States which is capable of hindering intra-Community trade, directly or indirectly, actually or potentially, is to be considered a measure having an effect equivalent to quantitative restrictions. This formulation appears to come very close to what the Court has said with regard to the concept of 'agreements ... which may affect trade between Member States within the meaning of Article 85 (1) of the EEC Treaty in Cases 56 and 58/64 *(Consten and Grundig* v *Commission* [1966] ECR 299) and in Case 56/65 (*Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235), although the term used in those cases is 'may affect' trade between Member States whereas, for example, in the *Dassonville* judgment the term 'hinder' is used. In a case where the national court has to judge whether a legal provision of a Member State which applies without distinction to imported and domestic products is a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, must it in its judgment take into account the case-law of the Court of Justice concerning Article 85 of the EEC Treaty and more particularly the interpretation given by the Court to the expression 'may affect trade between Member States', from which it is clear that the criteria bringing the case within the prohibition of Article 85 (1) are satisfied if it is established that a commercial provision is likely to deflect trade from its natural course, or must the national court give a more independent meaning to Article 30 of the EEC Treaty to the effect that such a legal provision only constitutes a restriction on trade and thus a measure having equivalent effect within the meaning of Article 30 if the court is able to find on the basis of the factual circumstances that the importation of goods from other Member States may be restricted by that legal provision?

2. Must a legal provision of a Member State which applies without distinction to domestic and imported products also be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty where it is clear that that provision restricts imports into a Member State only to a very small degree and other possibilities remain for the marketing of products from other Member States?

3. Must the national court in its inquiry into the restrictive effects on trade of a legal provision which applies without distinction to the importation of products from other Member States and the marketing of domestic products have regard solely to the effects of that legal provision or must it also take account of the fact that other restraints on trade exist on the relevant market as a

result of the tax laws of the Member States and the differences between them?

4. Does it make any difference to the reply to be given to the previous question if in the opinion of the national court the relevant legal provision has, taken by itself, no restrictive effect at all on trade?

5. If, as a result of a legal provision of a Member State, a system of vertical price-fixing exists to which all the traders concerned are bound and departure from which constitutes an offence, can an individual who has infringed such a provision rely before the national courts upon the incompatibility of that national provision with Article 5 (2), in conjunction with Article 85, of the EEC Treaty?"

The judgments referring the questions to the Court were received at the Registry on 14 July 1982. The written procedure followed the normal course.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were submitted on 18 October 1982 by the accused in the main proceedings, represented by A. F. de Savornin Lohman, of the Rotterdam Bar, and on 24 September 1982 by the Commission of the European Communities, represented by its Legal Adviser, Bastian van der Esch, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. After establishing that no Member State or institution involved in the proceedings had requested that the case should be decided in plenary session, the Court assigned the cases, by order of 23 February 1983, to the First Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

By order of the Court (First Chamber) of 10 March 1983 the cases were joined for the purposes of the procedure and judgment.

II — Observations submitted to the Court

1. Observations submitted by the accused in the main proceedings

First question

The accused in the main proceedings contend that in a related case (Case 13/77, *INNO* v *ATAB*, [1977] ECR 2115, at paragraph 28) the Court used the *Dassonville* criterion, including the term "hinder", when dealing with Article 86. The Court has always given the same meaning to the term "affect" trade between Member States in Articles 85 and 86. Therefore there is no justification for assuming, as the national court does, that different approaches may be adopted towards the term "affect" trade between Member States, depending on whether Articles 85 and 86 or Article 30 are in issue. There is no reason for drawing any fundamental distinction, either in general or specifically in this case.

In this context it is relevant that the Court has held that agreements and concerted practices between undertakings belonging, as parent company and subsidiaries, to the same concern are not caught by Article 85. It is common

knowledge that on many product markets the greater part of internal trade takes place within a group of associated companies. It is difficult to believe that in order to decide whether trade between Member States may be affected the Court intends to apply fundamentally different criteria depending on whether agreements between independent undertakings or undertakings in the same group are involved.

Second question

This question is related to the first in so far as an affirmative reply to the first question would tend to indicate that the requirement of an appreciable effect on trade may also exist when Article 30 is applied. A number of judgments of the Court concern what is called the requirement of an appreciable effect on trade for the purposes of Article 85. Reference may be made to the judgment in Case 58/80 (*Dansk Supermarked* v *Merco* [1981] ECR 181), in which the Court held that a commercial arrangement directed against an odd lot of only 1 000 dinner services is quite sufficient to render Article 30 applicable. That shows that if the Court intends here to apply the test of appreciable effect the threshold has in fact been set very low.

