effect equivalent to a quantitative restriction on imports which is prohibited under the said Article 30.

2. Article 92 of the EEC Treaty must be interpreted as meaning that the fixing by a public authority of minimum retail prices for a product at the exclusive expense of consumers does not constitute an aid granted by a State within the meaning of that article.

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 24 January 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 13 DECEMBER 1977 [1]

Mr President,
Members of the Court,

1. The principal point raised in the present proceedings may be summarized thus: is a national provision whereby minimum prices for the retail sale of given products are fixed compatible with the prohibition on measures equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty?

The products in question are two types of alcoholic beverages which are very common in the Netherlands: hollands gin and 'vieux' (a cognac-flavoured drink). Netherlands manufacturers of these drinks had for long applied by mutual agreement a system of resale price maintenance which distributors were required to observe. However, the Arrondissementsrechtbank (District Court), Utrecht, in a judgment of 22 September 1975 ruled that such an agreed system of prices was incompatible with the Netherlands Wet op de economische Mededinging (law on commercial competition). Fierce competition ensued in the trade, accompanied by an appreciable fall in prices. In order to avoid the ruin of many small traders the Board of Managers of the Produktschap voor Gedistilleerde Dranken (the agency empowered to supervise the production and marketing of spirits) was empowered under Koninklijk Besluit (Royal Decree) No 51 of 18 December 1975 to control prices for a period not

1 — Translated from the Italian.

exceeding three years. In exercise of this power, which had been granted under Article 4 of the Law of 30 September 1954 setting up the Produktschap, a regulation was adopted on 17 December 1975 containing *inter alia* the following provisions:

1. A prohibition on sales of new hollands gin and vieux, either branded or kinds for which there was a catalogue price per unit ('geriefprijs'), at a price below the abovementioned catalogue price increased by a fixed amount of Hfl 0.60 and by value added tax of 16%. The catalogue price per unit is the price per litre which appeared on 6 October 1975 in the price-lists sent by the producer to his customers, without taking account of any discounts or reductions, to which is added the increase in excise duty of 1 January 1976 and exclusive of value added tax (Article 2 (1) and Article 1 (3)).
2. If there is no catalogue price per unit laid down for the said two products and in any case as regards old hollands gin sales may not take place at a price below Hfl 11.25 per litre (Article 2 (2) and (3)).
3. Other spirits are not to be sold at a price below the cost price increased by value added tax (Article 4)

Pursuant to Article 1 (2) of the said regulation 'retail sales' means sales to persons who are not entitled to trade in the alcoholic beverages in question.

Article 3 prohibits the grant of discounts or reduction on retail sales if they have the effect of bringing the actual price below the minimum price laid down under Article 2. If the products are sold at that minimum price it is prohibited to offer gifts or discounts in any form whatever. The same prohibition applies in all cases in which the benefit conferred, regard being had to its actual value, would reduce the selling price to a level below that provided for in Article 2.

The Produktschap adopted the said system of prices for one year and subsequently extended it until 1 March 1978. The initial minimum price of Hfl 11.25 was subsequently increased to Hfl 11.70.

It must be emphasized that the system in question is applied both to domestic products and to those from other Member States and that there is no common organization of the market in spirits.

2. The Economische Politierechter (Police Magistrate for Commercial Cases) of the Arrondissementsrechtbank, Rotterdam, delivered a judgment on 18 May 1976 whereby Mr Jacobus Philippus van Tiggele, the operator of a discount self-service business in wines and spirits in a town in the Netherlands, was sentenced to a fine of Hfl 5 000 or, in default of payment to three months' imprisonment for persistent infringement of the abovementioned regulation by the sale of various brands of gin at less than the minimum prices fixed. After two appeals to higher courts (one to the Gerechtshof (Court of Appeal), The Hague, which quashed the judgment of the court of first instance, and a further appeal to the Hoge Raad (the Supreme Court for the Netherlands) which quashed the judgment of the court of second instance) the case was referred to the Gerechtshof, Amsterdam, which has requested the Court of Justice, pursuant to Article 177 of the EEC Treaty, to deliver a preliminary ruling on the following questions:

1. Must Articles 30 to 37 of the EEC Treaty be interpreted as meaning that the fixing of minimum prices for the marketing of spirits in the Netherlands as laid down in the Regulation concerning the price of spirits by the Board of Managers of

the Production Board for Spirits on 17 December 1975 is prohibited as a quantitative restriction on imports or a measure having equivalent effect?

