it in so far as the agreement has not been notified.

3. Although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings.

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

Mr President,
Members of the Court,

I — Introduction

The applicants in these joined cases ask in substance that the Court:

(1) Primarily, declare the Commission decision of 15 July 1982 (IV/29.525 and IV/30.000 SSI) void in whole or in part;

(2) In the alternative, declare void, in whole or in part, Article 5 of that decision, in so far as it imposes fines on certain of the applicants, or at least reduce the amounts of the fines to such amount as the Court shall think fit.

II — Summary of the facts and of the relevant Community and Netherlands legal measures (other than competition law)

The following summary of the most important facts and of the relevant legal provisions relied on by the applicants is drawn, with some additions and with differently numbered paragraphs, from the report for the hearing.

1. *The Stichting Sigarettenindustrie*

1.1. The Stichting Sigarettenindustrie (hereinafter referred to as 'SSI') is a foundation which was established under Netherlands law in 1955 with the purpose of furthering the common interests of its members, who are manufacturers and importers of cigarettes in the Netherlands. According to information provided by SSI there are only one manufacturer and four importers of cigarettes in the Netherlands who are not members of SSI.

1.2. On 20 December 1976 the members of SSI entered into a master agreement, which was notified to the Commission on 20 September 1977 in compliance with Article 4 of Regulation No 17. That

* Translated from the Dutch.

agreement states in essence that the members designate SSI as their sole spokesman in negotiations with the authorities with regard in particular to retail prices and wholesale and retail margins.

1.3. On the Netherlands cigarette market there are also two wholesalers' organizations and one association of specialist retailers, the Nederlandse Sigarenwinkeliers Organisatie (hereinafter referred to as 'NSO').

2. *Special provisions relied on by the applicants*

2.1. In defence of the agreements prohibited by the contested decision the applicants rely in the first place on Council Directive, 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition 1972 (31 December L 303, p. 1), as amended by Council Directive, 77/805/EEC of 19 December 1977 (Official Journal, L 338, p. 22). That directive, which is intended to harmonize fiscal provisions affecting the consumption of manufactured tobacco, permits the levying of a proportional (or *ad valorem*) excise duty, expressed as a percentage of the maximum retail price, and of a specific excise duty per unit of the product. The object of the directive is to make the relationship between proportional and specific taxes the same in all Member States.

2.2. The Netherlands excise duty legislation (Wet op de Accijns van Tabaksfabrikaten [Excise Duty (Tobacco Products) Law]) is in conformity with the Community provisions. Cigarette taxation consists primarily of an *ad valorem* excise duty, collected by means of tax stamps (banderoles) showing the retail price on which the duty is calculated. The manufacturer buys the tax stamps from the tax authorities, pays the excise duty and affixes the tax stamps to the packets of cigarettes. Under Article 30 of the Excise Duty (Tobacco Products) Law, once tax stamps have been affixed to them tobacco products may no longer be sold for a price higher or lower than that shown on the tax stamp. The Law further provides that a given tobacco product may not be sold at more than one retail price, unless a distinction is clearly made within the brand under which it is marketed or by means of a separate brand (Article 28).

2.3. Finally, it is of relevance for the decision in these cases that with a view to combating inflation the Netherlands authorities have introduced price regulation on the basis of the Prijzenwet [Prices Law], the Prijzenbeschikking Goederen en Diensten [Prices (Goods and Services) Order, hereinafter referred to as 'the Prices Order']. Such an order has been adopted by the Minister each year since 1973 and lays down criteria for the calculation of increases and reductions in prices where costs rise or fall. Article 2 of the order prohibits *manufacturers* from selling their products at a price *higher* than that at which they were sold on a specified date (reference date), adjusted according to the amount by which production costs of those products have risen or fallen since that date. Article 3 prohibits *dealers* from selling a product at a price higher than the purchase price together with a maximum profit margin. Infringements of the order are criminal offences punishable under the Wet

Economische Delicten [Economic Offences Law] of 22 June 1950.

2.4. In so far as is relevant I shall deal more fully in the remainder of this opinion with all the provisions referred to. They are also set out more extensively in paragraphs (21) to (32) of the contested decision.

3. *The agreements and practices at issue*

3.1. In addition to the SSI master agreement referred to above, the members of SSI have entered into various agreements and have engaged in certain practices with regard to margins and prices.

3.2. On 4 December 1974 the members of SSI and the Gruno Tobacco Company signed an agreement providing for discounts for specialist tobacco retailers (hereinafter referred to as 'the specialist retailer's bonus scheme'). Subsequently Imperial Tobacco also took part in the scheme, although it did not sign the agreement. Under the scheme *specialist retailers* receive a fixed bonus each year for each 1 000 cigarettes bought from the signatories to the agreement. The bonus has been regularly increased and in 1978 stood at 75 cents per 1 000 cigarettes. The total sum necessary for the payment of the bonus is divided among the manufacturers and importers in proportion to their sales through specialist shops. The scheme includes a definition of specialist retailers based on a number of criteria such as the portion of their total sales attributable to cigarette sales, or a minimum sales figure. That scheme was notified to the Commission on 20 September 1977.

3.3. Agreements were concluded between SSI and wholesalers and retailers laying down maximum profit margins for wholesalers and retailers. Since for fiscal reasons arising out of the Netherlands excise legislation it is possible at the production stage to know the retail price of a packet of cigarettes, agreements could be concluded establishing which percentage of that price would be attributed to the various dealers. The agreement laying down wholesale margins was notified to the Commission on 27 December 1979.

3.4. In addition to the agreements described above, on 23 April 1975 the members of SSI entered into an agreement laying down rules of conduct in the cigarette trade. That agreement provides in particular that no discounts may be granted other than those agreed upon between the members of SSI.

3.5. The Commission also makes allegations of concerted practices which had the result of fixing a maximum profit margin for retailers. Those practices are alleged to have been engaged in on the one hand between the members of SSI and non-member manufacturers (with regard to the direct delivery of cigarettes from manufacturer to retailer), and on the other hand between SSI members and wholesalers.

3.6. On 1 August 1974, 7 November 1975 and 1 February 1978 agreements were concluded between the members of SSI leading to increases in retail prices. Those agreements were concluded after the Minister had authorized price increases under the Prices Order. The agreements also include *inter alia* quantitative and qualitative sales restrictions and collective provisions limiting competition, which in part discriminate between dealers, regarding

margins and extra bonuses to be granted to dealers.