In the past the Commission has repeatedly shown that it considers rules such as those contained in Article 30 of the Tobacco Excise Law to be contrary to Article 30 of the Treaty. As regards the Netherlands provision in question, reference may be made to the Commission's comment in paragraph 107 (a) of its SSI decision of 15 July 1982 (Official Journal 1982, L 232, p. 1):

"... subject ... to observance of the relevant national law (in so far as it is not contrary to Community law)."

By their nature the national rules at issue in this case apply to all undertakings operating on the tobacco market. The importance which the Commission attaches to the general territorial scope of a measure is also shown by its SSI decision, namely at paragraph 99 (1):

"The restrictions of competition are appreciable because they are carried out by almost all the undertakings in this sector of the economy."

In fact Article 30 of the Tobacco Excise Law applies not to "almost all" but to all undertakings and at all relevant levels of trade.

Third question

The accused argued that in the Court's view, as expressed in paragraph 38 of the judgment in *INNO* v *ATAB,* the national court must assess the restrictive effect on trade of the national measure in question by reference to the entire fiscal arrangements applying to tobacco products and by reference to the obstacles to trade which may result from those arrangements *per se.* Two points should therefore be taken into account. First, the restrictive effect on trade of a particular national measure may, though relevant in itself, be temporarily overshadowed by the restrictive effect on trade of other existing rules. In this

regard it is relevant that, as appears from the SSI decision, the Commission is at present intent upon eliminating the greater part of those other measures having a restrictive effect on trade. Secondly, where existing obstacles already inhibit the free play of competition at one level, additional obstacles at another level are felt even more sharply.

Lastly, the national court must examine the situation on the market in tobacco products in the absence of the restrictions on competition which will be prohibited under the SSI decision or the Court's judgment in this case. It may be that, in view of the technical aspects of attaching excise labels, parallel imports at the retail level are very difficult at the moment pending the final phase of harmonization. It is a different matter as regards competition within a brand, however. It is not clear why this should be made impossible from the outset at the level of trade at which Kaveka operates.

It appears from its comments that the national court is inclined to think that since elasticity of demand for cigarettes is low (which is its supposition, but by no means proved) price competition is made difficult. That view does not accord with the Commission's findings in, for example, paragraph 96 of its SSI decision, particularly the passage dealing with SSI's argument that a drastic increase in tax would sharply reduce sales. That proves the existence of price elasticity on the cigarette market, even at consumer level.

Fourth question

The purpose of this question is not immediately clear to Kaveka, which reminds the Court of the test of appreciable effect as defined by the Commission in the proceedings against *van Landewyck*. Furthermore, in order to determine whether a restrictive effect is appreciable it may be necessary to take into consideration the fact that identical prosecutions have been brought against 17 other comparable undertakings.

Fifth question

In Kaveka's view, it is this question which essentially determines the importance of this reference and distinguishes it from Case 13/77 (*INNO* v *ATAB*). In that case it was established *inter alia* that Member States may not enact measures enabling private undertakings to escape the constraints of Articles 85 to 94 (paragraph 33). However, in its first question the national court focused its attention on Article 86 on the assumption that a dominant position was created or encouraged by similar Belgian rules. Consequently, paragraph 1 of the operative part of the Court of Justice's judgment in that case contemplates Article 86 only.

A national legislative provision which compulsorily fixes the retail price at the price quoted by the manufacturer or importer technically amounts to collective vertical price-fixing. One way in which an affirmative answer to the question might be important is that — assuming this to be a case of a quasi-agreement between undertakings imposed by the State — the judgments of the Court and the decisions of the

Commission on price agreements having territorial effect apply. Those judgments and decisions establish a presumption that where prices are imposed vertically a national obstacle to imports is created. On the question of proof, in so far as the existence of an outright prohibition can be doubted, the burden is not on the person concerned to demonstrate that an obstacle to imports may arise but on the State to prove that its measure does not and cannot create such an obstacle.

