the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.

2. As Community law stands, in the absence of a Community competition policy with respect to the book trade, Member States' obligations under the second paragraph of Article 5 of the Treaty, in conjunction with Articles 3 (f) and 85, are not specific enough to preclude them from enacting legislation whereby the retail price of books must be fixed by the publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the Treaty, in particular those relating to the free movement of goods.

3. Any national measure 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 a quantitative restriction within the meaning of Article 30 of the Treaty. That would be the case, for instance, where national legislation treated domestic products differently from imported products or disadvantaged, in any manner whatsoever, the marketing of imported products *vis-à-vis* domestic products.

4. Since it derogates from a fundamental rule of the Treaty, Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Neither the safeguarding of consumers' interests nor the protection of creativity and cultural diversity in the realm of publishing is mentioned in Article 36 and so cannot be relied on pursuant to that article.

5. In the context of national legislation on the price of books, the following constitute measures equivalent in effect to quantitative restrictions on imports, contrary to Article 30 of the Treaty:

   (a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail price, and

   (b) provisions requiring the retail price fixed by the publisher to be applied to books published in the Member State concerned and re-imported following exportation to another Member State, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

OPINION OF MR ADVOCATE GENERAL DARMON delivered on 3 October 1985 *

Mr President,
Members of the Court,

1. The Cour d'Appel [Court of Appeal], Poitiers, has referred to the Court a question of interpretation which has major implications not only in view of the principles involved but also because national courts which are trying similar actions are awaiting the Court's decision.

* Translated from the French.

This request for a preliminary ruling raises the issue of the legality in Community law of public intervention by a Member State in the field of competition. In the present instance the legal framework for the intervention is laid down by Law No 81-766 of 10 August 1981 'concerning book prices' [1] I shall briefly describe the purpose of that law and those of its provisions that are relevant to the question submitted by the national court.

2. Contrary to what its title might suggest, the Law of 10 August 1981 does not seek to fix book prices pre-emptorily. Rather, it requires publishers and importers to fix a retail price at which retailers are obliged to sell, subject to the possiblity of granting discounts of no more than 5% of that price. [2]

In addition, publishers and importers are required to take into account 'the quality of the services performed . . . with a view to disseminating books' by giving discounts for quality exceeding those granted by reason of the quantity purchased by the retailer. [3]

Those two provisions reveal the legislature's object, namely to prohibit the price-cutting policy practised by some supermarkets, which is viewed as ruinous for small retailers and as a threat to book quality and, ultimately, to literary creativity.

Whereas the system incorporates exceptions *ratione personae* in favour of particular associations and public-law corporations, [4] it applies to all books intended for retail sale in French territory, whatever their origin: by virtue of its scope *ratione loci* it applies therefore to imported books whether they were published abroad or published in France but initially offered for sale in other Member States. [5]

Its scope *ratione temporis* varies somewhat, inasmuch as it does not 'freeze' the retail price outright. The rules in question cease to apply to books distributed by sale on a commission basis, subscription or mail order nine months after the first edition was put on the market and to all books two years after the first edition was put on the market provided that the last delivery took place more than six months previously. [6]

Finally, although issued after the occurrence of the facts which gave rise to the reference, it must be pointed out that Decree No 82-1176 of 29 December 1982 makes offences against the Law of 10 August 1981 subject to a fine.

The possibility of conflict between those provisions and the Treaty of Rome constitutes the background to the case pending before the national court.

3. Having been prohibited by injunction from selling books at prices lower than the retail price fixed by the publishers, Association des Centres distributeurs Édouard Leclerc (hereinafter referred to as 'Centres Leclerc') appealed to the Cour d'Appel, Poitiers. The latter questioned whether the Law of 10 August 1981 was compatible with the Community rules on free competition, in view of its provisions concerning imported books, and submitted the following question to the Court:

'Must Articles 3 (f) and 5 of the Treaty of 25 March 1957 establishing the European Economic Community be interpreted as prohibiting the setting-up in a Member

1 — Journal Officiel de la République Française of 11 August 1981, p. 2198.
2 — Article 1 (1) and (4).
3 — Article 2 of the Law of 10 August 1981.
4 — Ibid., Article 3.
5 — Ibid., Article 1, first and last paragraphs.
6 — Ibid., Articles 4 and 5.

State, by law or by regulation, in respect of books published in that Member State and books imported into that State, in particular from other Member States, of a system which compels retailers to sell the books at the price fixed by the publisher or the importer without being able to reduce that price by more than 5%?'

For the sake of clarity I shall define the terms that will be used in the following discussion.

'French books' means books published in France, irrespective of the author's nationality and the language of publication.

By the same token, 'foreign books' denotes books published in another Common Market country.

A 'French publisher' or a 'French importer' is a publisher or importer, irrespective of nationality, who carries on his business in France; conversely a 'foreign publisher' is one who publishes in another Member State.