3.7. Finally, a 1971 agreement laid down conditions for the approval of wholesalers. That agreement was accompanied by a standard agreement regarding discounts and other conditions of sale, governing the relationship between manufacturer and wholesaler. The agreement lapsed in 1978.

3.8. All the agreements and concerted practices referred to are described in detail in paragraphs 33 to 87 of the contested decision.

4. *The Commission decision*

4.1. The Commission became aware of the practices of the Netherlands cigarette manufacturers and importers mainly as a result of the notification of the master agreement, the specialist retailers' bonus scheme and the agreement setting wholesale margins.

By decisions of 21 June 1979 and 12 December 1980 the Commission commenced the procedure laid down by Article 9 (3) of Regulation No 17.

After hearing the submissions of the undertakings and the association of undertakings concerned, in accordance with Article 19 of Regulation No 17 and Regulation No 99/63/EEC of the Commission of 25 July 1963, and after hearing the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, delivered in accordance with Article 10 of Regulation No 17 on 10 May 1982, on 15 July 1982 the Commission adopted Decision 82/506/EEC, the subject of these proceedings.

4.2. The Commission is of the view that the agreements and practices of which it has become aware constitute infringements of Article 85 (1) of the EEC Treaty. Certain of those agreements and practices, it says, make competition on margins entirely impossible. That is the case with regard to the specialist retailers' bonus scheme, the agreements setting wholesale and retail margins and finally the agreement laying down rules of conduct in the cigarette trade.

According to the Commission those measures are contrary to Article 85 (1) in the first place because they prevent traders (manufacturers, importers, wholesalers and retailers) from setting or negotiating their margins in full freedom and independence, and make it pointless to make any effort to obtain extra discounts. Moreover, manufacturers who do not take part in controlling competition in this way are compelled to adopt the same measures so as not to be excluded from the market. According to the Commission the members of SSI have also entered into actual price agreements, which have always been proscribed.

According to the Commission the agreements and practices in question did not qualify for exemption under Article 85 (3), either because one of the four conditions of that provision had not been fulfilled or because the agreements and practices had not been notified to the Commission under Article 4 (1) of Regulation No 17.

4.3. The Commission therefore required those to whom the decision was addressed, that is, the Stichting Sigarettenindustrie, British-American Tobacco Co. (Nederland) BV, Sigarettenfabriek Ed. Laurens BV, Theodorus Niemeyer BV, Philip Morris Holland BV, R. J. Reynolds Tobacco BV, Turmac Tobacco Co. BV, Tabaksfabriek Gruno BV, Imperial Tobacco (Holland) BV, Reemtsma Nederland BV, Tabak

Express Nederland, the Eerste Grossiers Vereniging, the independent wholesalers and the Nederlandse Sigarenwinkeliers Organisatie, to cease to apply the agreements without delay, and imposed fines on the undertakings which were party to the price agreements. Those were the British-American Tobacco Co. (Nederland) BV, Sigarettenfabriek Ed. Laurens BV, Theodorus Niemeyer BV, Philip Morris Holland BV, R. J. Reynolds Tobacco BV and Turmac Tobacco Co. BV.

III — The applicants' submissions

In support of their application the applicants have made four submissions.

In their *first and most fully-developed submission* they assert that the decision does not fulfil the conditions for the application of Article 85 (1) of the EEC Treaty. In the first place, effective competition in the sector concerned is prevented by the tax and price provisions which I have already summarized, by pressure exerted by the Netherlands authorities, by restriction of competition resulting from an excessively high 'multiplier' and the downward effects on prices of taxation (compression effect), and by restriction of competition due to abnormal methods of calculation and collection of excise duties on tobacco. Secondly, there is no question of any detrimental effect on trade between Member States.

According to the *second submission* of one of the applicants, the Commission decision is self-contradictory. That is, Article 6 of the contested decision, which prohibits SSI from consulting the authorities, is incompatible with Articles 1 and 4 of the decision, which leave intact the provisions of the master agreement governing such consultation.

In their *third submission* the applicants allege infringement of Article 15 of Regulation No 17 and of Article 190 of the EEC Treaty, inasmuch as the Commission imposed fines on the applicants. In that submission they raise objections both of form and of substance, and objections regarding the fixing of the amount of the fines and alleging infringement of Article 85 (3) of the EEC Treaty.

Finally, the applicants' *fourth submission* alleges infringement of Article 190 of the EEC Treaty inasmuch as the Commission failed to take sufficient account of the applicant's arguments.

At this point I think that very general summary of the submissions will suffice. For a summary of the way in which those submissions were amplified during the written procedure reference may be made to the report for the hearing, which also contains a synthesis of the counter-arguments of the Commission at that stage. In so far as is necessary, however, I shall deal more fully with the arguments of the parties in the course of my opinion. I shall of course also refer to the further arguments made by the parties at the hearing.

The alleged influence on competitive relationships of the Excise Duty (Tobacco Products) Law (and indirectly of the Council directives on the harmonization of such legislation, referred to above), the successive yearly Prices Orders and the interference of the authorities in the price and margin policy of the applicants played a predominant role in their applications and replies and in their oral arguments at the

hearing. That aspect was raised, moreover, in argument on various submissions. Following the example of the judgment of the Court of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie and Others* v *Commission* [1975] ECR 1663 at paragraphs 12 to 24) I therefore think it appropriate, in the next part of my opinion, to examine first in general the question what scope for competition the part played by the authorities in business affairs has left. I shall then deal in turn with the individual submissions of the applicants.

IV — Review of the submissions advanced

1. *The relevance of the part alleged to have been played by the authorities*

1.1. Preliminary remark

Like certain of the applicants in the *Suiker Unie* case (see paragraph 12 of the judgment referred to above) the applicants in this case have asserted in particular that action taken by the authorities made real competition between the applicants impossible. Here, too, therefore, it is necessary to examine specially to what extent that important allegation is supported by information provided by the applicants and by the Commission, or generally available, before the specific arguments are examined.