By introducing and enforcing the prohibition contained in Article 30 of the Tobacco Excise Law the Netherlands has instituted a compulsory price system which would be automatically prohibited if it were set up by undertakings. It would not be eligible for exemption. There seems to be no doubt that, although the second paragraph of Article 5 of the Treaty, considered in isolation, is not sufficiently specific to be directly applicable, it may none the less become specific when considered in direct relation with another provision of the Treaty. That was made clear by the Court in paragraphs 30 and 31 of its decision in *INNO* v *ATAB*. There is little doubt either that the same holds true of Article 5 when considered together with Article 85. That relationship has already been pointed out by the Commission.

If that argument is not adopted a lacuna is likely to be created. At the end of the introduction to paragraph 100 of the SSI decision the Commission expresses the view that the undertakings cannot rely on, *inter alia*, the Netherlands legislation "since the agreements are private in character and were not contracted in pursuance of any statutory requirement imposed by the Government". On that reasoning, therefore, if there had been a legislative basis for the agreements in issue no action would have been taken against the undertakings. If therefore no action could be taken in this case against the national authorities on the basis of the second paragraph of Article 5 in conjunction with Article 85, a lacuna would arise; or it must be assumed that Article 30 is directly applicable.

2. Observations submitted by the Commission

First question

The Commission contends that both Article 30 and Articles 85 and 86 are part of the fundamental rules of the Treaty, their aim being to achieve and maintain free movement of goods, that is to say a unified market. They complement one another and combine together towards achieving the objectives set out in Article 2 of the Treaty. This requires an exhaustive interpretation of those rules which leaves no lacunae as to the result to be achieved, as would happen, for example, if measures or practices of the persons addressed by those provisions which have a comparable negative effect in every respect on the unity of the market were examined in the light of

Articles 85 and 86 but not in the light of Article 30 or vice versa. That approach remains correct even if the expression "affect trade between Member States" is used primarily to define the competence of the Community whilst the expression "hinder intra-Community trade" establishes a substantive test for determining whether a measure or practice is compatible with the Treaty. Similar considerations apply to the judgments in which the Court has held that certain mandatory requirements of public interest relating to fair trading may in certain circumstances prevail over the free movement of goods.

The Commission therefore believes that the terms, purpose and context of the provisions in question militate against the application of different criteria for determining whether it is a question of a measure having equivalent effect hindering intra-Community trade or a measure affecting trade between Member States within the meaning of Article 85 of the Treaty. In its judgment in *INNO* v *ATAB* the Court has already expressed its views on rules comparable to Article 30 of the Tobacco Excise Law. According to paragraph 53 of the decision in that case, such a system "generally" has exclusively internal effect. Paragraph 54 qualifies that view by stating that the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-Community trade. That approach is wholly in accordance with the numerous decisions of the Court on the question whether national price systems are compatible with Article 30 of the Treaty, decisions which help the Commission to form its judgment of such measures. Measures which impose minimum or maximum prices or temporarily freeze margins or prices are inherently likely to deflect trade from its natural course as determined by the free interplay of supply and demand. Nevertheless, they are not *per se* contrary to Article 30. Such is the case only where the price level at which the State intervenes impedes intra-Community trade.

The specific cases now before the Utrecht court concern a statutory prohibition preventing the entire retail trade from selling certain products at a price lower than the retail price chosen by the manufacturers or importers having regard to the excise duty which they have to pay. The special feature of that system is not so much the price level which it thus brings about but the fact that it completely removes a whole marketing stage, namely the retail trade, from the influence of market forces. To put it another way, this case does not involve temporary control of the market but a permanent restriction on the number of traders on that market. The Court has not left the slightest doubt about the fact that trade and the freedom essential to it are vital to the proper functioning of the common market (cf. judgment in Joined Cases 56 and 58/64, *Consten and Grundig* v *Commission*, [1966] ECR 299). A retailer who is permanently prohibited from

engaging in any form of price competition to increase his turnover is deprived of the most effective means which he has to influence the volume of demand at his sale outlet.

According to generally accepted laws of economics, the volume of demand for products from other Member States largely determines the volume of inter-State trade in those products. A permanent freezing of demand by a prohibition against selling at a price lower than the price fixed by the manufacturer or importer permanently freezes the volume of imports as well; in other words it deflects trade from its natural course. Put in yet another way, when the retail trade is totally deprived of the most important and most natural weapon available to it in a market economy, namely its own price policy, an artificial level of demand is created, which in turn affects the volume of imports. Even if these factors are difficult to quantify, there is generally little doubt about the certainty and predictability of that relationship of cause and effect. There is little doubt either that the sale of new products, and thus quite often the sale of imported products, is impeded sooner and to a greater extent than the sale of established products. Those aspects of the system in question should not be overlooked when the question is answered whether or not intra-Community trade is in fact affected, which in paragraph 54 of the decision in *INNO* v *ATAB* the Court considered possible "in certain cases". Seen in that light, the fact that in the sector in question it is mainly small retailers who are affected (cf. on this point the Opinion of Mr Advocate General Reischl in *INNO* v *ATAB*) seems less important. The applicability of Article 30 of the Treaty ought not to depend on the economic importance of the market participants affected by a particular measure.