4. Since the observations submitted by Centres Leclerc, the French Government and the Commission are exhaustively summarized in the Report for the Hearing, I will refer the Court to that document and simply rehearse the main arguments put before the Court, notably in reply to questions put at the hearing, in order to identify the approach adopted by each party with a view to resolving the question of compatibility raised.

In order to show that the Law of 10 August 1981 is inconsistent with Community law, Centres Leclerc claim that there has been a two-fold infringement of the Treaty of Rome.

First, the provisions relating to imported books amount, they maintain, to a barrier to intra-Community trade contrary to the provisions of Article 30 of the EEC Treaty, which prohibits measures equivalent in effect to quantitative restrictions.

Secondly, Centres Leclerc maintain that by setting up a national collective system of sresale price maintenance, the French legislation affects trade between Member States by partitioning the French market through a series of vertical distribution agreements to which traders are obliged to subscribe.

Centres Leclerc maintain that that system is contrary to Article 85 (1) and does not qualify for exemption under Article 85 (3); the Law of 10 August 1981 therefore infringes Articles 3 (f) and 5, read together with Article 85 of the Treaty.

5. As far as the French Government and the Commission are concerned, Articles 3 (f) and 5 do not apply. Instead, the Law of 10 August 1981 should be examined in the light of the principles governing the free movement of goods, as interpreted by the Court of Justice.

In support of the above contention, the Commission pointed out that Articles 3 (f) and 5 only acquire the force of law through those provisions of the Treaty that secure their practical application, such as Articles 85 and 86. It also attempted to identify the features specific to the provisions which lay down prohibitions addressed to undertakings and those which lay down prohibitions addressed to the Member States. Lastly, the Commission acknowledged that Article 5 (2) of the Treaty is applicable to two types of situation:

(a) where the Member State requires, fosters or exacerbates corporate behaviour prohibited by Articles 85 and 86;

(b) what the Commission terms the 'exceptional' situation where a public measure has the sole object — unjustified by the general interest — of enabling undertakings to evade the prohibitions laid down in the said articles.

In the Commission's view, neither of those hypothetical situations applies to the case at issue.

Turning to the free movement of goods, the French Government emphasizes that the collective system of resale price maintenance has no effect on the importation of foreign books, since the latter are subject to the same constraints as French books. In that regard, the fixing of the price by the main importer/distributor [7] is not a barrier to trade, since the latter is simply the reasonable counterpart, in French territory, of the French publisher. As for re-imported books, alignment of their retail price with that of similar books which never left France ensures consistency and precludes fraudulent practices.

In contrast, in the Commission's opinion, the existence of legislative provisions which apply solely to French and foreign imported books has the effect of impeding intra-Community trade: as far as re-imported books are concerned, the French importer is precluded from passing on the lower price obtained in the other Member State, while in the case of books published abroad the fact that their retail price is fixed by a single importer — the main distributor — debars any other importer from fixing a lower price. Those measures equivalent in effect to quantitative restrictions on imports, which are prohibited by Article 30 of the EEC Treaty, cannot be justified under Article 36 of the Treaty. The Commission also rejects the application of the Court's decision in the 'Cassis de Dijon' case, [8] on the ground that the means employed by the law are neither appropriate nor the least restrictive of trade, having regard to the cultural objective pursued.

The above summary of the observations provides an indication of the unusual nature of the question of conformity with Community law which is raised: in effect, the basic task is to identify the Treaty provisions applicable to the situation created by the French legislation. Let us examined what guidance is given by previous decisions of the Court of Justice.

6. The Law of 10 August 1981 applies to all books, whatever their origin, and requires all retailers to apply the price fixed by the publisher or importer, subject to a maximum discount of 5 %. It may be described as setting up in the book trade a *semi-public* [9] system of *partially* fixed prices.

To my knowledge, there is no exact precedent in the Court's previous decisions.

Admittedly, in its recent decision in *VBVB and VBBB* v *Commission*, which followed the opinion delivered by Mr Advocate General VerLoren van Themaat, the Court did have to consider a collective system of retail price maintenance for books but not a public system. [10]

As far as the conformity with Community law of public and semi-public price maintenance systems in a field other than publishing is concerned, there are more numerous relevant decisions of the Court — principally *Inno* v *ATAB:* [11] *Openbaar Ministerie* v *van Tiggele;* [12] and *van de Haar* and *Kaveka de Meern BV.* [13]

7. As regards contractual systems of resale price maintenance for books, the Court's judgment in *VBVB and VBBB* v

7 — Article 4 of Decree No 81-1068 of 3 December 1981, Journal Officiel de la République Française of 4 December 1981, p. 3305.

8 — Case 120/78, *REWE-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

9 — The term 'semi-public' is used to denote a price maintenance system in which the prices are not fixed directly by law.