1.2. The Council directives

Since the Netherlands excise duty legislation is based in part on those directives and the applicants moreover base separate arguments on them, I think I should comment first of all on the Council directives on harmonization of legislation in that field, which I have already referred to. It appears from the first three recitals in the preamble to the directive of 19 December 1972 that its adoption was largely motivated by the fact that the divergent existing excise taxes on tobacco products distorted competition within the common market and within the individual Member States, and impeded the free movement of those goods within the common market. The subsequent recitals and the provisions of the directives themselves show in what way the harmonization of tax structures serves to put an end to distortions of competition and to some of the obstacles to trade between States.[1] For cigarettes in particular, according to Article 4 (3) the same ratio between proportional duty (calculated on the basis of value) and specific duty (identical for all price categories) was to be achieved in all Member States, so that the range of varying retail selling prices could reflect fairly the varying manufacturers' prices. In explanation of this point I should add that distortion of competition within the common market arises here in particular because high specific duties (identical for all price categories) result in a relative advantage for the higher price categories, whilst high proportional duties place the lower price categories in a relatively more advantageous competitive position. Under specific duties differences in production and distribution costs are closely reflected in retail prices; with proportional duties they are amplified in retail prices (in the Netherlands, initially by a multiplier of 4). Because of those different effects the simultaneous existence of relatively high specific

1 — The problem of abolition of tax controls at frontiers is connected not only with differing tax *structures* but also with differing tax rates, and is not dealt with in the applicable harmonization directives.

duties in certain Member States and relatively high proportional duties in other Member States tends to restrict trade. The more expensive price categories which enjoyed a relatively favourable market position in the first group of Member States were handicapped on exportation to Member States of the second group, and *vice versa*. For the first stage of harmonization Article 8 of the first directive therefore provided that the specific component of duty on the most popular price category of cigarettes was to lie between 5 and 75% of the aggregate amount of duty. The directive of 19 December 1977, referred to above, reduced to 55% (with minor exceptions) the proportion of the total burden of duty attributable to specific duty. The total tax burden was however defined as including value-added tax, which does not distort competition. Further narrowing of the range, by increasing the minimum from 5%, has not yet taken place. Because of the distortions in the conditions of competition found to exist, I think progress could be made by a qualified majority in the Council on the basis of Article 101 of the Treaty.

As appears from the report of the Commission to the European Parliament of 18 February 1982 on the effects of further harmonization (the 'Tugendhat Report'), submitted by the applicants as an annex to their reply, and from the applicants' arguments during these proceedings, business interests generally advocate higher specific and lower proportional components in the tax burden. That is understandable, since their relative share of the retail price of more expensive brands thus increased, and they naturally earn more from more expensive than from less expensive brands. Conversely it is less clear that such a shift in the ratio between the specific and proportional components of the duty is also in the interest of consumers. That is, if total tax revenue is to remain the same the less expensive brands will be taxed more heavily. The price to the consumer of less expensive brands will therefore increase.

Furthermore, the applicants did not provide the Court with pages 73 to 80 of the report referred to, which are also relevant to these proceedings. It appears irrefutably from the statistics on those pages that the price differences between different brands in countries with a high component of proportional duty are very much greater than those in countries with a high component of specific duty. Thus in Italy the most expensive cigarette costs 500% more than the least expensive, whilst in Ireland, as an extreme example of high specific, duty there is only a 10% difference. Moreover, the high element of proportional duty in the Netherlands and in Luxembourg seems to present no obstacle to the fact that the most popular brands are significantly more expensive than the cheapest brands, which in the Netherlands, according to the statistics included in the report, have a market share of only some 15%, as against a 75% market share for the most popular price category, some 10% more expensive. Those facts certainly qualify the value to be attached to the applicant's remarks regarding the 'compression effect' of high proportional duty.

Article 5 of the first directive provides that in the absence of national price control measures manufacturers and importers are to be free to determine the maximum retail price of their products. Agreements between manufacturers and importers regarding such retail prices must in principle therefore be regarded by the Commission as incompatible with that provision, which

must in particular be taken into account in assessing the price agreements now in question. Article 5 (2) further provides that in order to facilitate the levying of duty the Member States may fix a scale of retail selling prices, but only on condition that the scale has sufficient scope and variety to correspond to the variety of Community tobacco products.

It must be inferred from Article 5 as a whole that in 1972 the Council itself did not view the then still very high possible proportional component of excise duty (75%) as any justification for price agreements or for agreements or official measures restricting the number of brands (price categories) to be carried. On the other hand no clear conclusion can be inferred from the directive regarding agreements on margins, except in so far as such agreements also limit the freedom to set retail prices.

1.3. The Netherlands excise legislation

Apart from a few special points which must now be dealt with, these last conclusions of my analysis of the harmonization directives also apply to the Netherlands Wet op de Accijns van Tabaksfabrikaten [Excise Duty (Tobacco Products) Law] (Staatsblad 1964, p. 208, as amended from time to time). In 1977 the proportional component of that duty was reduced, for cigarettes, to 51.75% of the retail price, and the distortion of competition caused by its relationship to the specific duty of HFL 2.50 per 1 000 cigarettes was thus diminished. In 1980 the proportional component was further reduced to 50.72% and the specific element increased to HFL 9.45 per 1 000 cigarettes, bringing the relationship between the proportional and specific components further into balance. In these proceedings the amendments made to the Law in those two years are of particular relevance. Article 30 of the Netherlands Law provides *inter alia* that tobacco products may not be sold, otherwise than for resale, '... for a price lower than that shown on the tax stamps applied'. That provision, which has been an important factor in these proceedings, certainly precludes any price competition between retailers. On the other hand neither that provision nor any other provision of the Law limits in any way the freedom of manufacturers and importers to set their retail prices within the scale of retail prices for which tax stamps are available in accordance with Article 5 of the first directive, due regard being had to Article 28 of the Law. Under Article 28 (1) a manufacturer or dealer may not market the same tobacco product, or allow it to be marketed, at more than one retail price, unless a clear distinction is made in the brand, or it is packaged under a different brand. Probably in order to permit a price difference between old and new stocks when prices are increased or reduced, Article 28 (2) empowers the Minister to authorize exceptions to Article 28 (1), under such conditions as he may impose. The Minister has used that power regularly for the purpose indicated, in transitional orders authorizing dealers to market the same tobacco product under the same brand at the prices applicable both *before* and *after* the coming into force of the order, usually for a period of one month.

The scheme of the Law (tax stamps for the retail price) does not restrict the fixing of trade margins either. Thus the Law does not restrict price competition between manufacturers and importers in the fixing of retail prices or in the sale of their products to wholesalers and retailers (or in sales by wholesalers to retailers).