Finally, still on this point, the Commission refers in particular to the judgment of the Court in Joined Cases 16 to 20/79 (*Openbaar Ministerie* v *Danis and Others* [1979] ECR 3327, at p. 3339) where it was held that, if as a result of a measure to control prices traders wishing to import products could do so only at a loss, such a situation constituted a measure having an effect equivalent to quantitative restrictions on imports. In other words an economic measure by which the national authorities restrict the normal supply of imported products must be examined to see if it is compatible with Article 30. In the *Danis* case the restriction consisted in the risk of loss run by importers. In this case the restriction is applied at the retail level so that the final consumer has no incentive to increase demand for imported products. The phenomenon is more diffuse, but of the same nature nevertheless. A similar argument may be advanced with reference to the case concerning restrictions on production which the Court decided in its judgment in Case 190/73 (*Officier van Justitie* v *van Haaster* [1974] ECR 1123).

Second question

The Commission observes that, as regards measures having an effect equivalent to customs duties on imports, the Court has already stated in its judgment in Joined Cases 52 and 55/65 (*Germany* v *Commission* [1966] ECR 159) that, however small its discriminatory effect, such a measure is still caught by Article 13 (2). As far as measures having an effect equivalent to quantitative restrictions are concerned, the Commission refers to the fact that the Court has repeatedly emphasized the wide scope of Article 30 and to the wide definition of a measure having equivalent effect given in the judgment in Case 2/73 (*Riseria Luigi Geddo* v *Ente Nazionale Risi* [1973] ECR 865, at p. 879).

The Commission believes that in such a system there is no place for a *de minimis* rule whereby Article 30 would not be applied to an existing and ascertainable restrictive effect on imports because it was so slight. It must also be remembered that to define a slight effect is extremely difficult. Finally, the Commission points out that a total prohibition on retailers' practising any form of price competition can, by its very nature, rarely if ever have only a very slight effect on intra-Community trade, especially in the case of a consumer article which is widely distributed and on sale at thousands of outlets.

Third question

The Commission's reply to this question adopts paragraphs 55 and 56 of the decision in *INNO* v *ATAB* in which the Court first of all states that intra-Community trade in tobacco products is subject to obstacles inherent in the methods of fiscal control applied (obstacles which do not fall within Article 30; cf. paragraph 49 of the decision) and describes the national court's role in ascertaining whether a system of compulsory retail prices is compatible with the Treaty: that role is to ascertain whether such a system may "in itself" hinder imports, directly or indirectly, actually or potentially, "taking into account", however, fiscal obstacles. The Commission believes that consideration must be confined to obstacles which are compatible with the Treaty. The fact that a legislative measure which is potentially contrary to the Treaty coincides with similar practices of the administration and undertakings does not by itself remedy the incompatibility but poses an administrative problem, for it is necessary to decide at which point the incompatibility begins.

To avoid any misunderstanding the Commission stresses the point that an examination of systems of compulsory retail prices in the light of Article 30 should not be limited to their inhibitory effect on parallel imports but should also take account of any resultant deflection of trade from its normal course. In this connection the Commission recalls the *van Landewyck* judgment ([1980] ECR 3125), which also deals with the question of the combined effect of different restrictive measures. In paragraph 133 of that decision the Court held that in spite of the other restrictions there remained for the manufacturer or importer a

sufficient margin to allow effective competition "even with regard to mass-produced products of current consumption in respect of which a very small reduction in the price at the manufacturing or import stage may have a significant effect at the consumer stage". The same naturally applies to price reductions at the retail level. Such reductions concern only a small volume of sales but that volume increases as the reductions spread to more sale outlets. The conclusion to be drawn from this is that, whilst regard must be had to obstacles of a fiscal nature, the possible effects on trade of fixed consumer prices should not be overlooked.