10 — Judgment of 17 January 1984 in Joined Cases 43 and 63/82, [1984] ECR 19, paragraph 6 in particular.

11 — Case 13/77, [1977] ECR 2115, paragraphs 5 to 12.

12 — Case 82/77, [1978] ECR 25, paragraphs 3 to 9.

13 — Judgment of 5 April 1984 in Joined Cases 177 and 178/82, [1984] ECR 1797, paragraph 16.

Commission (concerning books published in Dutch) has some relevance to the case at issue, both in view of the object of the agreement between the Belgian and the Netherlands associations and in view of the limits which the Court set to its appraisal.

That case is too recent and too well-known to the Court for it to be necessary for me to describe it in detail, but so much reference has been made to it during these proceedings, in particular when questions were put at the hearing, that it must be given some attention.

For our purposes, it is sufficient to bear in mind that by a decision of 25 November 1981 the Commission of the European Communities declared that the 1949 agreement, as amended in 1958, between the VBVB and the VBBB 'making provision for collective exclusive dealing and collective resale price maintenance in trade in books between Belgium and the Netherlands' infringed Article 85 (1) of the Treaty.

The Commission's decision related only to the 'transnational' agreement, which provided *inter alia* that 'books may not be sold or offered for sale in Belgium or the Netherlands at retail prices below those fixed by the Netherlands or Belgian publishers'. The national agreements specific to each association were expressly excluded from the ambit of the decision, despite the fact that they also provided, domestically, for the fixing of a single retail price for each book and for the prohibition of the sale or offer for sale of books at a lower price. [14]

When the two associations brought an action challenging the Commission's decision the Court expressly stated that it would confine its judgment strictly to the transnational agreement. [15] The intrinsic merits of the so-called 'cross-subsidization' system [16] relied on by the associations could be 'conclusively appraised only in terms of the national agreements'. [17]

It must therefore be stressed that in that decision the Court pronounced no value judgment on a national system of resale price maintenance for books. The Court's guarded attitude must be compared with that of the Commission, which, in the decision unsuccessfully referred to the Court by the associations concerned, declared that:

'it is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government'.

It added that it was:

'sure that the Member States concerned would not hesitate to take action to protect certain cultural interests should this be necessary.' [18]

It must nevertheless be emphasized that the Court's judgment in *VBVB and VBBB* v *Commission* held that the relevant transnational agreement constituted an agreement prohibited by Article 85 (1) inasmuch as it aimed to restrain the freedom to fix prices up to the level of the retailer and to enable the two associations thereby to control outlets in the other Member States. [19]

14 — Commission Decision No 82/123/EEC, Official Journal 1982, L 54, p. 36.

15 — Joined Cases 43 and 63/82, loc. cit., paragraphs 31, 44 and 58.

16 — Whereby publishers are able to use the profits gained from the sale of 'successful' books to compensate for the problems posed by books that are difficult to sell.

17 — Joined Cases 43 and 63/82, loc. cit., paragraph 59.

18 — Decision 82/123/EEC, loc. cit., last subparagraph of paragraph 60.

19 — Joined Cases 177 and 178/82, loc. cit., paragraph 45.

8. Let us now review the cases in which the compatibility with Community law of a public or semi-public system of resale price maintenance was in issue.

The decision in *Inno* v *ATAB* [20] signals a remarkable turning point in the Court's case-law in this field [21], since it reveals a concern to suppress such price regulation arrangements not only when they constitute an obstacle to the free movement of goods but also when they alter the normal course of competition in the Common Market. [22]

Considering first, that

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

and, secondly,

'the general objective set out in Article 3 (f) is made specific in several Treaty provisions concerning the rules on competition, including Article 86',

the Court held, on the basis of the second paragraph of Article 5, that

'while it is true that Article 86 is directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness'.

Accordingly, just as Article 90 prohibits Member States from allowing public undertakings to escape the rules laid down in Articles 85 to 94 of the Treaty, so

'Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty.' [23]

The Treaty, construed in the light of its aims and general scheme, therefore prohibits any State from distorting the normal course of competition by making it possible for traders to escape its provisions. Such a breach of the Treaty rules will generally manifest itself in a barrier to trade. The Court expressed it in the following terms:

'a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34.' [24]

None the less, such a measure may also be attacked under Article 86 itself, since the abuse of a dominant position cannot be justified by a national measure as far as Community law is concerned. [25]

Finally, the compatibility with Community law of a national measure whereby retailers are required to abide by the prices fixed for a product by other traders may be questioned in the light of Article 86 read together with Article 3 and the second paragraph of Article 5 of the Treaty, if, 'apart from any abuse of a dominant position which such arrangements might encourage, [they are] also likely to affect trade between Member States.' [26]

20 — Case 13/77, loc. cit.