2. Must Articles 92 to 94 of the EEC Treaty be interpreted as meaning that the fixing of minimum prices for the marketing of spirits in the Netherlands as laid down by the Regulation concerning the price of spirits by the Board of Managers of the Production Board for Spirits on 17 December 1975 is to be regarded as an aid granted by the Netherlands which is incompatible with the Common Market?

Before considering the problems raised by these questions I think it helpful to add that the present case concerns products to which the catalogue price per unit applies and that the general minimum price laid down for old hollands gin can be taken into consideration only if there are no catalogue prices per unit; it seems that this in fact applies to imported products of the same nature (new hollands gin and vieux).

However, the questions submitted by the Netherlands court call in question the whole system of minimum prices for the sale of spirits in the Netherlands. Account should therefore be taken of this system in its entirety, the more so since the task of the Court is not to establish whether a specific national provision is lawful or not in terms of Community law but rather to establish the scope of the provisions of the Treaty which the Court has been asked to interpret in relation to a system of prices of the type described.

3. The first question expressly comes within the framework of the chapter of the EEC Treaty concerning the elimination of quantitative restrictions between Member States. As I have said, the question is whether a national system of minimum prices, like that set up by the Prijsverordening Gedistilleerde Dranken, to which I have already referred, is contrary to the prohibition imposed on Member States pursuant to Article 30 of the EEC Treaty against the application of measures having an effect equivalent to quantitative restrictions on imports. Article 34 does not affect the problem before the Court which is a question of retail price control, so that there is no effect on exports and accordingly the prohibition on measures having effects equivalent to quantitative restrictions on exports does not apply.

The Court of Justice has consistently held that the abovementioned prohibition does not affect only national measures which have an *actual* restrictive effect on the movement of goods. It is sufficient that the commercial legislation of a Member State is capable of impeding intra-Community trade potentially or indirectly, for it to constitute a measure having an effect equivalent to quantitative restrictions.

This has been clearly established, as a general rule, in respect of all national provisions concerning trade, irrespective of the nature of the product, whether agricultural or industrial, and thus also of the existence of a common organization of the market, in the judgment of 11 July 1974 in Case 8/74, *Dassonville* ([1974] ECR 837); it was subsequently confirmed with regard to products coming under a common organization of the market, in the judgment of 30 October 1974 in Case 190/73, *Van Haaster* ([1974] ECR 1123).

A national system fixing minimum prices clearly falls within the scope of 'trade rules'; the interpretative guidelines mentioned a little earlier thus also apply to such a system.

As regards more particularly national measures to control prices the Court has often had occasion to lay down criteria for deciding whether measures fixing

maximum prices are compatible with the operation of a given common organization of the market (I refer in particular to the judgments of 23 January 1975 in Case 31/74, *Galli* [1975] ECR 47, of 26 February 1976 in Case 65/75, *Tasca* [1976] ECR 291 and in Joined Cases 88 to 90/75, *Sadam* [1976] ECR 323).

Whilst the *Galli* judgment, which is essentially based on the existence and implications of a common organization of the market, cannot be of assistance in the present case the *Tasca* and *Sadam* judgments in fact establish the scope of Article 30 of the Treaty in relation to intervention by the public authorities with regard to prices.

In these rulings the Court confirmed the abovementioned interpretative guidelines concerning the concept of 'measures having an effect equivalent to quantitative restrictions' and stated that 'Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult that of domestic products. A maximum price, in any event in so far as it applies to imported products, constitutes therefore a measure having an effect equivalent to a quantitative restriction, especially when it is fixed at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss' (paragraph 13 of the decision in the *Tasca* judgment, paragraph 15 of that in the *Sadam* judgment).