1.4. The Prijzenwet

Under Article 2 (1) of the Prijzenwet [Prices Law] of 24 March 1961 (Staatsblad 1965, p. 646) the Government may *inter alia*, in respect of specified goods or services, where the general socio-economic interest so requires and in respect of the internal market only, prohibit the sale of such goods at prices higher than those laid down by it. On the basis of that provision of the Prijzenwet a Prijzenbeschikking goederen en diensten [Prices (Goods and Services) Order] for the current year was adopted annually during the period to which these proceedings relate. These orders concern the calculation of prices, which means, as far as manufacturers are concerned, that they lay down what sort of cost increases they may pass on and, where appropriate, in what percentage (in particular for wage costs), whilst in connection with inflation a fixed price increase over a 'reference price' is authorized for the whole industry. The 'reference price' is defined in Article 1 of the order as the price, excluding value-added tax, which the person concerned or his predecessor in title charged for an article last supplied or hired out before 1 December of the previous year, or the highest price, excluding value-added tax, which he or his predecessor in title was entitled to charge for that article on 30 November of the previous year under an exemption from the Prices Order of the previous year, whichever is the higher. Article 2 of the order then provides with regard to the maximum price (without prejudice to the permitted passing on of cost increases) that a manufacturer may not sell any article on the domestic market for a price higher than a fixed percentage, (in 1980, 100.2%) of the reference price for an identical article in analogous circumstances, less the excise duties included in that price. I have taken this wording from the Prices Order applicable in 1980, in which 30 November 1979 was therefore the reference date for the establishment of the reference price.

Nothing can be inferred from the wording of Article 2 of the Prices Order or from Article 2 of the Prices Law itself to support the view that the permitted increases may only be introduced within a specified period after the coming into force of the Prices Order. Such a point of view is also clearly incompatible with the general purpose of the Prices Law, to prevent price increases as far as possible and, where costs fall, to enforce price cuts. Finally, Article 2 of the Prices Order makes no provision regarding the setting by manufacturers of prices to the public. The competitive freedom of manufacturers is thus not restricted in those respects by the Prices Order.

Like its predecessors, *mutatis mutandis*, Article 3 of the 1980 Prices Order prohibits dealers *inter alia* from selling any article on the domestic market for a price higher than the purchase price of that article augmented by a percentage representing the margin which he or his predecessor in title last applied before 1 December 1979 for an identical article in analogous circumstances,

and further augmented by the applicable value-added tax. It is to that provision that the theory of the 'domino effect', put forward by the applicants, is linked. Where the manufacturer or importer does not raise his selling prices in accordance with the Prices Order, or does not raise them immediately or to the full extent, or even lowers them because of cost savings or for commercial considerations, the dealer must pass on those prices, which are relatively low in relation to those of competitors who may not follow the same course of action, whether temporary or not, in his prices on resale. If the reseller is a wholesaler, I think Article 2 of the Prices Order also makes any increase of the margin in his favour in principle impossible (except in the form of extra bonuses granted retroactively; it appears moreover from the documents before the Court that in this respect the authorities display a certain flexibility with regard to the cigarette market, without, however, exactly advertising the fact). With the same reserves, that also applies in principle where the wholesaler's purchase price is arrived at, through negotiation or otherwise, by the calculation of a specified discount on the price to the public. In the event of resale price maintenance prescribed by law, in this case Article 30 of the Excise Duty (Tobacco Products) Law, the situation with regard to retail margins is different. By application of Article 30 the retail price set by the manufacturer has acquired the force of a legal obligation, making it impossible for retailers to pass on lower purchase prices. I agree with the Commission's view that Article 30 would clearly be decisive in the unlikely event of inspectors or a commercial court deciding to regard the failure of a retailer to pass on lower purchase prices as a contravention of the Prices Order. Since the retail price is set by the manufacturer or importer, the retailer is by no means entitled to pass on savings in that way. Furthermore, the specialist retailers' bonus scheme, still to be dealt with, which was *at the very least* regarded as acceptable by the Netherlands authorities and was probably encouraged by them, confirms an important point which also clearly follows from Article 3 of the Prices Order, that is, that that provision on margins presents no obstacle to bulk discounts or other discounts or bonuses granted after sale to wholesalers or retailers. As appears from the price agreements described in the decision the applicants themselves assume that that also applies to wholesalers (see paragraph 65 of the decision).

The conclusion on this point must therefore be that the Prices Order makes competition on margins between manufacturers and importers in respect of wholesalers possible only in the form of special discounts or bonuses after sale and delivery, but at the retail level also makes it possible in the form of lower purchase prices (greater discounts on the price to the public). That is an important conclusion since it is well known that for products covered by resale price maintenance competition on margins at the retail level in particular is a very important means of competition, inducing retailers to make greater efforts with regard to the sale of the products concerned. I refer in that regard to the literature mentioned in my Opinion of 18 October 1983 in the Dutch and Flemish book cartel case (Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19).

1.5. The alleged exertion of pressure by the authorities

It certainly appears from the letters from the Minister for Economic Affairs to the Commission of 12 May and 20 July 1980 and 20 July 1981 (Annexes IX, X and XI to the application in Case 240/82) and from other documents provided by the applicants that the Netherlands authorities interfere to a very large extent in the applicants' price and margin policy. The general tenor of the indications given by the authorities in their consultations with SSI is given in paragraph 88 of the contested decision; further details are given in paragraphs 91 to 97.

It does not appear from the documents provided by the applicants that the Netherlands authorities ever pressed the SSI to incorporate the results of their consultations in binding agreements between the applicants. In the letters produced the Ministry of Economic Affairs denies that any such pressure was ever exerted, and it further denies that the Netherlands authorities were informed of the content of the agreements entered into. Those denials are moreover supported by the fact that, as appears from paragraph 2 of the contested decision and from Article 3 of the articles of association produced by the applicants as Annex I to SSI's application, under its statutes SSI, whose purpose is to carry on consultations with the authorities, is not empowered to make rules regulating competition between its members. Moreover, with regard at least to the agreements which the applicants are alleged to have concluded concerning retail prices, any pressure on the part of the authorities in favour of the conclusion of such binding agreements would be incompatible with Article 5 of the first directive, referred to above. It may not therefore be assumed that such pressure was exerted, and the applicants have not proved that it was.

It follows however from Article 8 (1) of the first directive and from Article 10 (b) of the directive of 19 December 1977 that the harmonization directives do not preclude all consultation between the authorities and manufacturers and importers, but in fact expressly provide for a certain degree of consultation. That consultation, however, concerns only statistical data regarding the relative popularity of the various price categories, in order that the most popular category may be ascertained. According to Article 4 (2) of the first directive, the rates of proportional and specific duty must be the same for all price categories. Under Article 8 (1) of the first directive and Article 10 (b) of the directive of 19 December 1977 the amount of the specific duty must however be established by reference to the most popular price category. For that purpose the authorities must therefore obtain comprehensive information.