21 — See the reference made thereto by Mr Advocate General Capotorti in Case 82/77 (*Openbaar Ministerie* v *van Tiggele*, [1978] ECR 25, at pp. 45-66).

22 — Note, however, that in the judgment in Case 78/70 (*Deutsche Grammophon Gesellschaft* v *Metro-SB-Großmärkte*, [1971] ECR 487) the Court adopted an identical approach in examining the scope under Community law of an exclusive right conferred by national law (paragraphs 7 and 8 and opinion of K. Roemer, p. 507).

23 — Case 13/77, loc. cit., paragraphs 28 to 33.

24 — Ibid., paragraphs 35 and 52 to 54 of the decision and paragraph 3 of the operative part of the judgment.

25 — Ibid., paragraph 34 of the decision and paragraph 1 of the operative part of the judgment.

26 — Case 13/77, loc. cit., paragraph 2 of the operative part of the judgment.

Faced with the issue of the compatibility with Community law of a semi-public system of price maintenance, in that case in the field of tobacco products, the Court's decision in *Inno* v *ATAB* points — through the questions put by the Belgian Court of Cassation — to the need for a broad approach to the principle of free competition.

That approach is predicated by the wide variety of effects that such systems have; it follows that economic intervention on the part of a Member State cannot be neutral with regard to the application of the rules governing the operation of the Common Market, even with regard to the competition rules, once it affects intra-Community trade.

Although the Court has been faced with similar arrangements it has not yet had an opportunity to apply the principles laid down in the *Inno* v *ATAB* judgment.

9. In *van Tiggele* the Court was called upon to examine a system of price maintenance operated by a public body in the field of the retail sale of spirits not subject to a common organization of the market. [27]

The Court held that such rules generally had solely domestic effects where they applied without discrimination to domestic and imported products. Nevertheless, it considered that they were liable to constitute a barrier to intra-Community trade where the national authority fixed 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'. [28]

Although that principle was consistent with previous decisions of the Court, [29] it was the first time that it was applied to a system of minimum prices, since the Court held that a barrier to trade is created by 'a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price'. [30]

Notwithstanding the suggestion made in the Commission's observations that the Court should take into consideration the principles laid down in Article 85 of the Treaty when assessing a public minimum price system in the light of Article 30 of the EEC Treaty, the fact remains that the Court based its decision solely on Article 30. The reason is clearly stated by Mr Advocate General Capotorti: for it to be possible to invoke Article 85 or 86 of the EEC Treaty, together with Article 30, 'the measures adopted by the public authorities must promote an infringement of the rules on competition by those to whom such rules apply, namely undertakings'. [31]

However, the body responsible for fixing prices in the case in question was not — by virtue of its composition, in particular — an association of undertakings but a public authority.

10. Comparison of the *Inno* and *van Tiggele* judgments brings out the respective functions of each of the prohibitions laid down in Article 30 and Articles 85 and 86 of the Treaty where a national price-fixing system imposed by the State is at issue:

27 — Case 82/77, loc. cit., paragraphs 3 to 9.

28 — Case 82/77, loc. cit., paragraph 14.

29 — Cf. *Inno* v *ATAB*, paragraph 52.

30 — Case 82/77, loc. cit., paragraph 18 of the decision and paragraph 1 of the operative part of the judgment.

31 — Ibid., opinion of F. Capotorti, pp. 47 and 48.

(a) If the prices are fixed directly by law it must be established whether their level is such as to constitute a barrier to intra-Community trade.

(b) If, on the other hand, the prices are fixed by one class of trader and made legally binding on another, the incompatibility may spring not only from application of the previous rule but, in addition, from a finding that the national measure fosters behaviour of one sort or another that is in restraint of competition. In the latter event, the principles laid down by Article 3 (f) and the second paragraph of Article 5 will be applied in conjunction with Articles 85 and 86 of the Treaty.

In my view, the above does not appear to have been called in question by the Court's judgment in the *Kaveka* case. [32]

With regard to the Netherlands Law on Excise Duty on Tobacco Products of 1964, which states that it 'shall be an offence to sell, offer for sale or supply tobacco products to persons other than re-sellers at a price lower than that appearing on the excise label', [33] the Court clearly emphasized the mutual independence of Articles 30 and 85 of the Treaty by stating that:

'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.' [34]

Must it be concluded that the Court is re-treating from its decision in *Inno* v *ATAB* and now takes the view that if a price-fixing scheme is public or semi-public it should only be considered with reference to Article 30?

Nothing could be further from the truth. Indeed, the judgment in the *Kaveka* case echoes the Court's early judgments. Repeating virtually word-for-word the principle laid down in *Inno* v *ATAB*, the Court indicates that, even though the provisions of Article 85 are not relevant to the question whether legislation setting up a system of resale price maintenance is compatible with Community law, 'Member States may not enact measures enabling private undertakings to escape the constraints imposed by Article 85 of the Treaty'. [35]

11. What lessons can be drawn in the final analysis from the Court's relevant decisions, taken together, with a view to settling the question now before the Court?