Fourth question

The Commission believes that if a national court errs and finds that there is no effect on trade when in fact there is such an effect, the remedy is to appeal, possibly with the taking of evidence from experts, and of course officials of the Commission may then be called upon as well. The parties concerned are also fully entitled to try to obtain a formal decision from the Commission on the matter in dispute.

Fifth question

This question is very similar to the sixth question submitted by the Cour d'Appel, Rouen, in Case 5/79 (*Procureur General* v *Buys* [1979] ECR 3203), the only difference being that in that case the question concerned agricultural products governed by Community rules. *Mutatis mutandis*, the answer must be the same. Member States are of course prohibited from adopting measures enabling private undertakings to escape the constraints of Articles 85 to 94 of the Treaty (paragraph 33 of the decision in *INNO* v *ATAB*). As regards Article 85, that rule is however applicable only if agreements covered by that article are actually involved. The mere fact that a Member State brings about a market situation which in its economic effects is the same as that which would result from a price system imposed by individuals, but in which there are no agreements within the meaning of Article 85, does not therefore come within that provision.

The Commission refers the Court to paragraph 35 of the decision in *INNO* v *ATAB*, according to which a national measure which infringes the rules on competition will generally be incompatible with Articles 30 and 34 of the Treaty.

III — Oral procedure

At the sitting on 5 May 1983 the Netherlands Government, represented by A. Bos, acting as Agent, the accused in the main proceedings, represented by A. F. de Savornin Lohman, of the Rotterdam Bar, and the Commission, represented by B. Van der Esch, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 30 June 1983.

Decision

1 By judgments of 1 June 1982, which were received at the Court on 14 July 1982, the Arrondissementsrechtbank, Utrecht, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a series of questions on the interpretation of Articles 5, 30 and 85 of the EEC Treaty.

2 Those questions arose in the context of criminal proceedings brought by the Officier van Justitie, Utrecht, against Kaveka de Meern BV, a company whose business is, in particular, the wholesale of tobacco products, and against its former general manager, Jan van de Haar.

3 The first sentence of Article 30 of the Wet op de Accijns van Tabaksfabrikaten [Law on the excise duty on tobacco products, hereinafter referred to as "the Tobacco Excise Law"] 1964 provides as follows:

"It shall be an offence to sell, offer for sale or supply tobacco products to persons other than resellers at a price lower than that appearing on the excise label."

4 The accused are charged, *inter alia,* with having infringed the aforementioned provision by offering for sale tobacco products to persons other than resellers at prices lower than those appearing on the excise labels.

5 It appears from the documents before the Court that Kaveka's customers are resellers and persons who use the tobacco products which they buy for their own needs in the framework of their business or trade. Kaveka's business practice is not to check at the cash desk whether the customer is a reseller of the tobacco products which he has in his trolley. The company consciously takes the risk that the buyer will not use the goods purchased by him for business or trade purposes. Kaveka operates a system of entrance cards under which businesses and institutions such as old peoples' homes can buy tobacco products from them.

6 The accused contended before the national judge that the alleged offences are not punishable since Article 30 of the Tobacco Excise Law is contrary to

Articles 5, 30 and 85 of the EEC Treaty. They contend that the abuse of a dominant position entailed by the compulsory price system may affect trade between Member States and impede imports. In addition, the fact that the excise duty is subject to an absolute minimum leads to the formation of an absolute minimum selling price, which is contrary to Article 30 of the Treaty.

7 The questions submitted by the Arrondissementsrechtbank, Utrecht, are as follows:

"1. In several decisions on Article 30 of the EEC Treaty the Court of Justice has declared that any commercial provision adopted by the Member States which is capable of hindering intra-Community trade, directly or indirectly, actually or potentially, is to be considered a measure having an effect equivalent to quantitative restrictions. This formulation appears to come very close to what the Court has said with regard to the concept of 'agreements ... which may affect trade between Member States' within the meaning of Article 85 (1) of the EEC Treaty in Cases 56 and 58/64 (*Consten and Grundig* v *Commission* [1966] ECR 299) and in Case 56/65 (*Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235), although the term used in those cases is 'may affect' trade between Member States whereas, for example, in the *Dassonville* judgment the term 'hinder' is used. In a case where the national court has to judge whether a legal provision of a Member State which applies without distinction to imported and domestic products is a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, must it in its judgment take into acccount the case-law of the Court of Justice concerning Article 85 of the EEC Treaty and more particularly the interpretation given by the Court to the expression 'may affect trade between Member States', from which it is clear that the criteria bringing the case within the prohibition of Article 85 (1) are satisfied if it is established that a commercial provision is likely to deflect trade from its natural course, or must the national court give a more independent meaning to Article 30 of the EEC Treaty to the effect that such a legal provision only constitutes a restriction on trade and thus a measure having equivalent effect within the meaning of Article 30 if the court is able to find on the basis of the factual circumstances that the importation of goods from other Member States may be restricted by that legal provision?