Because of the very great budgetary importance of the revenue from the duties in question it is moreover understandable that the authorities should also wish to have some idea of the probable yield of those duties. That revenue depends however not only on the price level in the various price categories but to an even greater degree on the total demand for cigarettes and on the distribution of demand as a whole among the various price categories. The importance of that aspect, which led the Belgian authorities so far as to take steps against unnecessary price increases, is emphasized in paragraph 121 of the judgment of the Court in the *Fedetab* case ([1980] ECR 3125), which I shall frequently have occasion to refer to. As appears from the

statistical data given in paragraph 11 of the decision the total consumption of cigarettes in the Netherlands varies considerably from year to year, sometimes by as much as 20%. Furthermore, unless very stringent sales restrictions are agreed upon with regard to the different price categories, manufacturers and importers can naturally give no guarantees that demand will not shift to the lowest price category, which in the Netherlands, as has been pointed out, is not necessarily the most popular. For those reasons the Netherlands authorities can have no clear interest based on budgetary considerations in having information on the price policy of manufacturers and importers accurate to within 10%. From time to time the authorities have, it is true, asked for general information regarding that price policy for clear budgetary reasons, as appeared in particular in 1975. At that time, according to the applicants, the authorities reduced the duty on cigarettes and at the same time authorized an increase in the price to the public of 25 cents per packet in order not only to take into account increased costs but also to improve the profit situation of manufacturers and dealers. In that regard reference may be made to paragraphs 66 and 95 of the contested decision. In order not to suffer a loss of tax revenue, despite the cut in duty, and in order to permit the trade to benefit from an increase of 10 cents, the authorities, according to the applicants, took steps to ensure that the permitted price increase was actually applied. As appears from paragraph 58 of the decision a price increase was also authorized in 1974, partly in order to permit an improvement of trade margins. The degree of certainty desired by the authorities in those years on budgetary grounds and in 1974 also on other grounds, concerning the policy to be followed by the applicants with regard to retail prices certainly did not, however, require, for the budgetary reasons already mentioned, precise information on their future policy, nor did it necessarily require the same information for all manufacturers and importers. In view of the great margin of uncertainty regarding turnover in the various price categories individual indications were certainly sufficient to permit a general estimate of tax revenue. Otherwise there is nothing in the documents provided by the applicants to indicate that the authorities, then or in any other year, pressed manufacturers and importers to enter into stringent price agreements such as those on retail prices (prices to the public) which, according to the documents before the Court, were concluded in 1974, 1975 and 1978. As has already been pointed out such pressure would also have constituted a clear infringement of Article 5 of the first directive.

With regard to the level of trade margins, it is in my view established, on the basis of the material submitted, that at least in 1978 the authorities strongly urged the persons concerned to give the maximum permissible increase in margins (see the third subparagraph of paragraph 96 of the decision). The threat of a sectoral decision was also raised. As the Commission correctly pointed out, the Prices Law does indeed allow the exact definition of the maximum permissible trade margins, but does not allow the imposition of those maxima as minimum margins as well. Moreover, even strong pressure of that kind does not affect undertakings' own responsibility for competition, with regard to restrictive agreements or concerted practices. Nor may it be concluded from the documents submitted by the applicants that the Netherlands authorities in fact pressed the persons concerned to enter into binding

agreements regarding the trade margins to be given. In the letters from the Ministry of Economic Affairs submitted to the Court it is expressly denied that any pressure was exerted for the conclusion of agreements on that point.

With regard to the specialist retailers' bonus scheme it is also established that the authorities exerted pressure for the granting of such a bonus and with regard to its amount. However, it does not appear from the case file in this respect either that they advocated the conclusion of a collective agreement in the matter. It has certainly not been shown that the authorities can be regarded as bearing any degree of responsibility for the criteria agreed upon for the selection of the specialist retailers to be benefited or for the conditions, restricting competition between SSI members and between the specialist retailers concerned, which were imposed on those retailers. The authorities deny that they were even informed of the way in which the bonus scheme was put into effect. A description of the working of the scheme may be found in paragraphs 41 to 49 of the contested decision.

1.6. Concluding remarks

In summary, I conclude on the basis of the above analysis:

first, that competition between manufacturers and importers with regard to the fixing of retail prices for cigarettes was not significantly restricted by the excise duty legislation, by the price measures, or by pressure exerted by the authorities;

secondly, that the pressure which was certainly exerted by the authorities with regard to the margins to be allowed to the trade related exclusively to the minimum margins to be granted, and that neither the existing price measures nor those which were possible on the basis of the Prices Law prevented or were capable of preventing manufacturers and importers from granting individually to specified retailers a greater margin from their portion of a given retail price; only in the case of wholesalers does it appear that they were in principle obliged to pass on to retailers any higher discount allowed to them under the Prices Order on the retail price; even in regard to wholesalers, however, that did not affect the possibility of granting them bonuses which did not have to be passed on;

thirdly, that the authorities certainly exerted considerable pressure on SSI for the grant to specialist retailers of bonuses of a certain amount, but it has in no way been shown that the authorities thus encouraged the persons concerned to establish a collective scheme involving restriction of competition of the nature found to have existed.

The applicant's argument in those three respects based on the *Fedetab* judgment (judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 [1980] ECR 3125) must be rejected.

With regard to the applicants' agreements on retail prices, it must be pointed out in the first place that no comparable agreements were dealt with in that judgment. Secondly, the possible influence of government measures and pressure exerted by the authorities can of course only be assessed by investigating the measures or pressure which existed in the Member State concerned. An important difference between the Belgian situation, summarized in paragraph 127,

and the Netherlands situation lies in the fact that the degressive effect of the multiplier, which is also substantial in the Netherlands, is limited to a lesser extent in the Netherlands by the minimum excise duty. That duty is significantly lower in the Netherlands than in Belgium (on the basis of the 1977 text referred to by the applicants, about 50% of the total amount of proportional and specific duty, as against 90% of that amount in Belgium). Finally, it has not been shown here that the Netherlands authorities prevent the persons concerned from reducing their prices by not making available the tax stamps for the lower prices (as seems to have been the case in Belgium, according to paragraph 129 of the *Fedetab* judgment). On the contrary, it appears from paragraph 16 of the judgment of the Court of 5 April 1984 in Joined Cases 177 and 178/82 (*Jan van de Haar and Kavelka de Meern BV* [1984] ECR 1797) that that is not the case in the Netherlands.