More recently the Court referred to this same criterion, in connexion also with internal measures which had the effect of turning the net manufacturing price into a fixed price binding as regards the retail sale of cigarettes, in its judgment of 16 November 1977 in Case 13/77, N.V. G.B.-INNO-B.M. v Vereniging van de Kleinhandelaars in Tabak (paragraph 52 of the decision).

It should be noted that, whilst the main action in the *Tasca* judgment related to the behaviour of a private person who had exceeded the maximum price levels permissible pursuant to national legislation, the *INNO* case related to goods sold at less than the prices fixed.

In the former instance an infringement of the prohibition of measures having an effect equivalent to quantitative restrictions might occur if the national authorities, in establishing the maximum level for prices, had failed to take account of the prices of any imported products which might be higher than the prices of comparable domestic products. In that case indeed it would have become difficult if not completely impossible for the products of other States to maintain an outlet in the State in question.

When a fixed price is imposed, as in the *INNO* proceedings, the same consideration applies to the implied prohibition on charging higher prices; indeed the Court made express reference to the concept of 'maximum price'. On the other hand no specific clarification was provided in the *INNO* judgment of the nature of 'minimum price' which is also inherent in the fixed price and in fact it was not directly taken into consideration in the Court's decision.

On the other hand it must also be noted that in the *INNO* case the national measure, which was adopted principally for tax reasons, merely conferred binding force on the price freely chosen by the manufacturer; in the present case, however, the uniform minimum price which, if foreign producers do not supply price-lists appears to be the only price in practice for foreign products,

constitutes a price fixed entirely by the authorities and in any case without prior consultation with producers outside the Netherlands.

All this indicates that in the judgments of the Court concerning State measures for the control of prices the problems inherent in a mandatory system of *minimum* prices have not been considered directly. Nevertheless two relevant factors emerge from these judgments. Firstly, clarification of the concept of measures having an effect equivalent to quantitative restrictions, which is applicable to any price control which is likely to constitute an obstacle, directly or indirectly, actually or potentially, to trade between Member States. Secondly, the more specific idea that a price fixed by the authorities, even if applied without distinction to domestic and foreign products, may constitute a measure having an effect equivalent to a quantitative restriction, if it is fixed at such a level as to make the marketing of imported products impossible or perhaps merely more difficult than that of domestic products. We shall see later the effects which these factors may have in the case before us.

To continue this train of thought, in connexion particularly with the second criterion set out above, it is appropriate to bear in mind the Commission Directive of 22 December 1969 based on the provisions of Article 33 (7) of the Treaty on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty. It states expressly that it is necessary to abolish measures which 'fix the prices of products solely on the basis of the cost price or the quality of domestic products at such a level as to create a hindrance to importation' (Article 2 (3) (e)) or which increase the costs of an imported product (Article 2 (3) (f)). This provides indirect confirmation that it is impossible to exclude the negative effects of a mandatory generalized minimum level of prices on the importation and marketing of imported products.

4. It has been observed by academic writers that the application of national price control systems not only has the effect of reducing the actual opportunities for competition and the ability of undertakings to compete with each other but often assumes that the undertakings operating on the Common Market have adopted practices at variance with the Community rules on competition (M. Walbroek, 'Les Réglementations Nationales de Prix et le Droit Communautaire', Brussels 1975, p. 55). Perhaps the Commission had this idea in mind when it considered the provisions of Article 30 *et seq.* of the Treaty together with the duty incumbent upon the States under Article 5 of that Treaty to abstain from taking any measure capable of creating situations which, if they had been brought about by the behaviour of undertakings would come under the prohibitions in Articles 85 and 86 of the Treaty.

The Commission has observed that the fixing of minimum prices generally constitutes a more restrictive measure and hinders the free play of market forces to a greater extent than the fixing of maximum prices. Unlike the latter the fixing of minimum prices at a level at variance with the natural tendency of a market based on a free price system to find a lower level necessarily involves a serious limitation of competition.

With regard to the present case the Commission has emphasized the fact that the mandatory Netherlands system of minimum prices for alcoholic beverages, after a brief interlude of free and very lively competition, succeeded the system, agreed between producers, of resale price maintenance agreements for the same products — a system which

was discontinued because it was held contrary to national legislation governing competition. The Commission maintains that the present system of minimum prices is equivalent in its effects on competition to the previous collective system of resale price maintenance agreements and likewise raises the problem of its compatibility with the principles set out in Articles 3(f) and 85 of the Treaty.