First, it appears from the Court's decisions that a semi-public system of retail price maintenance which is imposed through the agency of a certain category of traders and is applicable without distinction to both domestic and imported products is incompatible with Community law in the following two cases:

(a) If by fixing prices at a level constituting a deterrent to undertakings from other Member States, it is such as to represent an actual or potential, direct or indirect, barrier to imports from other Member States, in which case it will amount to a measure equivalent in effect to a quantitative restriction on imports, contrary to Article 30 of the Treaty.

(b) If by encouraging behaviour prohibited by Articles 85 and 86 it is, in addition, capable of affecting trade between Member States, in which case it will amount to an infringement of Article 3 (f) and the second paragraph of Article 5, read together with Article 85 or 86.

32 — Joined Cases 177 and 178/82, loc cit.

33 — Article 30 of the 1964 Law.

34 — Joined Cases 177 and 178/82, loc. cit., paragraph 1 of the operative part of the judgment and paragraphs 11 and 12 of the decision.

35 — Ibid., paragraph 24.

Secondly, the case before the Court has two novel features: to begin with, the Court is to pronounce for the first time on a *semi-public* system of resale price maintenance in the *book trade*: the undeniably special nature of the product constitutes a novel factor which, in view of the powers peculiar to the State in the cultural field, is bound to be relevant to the Court's assessment. I have pointed out that the Court's judgment in *VBVB and VBBB* v *Commission* extended only to a transnational agreement in the book sector and expressly excluded any ruling on the compatibility with Community law of a domestic system of resale price maintenance whatever its nature. But above all it should be observed that the alternative put forward by the Court's case-law, although reflecting the diversity of the effects of public intervention of an economic character, has not for all that covered all its manifestations.

In fact, the French legislation in question establishes a semi-public system of price maintenance which is designed to 'regulate' competition in the sector in question on the ground of its special characteristics: consequently, the Court must rule on the compatibility with Community law of a system which, in some respects, has made conduct in restraint of competition redundant.

12. In order to assess the conformity with Community law of legislation of the kind described, which is not, as such, specifically provided for in the Treaty, guidance must be sought in the primary sources of law and in the previous decisions of the Court.

The powers of the Community in connection with free competition in the Common Market are fundamental: the fourth recital in the preamble to the EEC Treaty and Articles 2 and 3 (f) clearly indicate that free competition is a crucial aim for the building of a Community economic area. That the Member States are subject to the principle of free competition is apparent, in particular, from Article 90 and Articles 92 and 94 of the Treaty, even as regards the exercise of their powers in connection with national defence (Article 225). The principle was laid down as early as the Court's judgment in *Wilhelm* v *Bundeskartellamt*: by virtue of the primacy of Community law the Member States may not 'introduce or . . . retain measures capable of prejudicing the practical effectiveness of the Treaty' inasmuch as 'the binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril.' [36]

Accordingly, a national measure which deprived of practical effectiveness the prohibitions directed to undertakings by Articles 85 and 86 or frustrated action by the Commission under Article 87 would be in direct conflict with the second paragraph of Article 5 inasmuch as it would prejudice the objective assigned to the Community by Article 3 (f), which aims at the institution of a system of effective competition in the Common Market, involving:

'the degree of competition necesssary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.' [37]

Such a breach of a principle as fundamental to the Community as that of free competition in the Common Market would constitute a frontal attack on the initial division of responsibilities laid down in the Treaty: were it to become systematic, it

36 — Case 14/68, [1969] ECR 1, paragraph 6.

37 — Case 26/76, *Metro SB-Großmärkte GmbH* v *Commission*, [1977] ECR 1875, paragraph 20.

would in time threaten the Member States' reciprocal duties of solidarity with regard to the obligations that they have entered into, and would thus become a potential source of economic disintegration. That risk, which one trusts is merely hypothetical, must stimulate particular vigilance with regard to public intervention in the field of competition.

In my view, those considerations bring closer to its proper proportions the objection that Article 3 (f) merely outlines an aim while the second paragraph of Article 5 is too general. It is true that Article 3 (f) lays down an objective for the Community, but it also sets forth a principle, the fundamental nature of which I have just emphasized. As for the second paragraph of Article 5, it makes the transfer of powers effected by the Treaty irreversible. The Member States must comply with the provisions in question, so as not to render nugatory the rules of the Treaty which provide for its implementation.

Every time a Member State prevents those provisions from being applied, its action is liable to deprive individuals of the rights that they might derive therefrom and prevent the Community institutions from exercising the prerogatives that the Treaty confers on them.