With reference to the possibility of margin competition, on the other hand, it appears from the foregoing analysis that the conclusion drawn with respect to Belgium in paragraph 131 of the *Fedetab* judgment applies equally to the Netherlands, albeit with particular reference to retailers. The Commission also correctly referred to the analogy between the Belgian and Netherlands situations in that respect.

With regard to the bonus scheme it will suffice to say that the Belgian cases involved no comparable scheme.

With the foregoing remarks a considerable portion of the applicants' arguments has already been met in advance. I shall now however go into the applicants' submissions separately in so far as is necessary.

2. *The first submission*

2.1. The alleged exclusion of real competition

In their first submission the applicants argue in the first place that as a result of government regulations and guidelines as a whole actual competition between the manufacturers and importers of cigarettes is impossible. On the basis of the above analyses of the nature and effects of that government intervention all the applicants' arguments on this point must be rejected. Moreover, the assumption underlying that argument, that Article 85 (1) applies only to restrictions of 'actual competition' (whatever that term, the subject of considerable academic discussion, may mean), finds no support either in that article or in the case-law of the Court. I refer in that regard for example to paragraph 24 of the judgment of the Court in the sugar cases, mentioned above, and to paragraph 132 of the *Fedetab* judgment, both of which were relied upon by the applicants. Indeed, in Case 56/65 (*Société technique minière* v *Maschinenbau Ulm* [1966] ECR 235) the Court made it clear that in applying Article 85 (1) the sole question is whether the competition which would be possible in the absence of the agreement concerned is prevented, restricted or distorted to an appreciable extent.

As the applicants themselves admitted during the proceedings, in the first place the government intervention analysed above did not prevent manufacturers or importers from bringing new brands on to the market

at a lower price. Secondly, it did not prevent the delayed or only partial application of authorized price increases. Thirdly, the government intervention did not prevent an increase in trade margins desired by the authorities from being borne in part by individual manufacturers or importers out of their own profit margin. In that regard the result of the multiplier effect, to which the applicants attach such importance, [2] was that the payment of even a small part of the margin increase from their own profit could lead to significant improvements in their competitive position with respect to the consumer price. It should also be pointed out with regard to the so-called 'compression effect' that the recognition of its existence in no way implies that the costs of all manufacturers or dealers are thereby compressed to the same amount per comparable unit of quantity (for example, 1 000 cigarettes). Finally, the prohibition, in principle, of the simultaneous application of two retail prices for a single brand results in practical difficulties only with regard to any price cuts which may from time to time occur, not with regard to the non-implementation of price increases or their implementation only in part or later than competitors.

With regard to the agreed restrictions on margin competition, I have already explained why the domino effect put forward by the applicants does not prevent margin competition at the retail level. The same is all the more true in respect of the grant of special bonuses for special efforts by a retailer. From the point of view of attracting customers, margin competition is an important competitive weapon at that level especially. Unlike retail price competition, margin competition, which does not affect retail prices and is thus carried on at the expense of the profit margins of manufacturers, importers or wholesalers, is moreover possible without practical difficulties throughout the validity of a Prices Order, as the Commission also contended. The applicants' assertion that the Prices Order prevents the grant to dealers of higher discounts on retail prices is not borne out by Article 3 of that order, referred to above, and is contradicted by the evident efforts of the authorities which in fact seem to be directed in favour of increased trade margins for wholesalers as well as retailers.

With regard to that first submission it is also noticeable that it extends only to the defence of the price and margin arrangements but includes no argument in defence of other far-reaching restrictions of competition contained in the price agreements ascribed to the applicants in the decision. I shall come back to this point in another connection.

I should note finally with regard to the first submission that the multiplier effect of high proportional duty relied on by the applicants does not restrict the effects of price and cost competition but in fact strengthens them. The contention that the alleged distortions of competition resulting from that multiplier effect also affect the possibility of actual competition finds no support in any academic commentaries of which I am aware regarding 'workable competition'. It is moreover refuted by the empirical data given in the Tugendhat

2 — The term 'multiplier effect' means that where for example excise duties amount to 300% of the cost of manufacture and distribution together with an allowance for profit, any increase or cut in manufacturers' or dealers' prices free of tax will result in an increase or cut of four times that amount in the final price.

Report referred to above. I have already pointed out that the assumption underlying that contention, that Article 85 (1) protects only 'actual competition' is not supported by the Court's case-law.

2.2. The requirement of potential harmful effects on trade between States

With regard to the second condition for the application of Article 85 (1) the applicants argue in the first place that once tax stamps have been affixed cigarettes can no longer be exported. They deny that the price and margin arrangements can have any influence on imports, since only 'intra-group imports' which have not yet been placed on the Community market are concerned, and there can therefore be no effect on trade. With all respect for the applicants I think that argument is untenable if not incomprehensible, since it is clear that importers are also concerned by the arrangements made within the SSI and that those arrangements also apply to cigarettes placed on the Netherlands market by way of 'intra-group imports'. It is furthermore established that the participants in the agreements and practices in issue account for virtually all imports into the Netherlands (the market share of which was also significant in the relevant years, according to paragraph 11 of the decision). As in the *Fedetab* case (see paragraphs 170 to 173) it must therefore be concluded that in its decision the Commission was correct in holding that the restrictive agreements and concerted practices in question were capable of affecting trade between Member States. The first submission must therefore be rejected as unfounded in its entirety.

3. *The second submission (of the applicant in Case 262/82)*

As a second submission the British-American Tobacco Company (Nederland) BV (Batco, the applicant in Case 262/82) alone argued that Article 6 of the contested decision, which, it says, prohibits SSI from entering into consultations with the authorities, conflicts with Articles 1 and 4 of the decision, which leave unaffected the provisions of the framework agreement regarding that consultation. As the Commission correctly pointed out in its defence that submission is based on an incorrect reading of Article 6 of the decision. Article 6 of the decision only prohibits 'the undertakings and associations of undertakings referred to in Article 7 ... from holding joint consultations with *one another* about increases in cigarette prices or changes in cigarette dealers' margins in the Netherlands' (my emphasis). According to the Commission the consultations between SSI and the authorities may be organized in such a way that the necessary information is collected in a neutral and confidential manner and the results are passed on objectively.

That submission must therefore also be rejected as unfounded.

4. *The third submission* (alleged infringement of Article 15 of Regulation No 17 and Article 190 of the EEC Treaty, by the imposition of fines)

In their third submission the applicants raise a number of separate arguments which I

shall deal with successively, in an order somewhat different from that followed in the report for the hearing.