The restrictive effect on competition inherent in any measure fixing minimum sale prices is clearly undeniable. It is also clear that such an effect, which also has an adverse effect on the products of other Member States, must inevitably affect the importation of such products into the State in which a measure of this nature is applied.

Nevertheless when intervention measures on the part of a Member State in the field of prices are considered from the point of view of the prohibition of measures having an effect equivalent to quantitative restrictions the adverse effect on competition is to be appraised quite differently from the behaviour of undertakings when the question is to establish whether the latter is compatible with the provisions of Articles 85 and 86.

In fact Articles 85 and 86 constitute rules on competition *applicable to undertakings* (as is expressly stated in the heading to the section of the Treaty in which they appear) logically and structurally separate from the rules on competition applicable to States (Article 92 *et seq.*). There is a distinction between Articles 30 and 34 on the one hand and Articles 85 and 86 on the other not only with regard to those subject to the prohibitions but also with regard to the nature of behaviour which is prohibited: we need only reflect that measures restricting trade between Member States are by their very nature incompatible with the Treaty because of the impediment which they cause to intra-Community trade whilst agreements between undertakings are incompatible with the Common Market in so far as the dual condition of a detrimental effect on trade between Member States and of the object or effect of restricting competition is fulfilled; and abuse of a dominant position in its turn entails abuse over and above the element of detriment to trade between Member States.

5. The Court, in its abovementioned judgment in Case 13/77, the *INNO* Case, did indeed appraise certain measures adopted by States in fixing prices not only in the light of Article 30 but also with regard to Article 86, which prohibits any abuse by undertakings of a dominant position. However the Court referred to that rule in so far as it establishes the fundamental objective (the protection of freedom of competition) laid down in Article 3 (f) of the Treaty and in so far as the prohibition, which is equally fundamental, of any measure by States which might jeopardize the attainment of the Common Market (second paragraph of Article 5), includes as a logical consequence the duty of Member States not to adopt measures which might cancel the effectiveness of the rules on competition, including Article 86. That is why it is stated in the abovementioned judgment that Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 90 of the Treaty or which might encourage abuse of a dominant position (paragraphs 33 and 34 of the *INNO* judgment).

It is accordingly clear that if Article 86 is to be relied upon in connexion with the prohibition of measures having an effect equivalent to quantitative restrictions (and the same must apply to Article 85), 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.

Having established the foregoing, when one turns to consider the problem before the Court one must wonder whether the measures adopted by the Netherlands Produktschap, although clad in the formal garb of measures of public law the observance of which the State enforces with penalties under criminal law, do not in fact express the unanimous will of the undertakings in the sector.

That is to say one may wonder whether in order realistically to appraise the situation before us, it is not inadequate to proceed only as far as formal consideration of the mandatory nature which the State can confer (and in the present case has conferred) on decisions of agencies charged with the exercise of tasks involving the public interest in regulating the economy. But an examination of this nature makes sense only if such agencies are constituted and operate in such a way that their decisions constitute the expression not only of the interests but of the actual unanimous will of the undertakings operating in the sector of the economy in which such agencies are competent.

In such a case the binding effect, or rather the legislative character, conferred by the public authorities upon decisions of such 'specialized' agencies should not in itself be sufficient to prevent this kind of measure, which may indeed involve the responsibility of the State as against the Community in relation to Article 30 *et seq.* of the Treaty, from being considered also in terms of the provisions of Articles 85 and 86 of the Treaty as 'decisions by associations of undertakings' or as concerted practices or abuse of a dominant position.

Prime importance must therefore be attached to the criterion set out in the said judgment in the *INNO* case which renders the appraisal of measures by States in the light of Articles 5, 3 (f) and 86 dependent on the extent to which such measures entail behaviour detrimental to competition on the part of undertakings. In the present case the undertakings concerned in a system of imposed prices, which produced effects analogous to those previously obtained through a series of resale price maintenance agreements, would have been in a position to implement their plan to curb competition through their representatives on the Board of Management of the Produktschap.