I consider that to be the sense of the Court's judgment in *Inno* v *ATAB*: a national measure which encourages behaviour in restraint of competition or, more generally, deprives of practical effect the prohibitions laid down in Articles 85 and 86 of the Treaty, is incompatible with Article 3 (f) and the second paragraph of Article 5, read together with Articles 85 and 86. [38]

13. In my view, therefore, the principles laid down in the Court's previous judgments are sufficiently general to apply to a semi-public system which has the effect of rendering unnecessary behaviour of the type in question which is prohibited by Community law.

38 — Case 13/77, loc. cit., paragraph 31.

In effect, there does not seem to me to be a difference in kind between the situation contemplated in *Inno* v *ATAB* — a national measure fostering a possible abuse of a dominant position and affecting trade between Member States — and the situation which has just been described.

The difference hinges on the degree of State intervention: the Court has not dwelt on the form of the intervention but has concentrated clearly on the effects of a national measure on patterns of trade or competition.

It is therefore appropriate to examine the impact of public intervention — irrespective of the forms taken thereby — on competition domestically in order to be able better to assess its implications as regards intra-Community trade. In my view competition rules of the type in question must be subjected to specific scrutiny, which alone can reveal their true implications as regards the Community. The existence of an impediment to competition must be assessed:

(a) either in the light of Article 30, if it can also be analysed as a barrier to trade; or

(b) in the light of Articles 85 and 86, if it deprives them of practical effect.

In addition, the Court should take account of the degree of responsibility retained by the Member States in the field in question. In this case the sector in question (books) has not yet been the subject of a Community policy and has uncontested economic and cultural aspects peculiar to itself.

14. In order to assess the competition rules introduced by the relevant French legislation, it must be investigated whether the system brought in by the law is itself restrictive of competition and, if so, whether the resulting restriction is such as to affect trade between Member States.

As regards relations between French publishers, the Law of 10 August 1981 leaves the free play of competition intact. In accordance with the laws of the market, each publisher is free to fix the retail price and, within that framework, can negotiate the price at which he sells to each retailer, having regard, in particular, to discounts for quantity and quality.

Although the 1981 Law does not cause behaviour in restraint of competition as between publishers, it does not preclude the possibility of such behaviour, any more than did the provisions previously in force. Were such behaviour to affect trade between Member States, the provisions of Articles 85 and 86 would apply.

15. Like French books, foreign books are subject in France to the principle of fixed retail prices. However, the obligation to fix the price falls not on the foreign publisher but on the main importer/distributor. [39]

In that respect, the Court has heard described to it a dual threat to competition: it is alleged that the privileged position of the main importer/distributor enables him:

(a) to take the place of the foreign publisher as regards framing commercial policy on the French market;

(b) to eliminate competition from any other importer by virtue of his control of the retail price.

Let us first remove an ambiguity. The main distributor is the one who is charged with effecting the legal deposit, which is designed principally to ensure that a specific number of copies of books published in France or imported into France are preserved. [40]

Consequently, the foreign publisher retains his normal power to negotiate the price with the main importer/distributor. It follows that in so doing he can pass on in the price the advantages ensuing, for instance, from a more favourable exchange rate or lower costs. Naturally he may also make the retail price a central element in that negotiation, with all the advantages that may bring for himself, the importer, the retailer and the consumer.

On the other hand, the obligation placed exclusively on the main importer/distributor to fix the retail price could put him, *vis-à-vis* other importers, in a dominant position which, if abused, could be capable of affecting intra-Community trade.

In accordance with the Court's judgment in *Inno* v *ATAB*, [41] that provision of French law is therefore incompatible with Article 3 (f) and the second paragraph of Article 5 in so far as it may encourage the main importer/distributor to behave contrary to Article 86.

16. It is now necessary to examine, at the retail level, the competition regime established by the 1981 Law and to consider what might be its effects on intra-Community trade.

By requiring retailers to adopt the retail price fixed by the publisher the law does not in fact ccompletely abolish price competition between retailers. Such competition continues to exist in the form of the maximum discount of 5%. Moreover, other forms of competition continue to exist as between retailers both by virtue of the provisions of Article 2 of the law, which is concerned with discounts for quantity and quality, and in the form of the quality of customer service.

39 — First paragraph of Article 1 of the Law of 10 August 1981.

40 — Article 8 of Law No 341 of 21 June 1943, to which Article 4 of the above-mentioned Decree No 81-1068 refers.

41 — Case 13/77, loc. cit., paragraphs 33, 34, 37 and 38 of the decision and paragraph 2 of the operative part of the judgment.

Nevertheless, the law does have the effect of depriving certain retailers — such as Centres Leclerc — of the possibility of granting discounts in excess of 5%. That is the *sole* restriction of competition as between retailers that has emerged either from the proceedings before the national court or from the proceedings before the Court of Justice.