4.1. Absence of intent or negligence

Tarmac criticizes the fact that in practice certain conduct contrary to Article 85 entails an automatic fine and that findings are made only with regard to the amount of the fine, no attention being given to the question of guilt. In that respect *Reynolds* also argues that intent or negligence cannot be inferred from the mere existence of a horizontal price maintenance agreement. The material requirements of intent and negligence have an independent significance and cannot be dissociated from the concepts of *dolus* and *culpa* generally accepted in the criminal law of the Member States. *Dolus* or *culpa* cannot be inferred from the mere occurrence of an infringement, but require an examination of the intention to commit a given act or to the circumstances under which the infringement took place and from which it appears that the person concerned was careless in failing to foresee the unlawfulness of the act in question. According to Reynolds the Commission should therefore have proven intent or negligence on the part of each of the undertakings concerned. Both *Reynolds* and *Batco* also rely in that respect on the Opinion of Mr Advocate General Mayras in the *General Motors* case (Case 26/75 [1975] ECR 1367, in particular at page 1389). It should be recalled that Mr Advocate General Mayras there stated that the term intent 'necessarily implies that the author of the infringement has acted intentionally with the will to commit an act which he knew was unlawful and prohibited by the Treaty and conscious of the unlawful consequences of his behaviour'.[3] Conversely, in his opinion there was negligence only in a case where 'the author of the infringement, although acting without any intention to perform an unlawful fact, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them'. *All the applicants* have argued that regard being had to those definitions they acted in this case neither with unlawful intent nor negligently. *Tarmac* and *Laurens* argue that they acted under an error of law absolving them of responsibility.

In further explanation of that argument the applicants contend in the first place that they were able to believe in good faith that the price agreement of 1978 was covered by the notification of the master agreement. With regard to the two earlier price agreements the applicants, in particular *Reynolds*, argue in their reply that when they were concluded it was not entirely clear that there was any bar to them in Community law. Until the judgment in the *VCH* case (Case 8/72 [1972] ECR 977) only very substantial price cartels between undertakings in different Member States were considered to be prohibited. Furthermore, the price agreements concluded within SSI differ in various respects from the national price arrangement at issue in that case. In particular the price agreements now under discussion were concluded in

3 — In my view it is sufficient in certain circumstances, according to the case-law of the Court, that a prudent person *should* have known that the act in question was unlawful and prohibited by the Treaty, but that point is not important in this case and I shall not deal with it further.

circumstances in which the legislative system played a decisive role, and they are the result of consultation with the authorities. It was therefore possible for the applicants to believe in good faith that their agreements were lawful. The reliance, in this regard, which the applicants place on the fact that the *Fedetab* judgment is of later date than those agreements may be disregarded here, since as I have already pointed out that case involved no comparable resale price maintenance agreements.

Philip Morris and *Niemeyer* in particular rely on the fact that they did not take part in the consultations with the Netherlands authorities. They became party to the agreements in question only because they were convinced that the authorities considered them necessary and that there were no objections to them. *Niemeyer* also argues that at that time it did not have well-informed legal advisers, and therefore had no way of knowing that there was any question of an infringement of Article 85 of the EEC Treaty. *Reynolds* states that at the time of the first agreements it was a newcomer on the Netherlands market and that it became party to the agreements in question only because of the attitude of SSI (which considered its participation in the agreements to be necessary). It placed emphasis on that point of view again at the hearing.

4.2. Assessment of the first argument

In commenting upon the first argument I should first recall that under Article 15 (2) of Regulation No 17 the Commission may by decision impose on undertakings or associations of undertakings fines between 1 000 and one million units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86 of the Treaty. That provision further states that in fixing the amount of the fine regard is to be had not only to the gravity of the infringement but also to its duration. During the proceedings it was established that in this case a fine of only 0.85% of the turnover in the preceding business year of each of the undertakings concerned was imposed.

Article 17 of the regulation provides moreover that the Court is to have 'unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed'.

I should next point out that as appears from paragraphs 162 and 169 of the decision the existence of intent or negligence in this case was inferred more by implication than expressly from the seriousness of the infringements of Community competition rules. As the Court will remember, in its judgments regarding the imposition of fines in the steel sector it has expressly held that negligence at least may be inferred by implication from the seriousness of an infringement. Here the Commission relies on both (a) the fact that Article 85 (1) (a) expressly refers to the fixing *inter alia* of selling prices as a measure preventing, restricting or distorting competition and (b) the periods for which the relevant price agreements were concluded. With regard to the content of the price agreements I should point out furthermore that it appears from paragraphs 61, 67, 69 and 75 of the decision

that they also contained quantitative restrictions on sales for a defined period (the period during which there was the greatest chance that the authorized price increases would not be introduced immediately or would not be introduced completely) and a gradual reduction of the number of price categories with a fixed or minimum price (from 13 initially their number was reduced to 12, 11, and finally to seven). In my view those quantitative restrictions on sales in particular undoubtedly fall under Article 85 (1) (b) and in themselves constitute a serious infringement of that article. It cannot on the other hand be inferred with certainty from the decision whether the gradual reduction in the number of price categories covered by the scheme also led to a restriction of the number of price categories and therefore also resulted in a serious infringement of Article 85. It may be inferred from the low rate of fine applied and from the written and oral explanations provided by the Commission that in this case it considered all the undertakings concerned guilty only of negligence.

The fact that paragraph 167 of the decision refers formally only to the *amount* of the fine does not in my view affect the fact that it was possible for the Commission to hold correctly that the conclusion of agreements which directly set selling prices and which also contained sales restrictions constituted very serious infringements of Article 85 (1). As has already been pointed out restrictions of competition of that nature are expressly mentioned in Article 85 as prohibited restrictions of competition (naturally, that is, where they are likely at the same time to affect trade between Member States, which, as has already been established, is sufficiently clear in this case). In my view it was also possible for the Commission to hold correctly in this case that the undertakings concerned could be charged at least with negligence, in the sense described by Mr Advocate General Mayras in the *General Motors* case.