The decisive element to be examined is in any event the composition of the Produktschap. Pursuant to Article 3 of the Law of 30 September 1954 which established the Produktschap with powers to deal with spirits the Board of Management is to consist of 20 members, half of whom are appointed by employers' associations and half by organizations of workers in the spirits sector. Each category is entitled to one member from the alcohol and must industry, three members from the spirits industry, one member from the import and distribution trades, one member from the domestic wholesale trade in spirits and four members from the retail trade in those products. The office of president is a crown appointment.

Such a composition certainly enables Netherlands traders in the spirits sector to assert their point of view and to ensure that the interests of producers of and traders in domestic products shall prevail. However, even if it is held that the decisions of an agency thus constituted will normally enjoy wide approval on the part of the undertakings in the sector, it does not seem to me possible to categorize the measures by which it intervenes in the economy as measures and behaviour to which Articles 85 and 86 of the Treaty apply, especially having regard to the fact that employers and employees are jointly represented. In other words the Produktschap is not agent of an association of undertakings.

There still remains the argument that the formal measure adopted by the Produktschap reflects an underlying agreement or concerted practice on the part of the undertakings in the sector. However in the present case this problem does not arise for the simple reason that throughout the entire course of the present procedure no question whatever has been raised as to whether the behaviour of the Netherlands undertakings, for whose benefit the minimum prices were fixed, is compatible with Articles 85 and 86 of the Treaty. The court making the reference referred exclusively to the regulation of the Produktschap and to the Royal Decree whereby the Produktschap was empowered to issue the regulation. For its part the Commission, which is entrusted under the Treaty with the task of ensuring compliance with the rules on competition, has not only omitted any reference to investigations carried out by it into the behaviour of the undertakings in the sector in connexion with the prohibitions laid down in Articles 85 and 86 but in the course of the present proceedings it has not even raised doubts as to whether such behaviour is compatible with those provisions.

Accordingly I consider that at this stage of the proceedings the necessary conditions for the application to those provisions as regards an appraisal of measures of the kind mentioned by the court making the reference are not fulfilled.

6. We must now consider each of the three kinds of minimum prices which, as has been recalled above, were laid down by the regulation of the Produktschap, in relation to the restrictive effects which they may have on trade between Member States.

With regard to the 'catalogue price per unit' the method whereby it is calculated, namely the application of specific increases to the selling price announced by the manufacturer on 6 October 1975, is clearly intended to guarantee a certain margin of profit to the retail seller.

Since the discounts and reductions in price generally conceded by the manufacturer to large-scale wholesalers are not taken into consideration this minimum price precludes large stores from passing on in their prices the advantageous position which they enjoy over small businesses in regard to actual purchasing prices and to costs — which might be ruinous for such small businesses.

It is both well known and accepted that widely-consumed products sold in a large self-service store are generally offered at lower prices than in businesses where customers are served individually by a shop assistant. Such lower prices are the result of economies in staffing costs brought about by the self-service system of marketing and generally through the discounts which large stores can obtain when purchasing goods since their orders are in bulk and usually greater than of small-scale traders. Furthermore the greater volume of sales permits large stores to restrict their profit margin per unit as compared with that required by small businesses. Thus since the imposed price in question prevents unrestricted competition from lowering the price of alcoholic beverages to such a level that it would no longer be profitable for small-scale retailers it constitutes a measure of support for the latter.

Correspondingly there is a restriction on competition at the cost of large stores (compensated, it might be added, by the larger profit margins which the system of minimum prices allows them). The point which concerns us here is, however, that the restriction does not relate specifically to this or that product (and in particular imported products) but rather applies to all products, domestic or foreign, sold in such stores. Bearing in mind the fact that the price is

fixed specifically for each brand and kind of alcoholic beverage on the basis of the price stated two years previously by the manufacturer the sole effect of the arrangement in question is to rule out competition between distributors of products of the same brand whilst, unlike the situation in the field of application of uniform minimum prices, competition between the different brands is not impeded.

I do not think, then that the catalogue price per unit is capable of placing imported products at a disadvantage in comparison with domestic products.