Circumscribed in the above manner, the restriction appears to be the outcome of a particular conception of books, the special economic and cultural features of which call for special market rules.

Be that as it may, let us examine whether the restriction affects intra-Community trade.

As far as foreign books are concerned, the fact that retailers are debarred from granting discounts of more than 5% could in theory affect intra-Community trade. Nevertheless, that risk must be seen in its proper proportions. As has been shown, the lower cost of foreign books can still be passed on in the retail price: so, as far as foreign books are concerned, the effect of additional discounts would be marginal. In that regard, it is not without interest to observe that at no time have Centres Leclerc claimed that pre-existing patterns of trade have been affected by the 1981 Law. Furthermore, counsel for the French Government was not challenged when he stated at the hearing that since the entry into force of the 1981 Law imports into France of books from other countries of the Community increased in 1982 by 17% in terms of value and by 5% in terms of volume and in 1983 by 27% and 16% respectively.

17. As regards re-imported French books, we may now examine whether the provisions of the 1981 Law that apply to them affect trade between Member States.

In order, here too, to remove all ambiguity, it is appropriate first to determine what is meant by re-importation or parallel importation.

In the first place, parallel imports enable retailers to obtain supplies more cheaply on the market of another Member State and to benefit from the resulting competitive advantage.

In addition, they enable traders from that other Member State to increase their outlets in the French market by virtue of the lower price of the re-imported product.

In that sense, the definition necessarily excludes operations whereby a retailer exports French books for the sole purpose of re-importation. Such an operation, mounted solely to circumvent the requirements of the 1981 Law, is to be classed as an *artificial* trade flow. One cannot both avail oneself of the rules of the single market and at the same time take improper advantage of the existence of frontiers. Only *normal* commercial transactions may qualify for Community protection.

Does the 1981 Law affect such transactions?

In order to answer that question it must be established whether the traders concerned are precluded as a result of that law from profiting by the price difference.

The law provides that 'where books published in France are imported, the retail price fixed by the importer is to be no lower than that fixed by the publisher'; [42] naturally that provision only relates to books published or imported less than two years previously the last delivery of which took place less than six months previously.

42 — Last paragraph of Article 1.

That provision is essential for the balance of the law. It affects the law's effectiveness, since, without it, there would be nothing to prevent reduced prices.

Despite that requirement, the French law in no way prohibits French retailers from directly or indirectly procuring French books more cheaply abroad. Indeed they have every interest in so doing, not only in view of the additional profit but also because of the competitive advantage which they can derive by passing that profit on in the prices of products other than books or in the prices of older books which are no longer subject to resale price maintenance. That is termed cross-subsidization.

As has already been mentioned, retailers may not, under the law, deviate by more than 5% during the period stipulated by the law from the retail price initially fixed by the French publisher. Admittedly, it is possible to contend that the provision in question could have a deterrent effect on parallel imports, despite the existence of the advantages described above. Yet it is hard to see why retailers should forego those advantages unless it is because the legal restriction on competition impedes the practice of reduced prices. Any damage to trade would therefore ensue not from the law but from retailers' commercial policy, that is to say, it would be self-inflicted.

Furthermore, it has never been claimed that there existed, prior to the enactment of the 1981 Law, normal patterns of trade that have been affected since its entry into force.

Consequently, the causal link between the 1981 Law and the effect on trade between Member States — even supposing such an effect to have been established — seems to be too uncertain to be accepted by the Court.

18. In the light of the above, what answer would it be appropriate to give to the question submitted by the national court?

It has been shown that the 1981 Law is incompatible with Article 3 (f), the second paragraph of Article 5 and Article 86 of the Treaty as regards the position which it gives to the *main importer/distributor.*

The extraterritorial impact of the rules on *competition at retail level* introduced by the law has the following characteristics:

(a) It can only ensue from the fact that retailers are precluded from granting a discount of more than 5% on imported or re-imported books.

(b) The existence of a causal link between the fact that retailers may not grant a discount of more than 5% and the effect on intra-Community trade is uncertain since retailers' behaviour is a decisive factor.

The above is predicated by my analysis of the 1981 Law, which, as I have already stated, is confined to establishing a semi-public system for competition and does not seek to regulate trade in goods, so that its effects on intra-Community trade can only be assessed in the light of its provisions restricting competition.

Hence it has not been established that the impediment to domestic competition constitutes *per se* a barrier to intra-Community trade. Therefore, in the light of the information at present available to the Court, I do not consider it possible to propose that the Court should base its decision on the provisions of Article 30.

Nevertheless, I do not rule out the possibility that the competition rules resulting from the Law of 10 August 1981 may affect trade. Irrespective of the uncertain nature of its impact on trade between Member States, the existence of such a risk would suffice — if the special cultural aspects of books are ignored — to render applicable the principle that I have derived from the Court's decision in *Inno* v *ATAB*: a national measure which deprives Articles 85 and 86 of practical effect by replacing normal competition between undertakings by a semi-public system limiting competition is contrary to Article 3 (f) and the second paragraph of Article 5, read together with Articles 85 and 86.