2. Must a legal provision of a Member State which applies without distinction to domestic and imported products also be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty where it is clear that that provision restricts imports into a Member State only to a very small degree and other possibilities remain for the marketing of products from other Member States?

3. Must the national court in its inquiry into the restrictive effects on trade of a legal provision which applies without distinction to the importation of products from other Member States and the marketing of domestic products have regard solely to the effects of that legal provision or must it also take account of the fact that other restraints on trade exist on the relevant market as a result of the tax laws of the Member States and the differences between them?

4. Does it make any difference to the reply to be given to the previous question if in the opinion of the national court the relevant legal provision has, taken by itself, no restrictive effect at all on trade?

5. If, as a result of a legal provision of a Member State, a system of vertical price-fixing exists to which all the traders concerned are bound and departure from which constitutes an offence, can an individual who has infringed such a provision rely before the national courts upon the incompatibility of that national provision with Article 5 (2), in conjunction with Article 85, of the EEC Treaty?"

The first and second questions

8 In the first question the national court asks whether, for the purpose of assessing, in the light of Article 30 of the Treaty, rules applicable both to imported and to domestic products, the criteria developed by the Court of Justice regarding Article 85, in particular with regard to the concept of effect on trade between Member States, should also be taken into account, or whether Article 30 is to be interpreted independently, only coming into consideration when it is established that the rules in question are of such a nature as to restrict imports. The second question seeks to ascertain, more particularly, whether such rules are even to be considered a measure having equivalent effect within the meaning of Article 30 of the Treaty where it is

clear that they restrict imports only to a very small degree and other possibilities remain for the marketing of imported products.

9 The accused in the main proceedings and, to a certain extent, the Commission contend that Articles 30 and 85 of the Treaty cannot be interpreted differently with regard to the concept of effect on trade between Member States. The Netherlands Government, on the other hand, argues that Articles 30 and 85 should be interpreted independently of each other.

10 At the hearing, however, the Commission qualified the view it had expressed in its written observations, and pointed out that, while the effects of national measures or agreements between undertakings which relate to the same economic facts must be analysed in the same way, the legal consequences may be different because the provisions at issue have their own internal logic and must be interpreted independently of each other.

11 It is important to bear in mind the context in which those two provisions of the Treaty are situated. Article 85 of the Treaty belongs to the rules on competition which are addressed to undertakings and associations of undertakings and which are intended to maintain effective competition in the common market. As the Court has held in previous judgments, that provision only comes into consideration with regard to agreements, decisions or practices restricting competition which appreciably affect intra-Community trade.

12 Article 30, on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement. Thus the Court has held that a national provision which is capable of hindering intra-Community trade, directly or indirectly, actually or potentially, must be regarded as a measure having an effect equivalent to a quantitative restriction.

13 It must be emphasized in that connection that Article 30 of the Treaty does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is

affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.

14 The reply to the first and second questions must therefore be that Article 30 of the Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article 85, which seeks to maintain effective competition between undertakings. A court called upon to consider whether national legislation is compatible with Article 30 of the Treaty must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.

Third and fourth questions

15 These questions concern the compatibility with Article 30 of the Treaty of a national legislative provision such as Article 30 of the Netherlands Tobacco Excise Law, in so far as it imposes, in the case of sales to the consumer, a selling price fixed by the manufacturers or importers. The national court wishes to ascertain, in particular, whether the issue of compatibility must be resolved in the light of the effects of such a provision taken in isolation or whether account should be taken of the existence of other hindrances to trade caused by the differing fiscal legislation of the Member States, even though the provision at issue is not in itself deemed to have any restrictive effect on trade.

16 The national court states that in order to ensure the levying of excise duties on tobacco products a system of excise labels is operated. Retail sales of tobacco products must be made at the price appearing on the excise label. The price is freely determined by the importer or by the domestic manufacturer. The importer is free to determine his prices without reference to the foreign manufacturer. The assortment of excise labels offers many possibilities and in practice permission to alter the price on the label is always

granted on request. Excise labels are obtainable by any person, subject to the conditions laid down by revenue law, the principal requirement being one of registration.