For similar reasons it must be held that the minimum price imposed for all alcoholic beverages other than hollands gin and vieux, corresponding to the actual cost price does not entail an improper restriction on intra-Community trade; in this connexion it should be added that it is impossible to consider as a normal feature of a system of free trade and healthy competition sales effected at less than the cost price in order to gain control of a market.

7. It remains for me to consider the case of the uniform minimum price applied to old hollands gin, and extended to new hollands gin and vieux where there is no catalogue price per unit.

Unlike the two foregoing types of price the level of the price in question cannot be related to information supplied independently by the manufacturer or to a choice made by the distributor when he purchases a given product. The uniform minimum price is fixed entirely by the authorities and cannot be varied on the basis of quality or costs of the relative commercial and competitive positions of the various products.

In the course of the procedure the Netherlands Government stated that the minimum price in question was established by taking account of the level of prices of cheap Netherlands spirits, which clearly differed from the level of prices of branded spirits. Furthermore, in the sector of cheap spirits there are not great differences in the prices of new and old hollands gin.

Counsel for Mr van Tiggele has furthermore maintained that, before the relevant system of prices was set up, the price of new hollands gin was approximately Hfl 9.50 per litre bottle, which is appreciably less than the uniform minimum price of Hfl 11.25. This undertaking also stated that at present it has an offer of hollands gin from a producer in the Federal Republic of Germany at such a price (Hfl 8.95 per litre carriage paid) that it could sell it in the Netherlands at a profit very much below the present minimum price of Hfl 11.70.

Apart from these points of fact, which it is for the national court to appraise in the light of the interpretative ruling delivered by the Court of Justice, I should like to make the observation, in contrast to my views on the two other types of minimum prices which I have previously considered, that it is conceivable that the uniform minimum price may be such as to put imported products at an artificial disadvantage as against competing domestic products.

In fact a foreign product, less well-known and less firmly established on the market of a given country than the corresponding domestic brand may encounter serious difficulties in penetrating that market, or in maintaining its position, if it is deprived of all opportunity of competing on price.

I have in mind, in particular, a foreign product, the quality and presentation (packaging and wrapping etc.) of which are inferior to those of the corresponding domestic product but which has the advantage of being appreciably cheaper to produce and accordingly can make headway on the market only through its particularly attractive price. In such a case the fixing of mandatory

minimum prices constitutes a clear impediment to the importation of the product in question whenever the level of the minimum price is determined by reference to the quality, presentation and average (or even minimum) costs of domestic products, disregarding differences in level which may exist in these matters between the domestic market and the market in other Member States.

It accordingly appears to me that a system of prices having these features constitutes an impediment, albeit merely indirectly, to trade between Member States and that in the circumstances envisaged the criterion which I mentioned previously following my analysis of the case-law of the Court of Justice must be applied: that is to say the criterion that, although a maximum price fixed by the authorities is applied without distinction to domestic and imported products this constitutes a measure having an effect equivalent to a quantitative restriction when the level of that price renders the marketing of imported products more difficult than that of domestic products. Furthermore the circumstances which have been described come within the field of application of Article 2 (3) (e) of the Commission Directive of 22 December 1969 which prohibits measures fixing the price of products solely on the basis of the cost price or the quality of domestic products at such a level as to create a hindrance to importation.

Turning to the present case I observe that, according to the statement of reasons on which Netherlands Royal Decree No 51 of 18 December 1975 empowering the Produktschap to fix minimum prices for spirits was based, the system was intended to prevent the selling prices of the product in question from falling to such a level that even efficient and well-run marketing businesses could not make a profit; it was intended furthermore to permit firms to modernize and improve their management organization.

However, statements were made at the hearing, which the agent of the Netherlands Government did not challenge, to the effect that the system in question requires importers to resell the products of other Member States at prices appreciably higher than those which they could well charge whilst still retaining a reasonable profit margin.

If the national court were to find that the minimum price in question was fixed at a level which was excessively high having regard to the costs of products imported from other Member States so that such products are placed at a disadvantage, from the point of view of their actual ability to compete, as against corresponding domestic products, this would of itself constitute an infringement of the prohibition laid down in Article 30 of the Treaty against measures having an effect equivalent to quantitative restrictions.