That principle is of fundamental importance, especially in a period of prolonged economic crisis, since it debars the Member States from circumventing the provisions safeguarding the freedom of competition which undertakings enjoy in the Common Market.

19. Yet application of that principle cannot ignore the imperatives to which the Member States are subject in those areas which are their own responsibility.

Hence, in the sector in question — economic policy with regard to books viewed as an element of cultural policy — each Member State must be recognized as having, in the absence of a common policy, the power to take the measures necessary to achieve the particular objective in question.

It is therefore a question of reconciling a Community principle and a national imperative.

In a comparable situation — compatibility of the tax provisions of a Member State in the light of the second paragraph of Article 5 and Article 7 of the Treaty, read together with the regulation establishing a common organization of the market — Mr Advocate General Trabucchi stated that:

'when the Court applies the very important instrument entrusted to it, the preliminary ruling, an interpretative intervention achieves maximum value only in the context of the system and the harmonious equilibrium which the Treaty has established between all subject to Community discipline and the respective powers of the institutions.' [43]

He went on to say:

'Emphasis must certainly be laid on the concept of direct application, which is essential to enable the system to work properly, but, in the interests of preserving its value and effectiveness, this property cannot be ascribed indiscriminately to all the provisions and all the principles of the Treaty, even the most general ones, by drawing arguments from their interpretation subordinating the legislation of Member States to the authority of *theoretical conformity* [44] and thus giving an individual the right to exempt himself from complying with quite precise enactments. Instead, because the situations are complex and the demands they make are numerous, it shows how advisable it is for the Community institutions charged with applying and implementing the general principles to study *in concreto* whether they are observed'. [45]

Applied to books, the above considerations take on special importance in view of the particular cultural characteristics of books.

In such an area, which, I repeat, comes within the jurisdiction of the Member States in the absence of a Community policy on books, I consider that only an economic risk that substantially compromises the application of the Community rules would be such as to warrant the implementation of Article 3 (f) and the second paragraph of Article 5 of the Treaty, read together with Articles 85 and 86, as against a national measure restricting competition in the

43 — Case 2/73, *Geddo* v *Ente Nazionale Risi*, [1973] ECR 865, Opinion p. 885.

44 — Emphasis added.

45 — Case 2/73, loc. cit., Opinion, p. 885.

Common Market. That is the outcome of the particular cultural characteristics to which I referred earlier. [46]

Should such a risk materialize, it would fall to the Commission to act pursuant to the first indent of Article 155 and, if necessary, on the basis of Article 169 of the Treaty. In that event it would be appropriate to study the specific circumstances of the case rather than to consider the 'theoretical conformity' of the legislation in question.

20. Hence it is for the Community institutions to play the respective roles assigned to them by the Treaty, having regard to the importance of the subject in question and the situation existing in the various countries of the Common Market.

In fact, as the Report for the Hearing indicates, in virtually all the Member States, price-fixing systems which derogate from the rules of free competition have been introduced for the protection of the book trade, either by legislation or by private practices.

On 13 February 1981 the European Parliament passed a resolution on 'the fixing of book prices', [47] in which it underscored 'the specific nature of books as products' and the threat to the 'cultural identity of Europe' if books are exposed to 'free-market forces'.

The convergence of views is striking. It suggests that there is a joint will, in the Member States and the European Parliament alike, to safeguard books and thereby literary creativity and the culture of the countries that go to make up the Community.

Hence what is at stake may not be approached purely in terms of the market. The choice is between a hypothetical economic risk and a definite cultural risk.

21. In the light of the foregoing it is suggested that the Court should rule that:

The introduction in a Member State, by legislation, of a semi-public price-fixing system whereby retailers are required to sell books at the price fixed by the publisher or the importer without being able to apply a discount greater than 5%:

(i) is not contrary to the provisions of Articles 3 (f) and the second paragraph of Article 5 of the Treaty, read together with Articles 85 and 86, unless it is established that the resultant restriction on retail competition substantially compromises the application of those provisions in the Common Market;

(ii) is nevertheless contrary to the provisions of Article 3 (f) and the second paragraph of Article 5 of the Treaty in so far as it may possibly encourage behaviour prohibited by Article 86 of the Treaty by conferring on a single importer the power to fix the retail price of books published in another Member State.

46 — It is noted in passing that such an approach corresponds, in the sphere of competition to which our appraisal of the 1981 Law has led us, to the stance which the Court has adopted with regard to barriers to the free movement of goods ever since its judgment in the 'Cassis de Dijon' case (Case 120/78, loc. cit.).

47 — Official Journal 1981 C 50, p. 103.