17 The Tobacco Excise Law permits a foreign producer to market the same tobacco product in the Netherlands at different prices. However, it does not appear that in practice the same brand has been imported by more than one firm.

18 The prohibition laid down in Article 30 of the Tobacco Excise Law applies without distinction to domestic and imported products. Competitive pricing in respect of a particular product at the retail stage is therefore impossible. Competition is, however, possible at the intermediate stage as a result of various reductions and discounts. Furthermore, competition is also possible by means of advertising and promotions. The introduction of new brands is increasingly based on quality and taste.

19 In its judgment of 24 January 1978 (Case 82/77, *Openbaar Ministerie* v *van Tiggele,* [1978] ECR 25), the Court held that, whilst national price control rules applicable without distinction to domestic products and imported products cannot in general produce an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty, they may do so in certain specific cases. Thus imports may be impeded when, for example, a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products, either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.

20 As regards the fixing of prices and the taxation of tobacco products, the Court held, in its judgment of 16 November 1977 (Case/13/77, *INNO* v *ATAB,* [1977] ECR 2115), that in the present state of Community law it is for each Member State to choose its own method of fiscal control over tobacco products on sale in its territory and that a system whereby the prices

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

21 However, as the Court pointed out in the same judgment, the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-Community trade. If therefore imports and exports of tobacco products are subject to obstacles due to the different methods of fiscal control used by the Member States to ensure collection of the taxes on those products, it is necessary to decide whether such a system of fixed prices imposed on the consumer for reasons of fiscal control is or is not of itself of such a nature as to allow imported products to be profitably marketed or to allow a possible competitive advantage to be obtained as a result of the lower production costs of imported products compared to domestic products.

22 Consequently, in order to decide whether legislation of a Member State which, as regards the sale of tobacco products to the consumer, imposes a fixed price freely chosen by the manufacturer or importer constitutes a measure having an effect equivalent to a quantitative restriction, the national court must investigate whether, having regard to the fiscal restraints on trade in the products concerned, such a system of imposed prices is in itself likely to hinder, directly or indirectly, actually or potentially, trade between Member States.

Fifth question

23 In its fifth question the national court asks whether a private individual may rely, before a national court, on the incompatibility of a national provision with the provisions of the second paragraph of Article 5 and Article 85 of the Treaty read together.

24 Whilst it is true that Member States may not enact measures enabling private undertakings to escape the constraints imposed by Articles 85 of the Treaty, the provisions of that article belong to the rules on competition "applying to

undertakings" and are thus intended to govern the conduct of private undertakings in the common market. They are therefore not relevant to the question whether legislation such as that involved in the cases before the national court is compatible with Community law.

Costs

25 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the prosecutions pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, Utrecht, by judgments of 1 June 1982, hereby rules:

1. **Article 30 of the EEC Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article 85, which seeks to maintain effective competition between undertakings. A court called upon to consider whether national legislation is compatible with Article 30 of the Treaty must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.**

2. **In order to decide whether legislation of a Member State which, as regards the sale of tobacco products to the consumer, imposes a fixed price freely chosen by the manufacturer or importer constitutes a measure having an effect equivalent to a quantitative restriction, the**

national court must investigate whether, having regard to the fiscal restraints on trade in the products concerned, such a system of imposed prices is in itself likely to hinder, directly or indirectly, actually or potentially, trade between Member States.

3. **The provisions of Article 85 of the EEC Treaty are not relevant to the question whether legislation such as that involved in the cases before the national court is compatible with Community law.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 5 April 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 30 JUNE 1983 [1]

Mr President,
Members of the Court,

Article 30 of the Netherlands Wet op de Accijns van Tabaksfabrikaten [Law on the Excise Duty on Tobacco Products] of 1964 provides that it shall be an offence to sell, offer for sale or supply tobacco products to persons other than resellers at prices lower than those appearing on the excise label. According to the official explanatory statement, the purpose of that provisions is to prevent any deviation from the minimum prices from affecting conditions of competition in the retail trade, in other words to protect specialized retailers.

The accused in the main proceedings, Kaveka de Meern BV, a self-service wholesale business, and its general manager are charged with contravening that provision. It was found that in November 1977 Kaveka offered for sale cigars, cigarettes and pipe tobacco at prices lower than those marked on the

1 — Translated from the German.