The Netherlands Government has, however, argued that even on that view the system in question is not incompatible with the prohibition in Article 30 since the said regulation of 17 December 1975 on minimum prices provides in Article 8 that 'the President of the Produktschap may in certain cases or categories of cases grant exemption from the application of the provisions of this regulation'.

I do not find this argument convincing. In my view measures capable of impeding the importation of goods from other Member States do not escape the prohibition in the said Article 30 simply because a national administrative authority has been empowered to grant exemptions from the application of such measures. It should also be pointed out that the provision in Article 8 of the Netherlands regulation does not establish any criterion as a guide-line for the exercise of the power of exemption and leaves instead the widest discretion to the national agency. Consequently, far from providing

entitlement to exemption for the products of other States which encounter difficulties in penetrating the market because of the system of minimum prices this provision entails a direct risk that it may subsequently be employed in a discriminatory way to the detriment of imported products.

8. In the second question the Netherlands court requests, as I have previously recalled, an interpretation of Articles 92 to 94 of the EEC Treaty in order to enable it to establish whether a system of minimum prices like that described above is to be regarded as an aid granted by the Netherlands contrary to the said articles.

It is clear that for a measure which has the effect of favouring certain undertakings to constitute an aid it must entail a financial burden for the State. This follows from the actual wording of Article 92 (1) in which reference is made to 'any aid granted by a Member State or through State resources'.

It is thus necessary that the State should grant certain undertakings, selected individually or by categories, an advantage entailing a burden on the public finances in the form either of expenditure or of reduced revenue.

In the case-law of the Court the judgment of 23 February 1961 in Case 30/59, *Gezamenlijke Steenkolenmijnen in Limburg* ([1961] ECR 1) it is stated with reference to Article 4 of the ECSC Treaty that the concept of 'aid' embraces positive benefits, such as subsidies, or interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking being similar in character and effect to subventions. Subsequently the Court ruled that preferential rates of discount for exports granted by a State in favour only of national products exported (judgment of 10 December 1969 in Joined Cases 6 and 11/69, *Commission* v *France* [1969] ECR 523) and the partial reduction of public charges devolving upon undertakings in a particular sector of industry (judgment of 2 July 1974 in Case 173/73, *Italy* v *Commission* [1974] ECR 709) also constitute aids prohibited by Article 92 of the EEC Treaty.

The fixing of minimum prices which, even though applied uniformly to retail sales of given products, whether domestic or foreign, have the effect of placing certain categories of undertaking at a competitive disadvantage as against others, cannot be regarded as an aid granted by the State to the undertakings. A system of prices applicable to goods produced by private undertakings does not in fact entail any burden on the State's resources.

If the undertakings placed at a disadvantage by the measure adopted by a State are identical with undertakings distributing imported products the compatibility of such a measure with the Treaty must be appraised on the basis which I have endeavoured to adopt, namely the provisions prohibiting impediments to the free movement of goods.

9. For the reasons set out above I am of the opinion that the Court should reply to the questions submitted, pursuant to Article 177 of the EEC Treaty, by the Gerechtshof, Amsterdam, by an order of 30 June 1977, as follows:

1. A national price-control system constitutes a measure having an effect equivalent to a quantitative restriction prohibited under Articles 30 and 34 of the EEC Treaty if and in so far as it constitutes an impediment, directly or indirectly, actually or potentially, to intra-Community trade.

2. Article 30 of the Treaty, which prohibits Member States from applying measures having an effect equivalent to quantitative restrictions on imports, precludes the State or public agencies with powers delegated by the State from fixing a uniform minimum price applicable to the retail sale of given products if such price is fixed at such a level as to make the marketing of imported products more difficult than that of domestic products. This may occur in particular when the level of the minimum price, based on the average level of the cost and the average quality of domestic products is appreciably higher than the price at which cheaper imported products of a lower quality could hold their own on the market.

3. A national measure which, without involving any burden for the State, fixes minimum prices for the retail sale of goods produced by private undertakings does not constitute a State aid within the meaning of Article 92 of the Treaty even if such a measure has the effect of conferring a competitive advantage on domestic products as compared with imported products.