With regard to that negligence I agree in the first place with the Commission that the applicants could not in good faith believe that the 1978 price agreement was covered by the notification of the master agreement. In so far as retail prices are concerned that master agreement related exclusively to consultation between SSI and the authorities (see paragraph 35 of the decision). As has already been pointed out, the articles of association of SSI expressly provide that the regulation of competition between its members does not fall within the powers of SSI. It may further be inferred from the uncertainty of the persons concerned as to whether the master agreement was notifiable, referred to in paragraph 34 of the decision and further elucidated during the proceedings before the Court, that it was not considered that the agreement itself contained serious restrictions of competition of the kind now in question. Finally, that argument cannot in any event explain the failure to notify the 1974 and 1975 price agreements. With regard to those earlier agreements, in the light of the 1972 *VCH* judgment, referred to by them, the applicants could not in good faith believe that notwithstanding the clear words of Article 85 (1) the price agreements in question, which covered *inter alia* imported cigarettes, did not fall under that prohibition. The reliance which the applicants, by way of excuse, place in the consultations with the authorities cannot be sustained, since I have already stated that

those consultations in no way concerned price agreements such as those described in the decision. The specific arguments of Philip Morris, Niemeyer and Reynolds may also be disregarded since those arguments are no obstacle to the implied finding that those applicants were negligent in the sense set out above.

For those reasons I am of the opinion that there is sufficient basis in the decision for a finding that all the applicants were at least negligent and that this argument must therefore be rejected. I shall not however conceal the fact that I find it regrettable that the Commission did not devote more attention in its decision to ascertaining the degree of culpability. The result is that the fines imposed are harmonized, so to speak, on the basis of the rate of fine appropriate to the degree of negligence displayed by the least negligent of the participants. That means that even in the case of participants who could clearly be accused of a greater degree of negligence or even of intentional fault the Commission, wrongly, applied no higher rate of fine than the 0.85% of the previous year's turnover referred to above. Under Article 17 of Regulation No 17 that in itself might give the Court occasion to increase, of its own motion, the fines imposed on certain undertakings. I shall not however propose that the Court make use of that power in this case. In the first place that power has never been exercised by the Court and it should preferably be exercised for the first time by the full Court, in view of the related formal and substantive problems. Secondly, in a case in which the exercise of that power was considered it would perhaps be advisable, in my view, to call the attention of the parties by written notice sufficiently in advance of the oral procedure to the existence of this power, and at the same time if necessary to request the Commission to provide the information necessary for its exercise and give the applicants the opportunity to make written submissions before the oral procedure. In this case it would certainly have been necessary to request further information regarding the degree of negligence or of culpability since on this point, as has been stated, the decision is clearly based on a minimum degree of negligence established for only some of the participants, and takes no account of the probably greater degree of culpability of other participants. I have considered it nevertheless desirable to draw attention to that possibility in these proceedings, since they provide a good example of a case in which the exercise of that jurisdiction might be justified. At the same time I think it opportune to point out to interested parties that in principle the bringing of an application against a fine which has been imposed carries with it the risk that the fine may be increased as well as the chance that it may be reduced. In certain circumstances that may also be important for steel cases, in which, as is well-known, it is the Commission's practice to apply standard rates which may by definition be unfairly high in some cases but unfairly low in others. In connection with a remark of the Commission regarding the different requirements which must be observed in the imposition of fines in the steel sector on the one hand and in competition matters on the other, I shall deal further with the relevant differences in that regard in my Opinion of 14 February 1985 in Case 64/84 *Queenborough Rolling Mills.*

4.3. The alleged applicability of Article 4 (2) (1) of Regulation No 17

In a second argument the applicants contend that under Article 4 (2) (1) of Regulation No 17 they were not obliged to

notify the relevant price agreements since all the parties were undertakings from one Member State and their agreements did not relate to imports or exports. In its reply *Tarmac* further argues (referring to Gleiss-Hirsch, *Kommentar zum EWG-Kartellrecht*, Third Edition, Article 15 of Regulation No 17, paragraph 71) that the distinction in Article 4 between agreements which must be notified and those which need not would be meaningless if the failure to notify could constitute grounds for the imposition of fines. In support of their argument the applicants refer to the judgment of the Court of 3 February 1976 in Case 63/75 (*Fonderies Roubaix* [1976] ECR 111), according to which, in their view, agreements do not relate to imports or exports where the marketing envisaged by them takes place solely within the territory of the Member State to whose law the undertakings are subject.

4.4. Assessment of the second argument

The discussion of this second argument in the third submission must be prefaced by the remark that it results clearly from the wording of Article 4 (2) (1) that the criterion which it establishes for the non-application of Article 4 (1) (the so-called duty to notify) [4] is clearly narrower than the comparable criterion for the application of Article 85 (1) of the Treaty. The Court has also confirmed that in several of its judgments. To that extent the argument of the applicants is therefore justified.

That sheds no light, however, on the exact meaning of the narrower criterion of Article 4 (2) (1). Some assistance is certainly given by the *Roubaix* judgment, cited by the applicants. The general criterion laid down in that judgment is not however the criterion in paragraph 7, relied on by the applicants, which was applicable to the case there at issue (an exclusive sales agreement between two undertakings from one Member State), but the preceding criterion laid down in paragraph 6. According to paragraph 6 'this second condition' — that is, that the agreement does not relate to imports or exports between Member States — 'must be interpreted with reference to the structure of Article 4 and its aim of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their peculiar characteristics, to be less harmful from the point of view of the objectives of this provision and which are therefore very likely to be entitled to the benefit of Article 85 (3)'. The application of that general criterion to an agreement which was much more extensive than that concerned in the *Roubaix* case but which, like the exclusive sales agreement at issue in that case, related only to the marketing of goods within the territory of a single Member State led the Court to the conclusion, in paragraphs 34 and 35 of its judgment of 8 November 1983 in Joined Cases 96 to 102, 104, 105, 108 and 110/82 (*ANSEAU-NAVEWA* [1983] ECR 3369), that because of its nature that more important agreement was not exempted under Article 4 (2).

With regard to the agreements in question I propose the same conclusion as was reached

4 — As the Court is aware, this is not in fact a duty to notify but only a condition for the obtaining of an individual exemption under Article 85 (3), as is made clear in paragraph 4 of the *Roubaix* judgment.

by the Court in the *ANSEAU-NAVEWA* judgment. It is clear that the manufacturers and importers party to the price agreements together enjoy a market share of some 90% in the Netherlands and that the agreements also cover the great majority of cigarettes imported from other countries. According to paragraph 11 of the decision, in 1974, 1975 and 1978, the years relevant to these proceedings, the market share of those imported cigarettes amounted to 26.1%, 29.5% and 31.3% respectively. Just as, according to the Court's case-law, minimum price regulations imposed by the authorities and innumerable other measures which relate to the resale of imported goods are to be regarded as measures having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the EEC Treaty, so price agreements or agreements to limit sales as referred to in Article 85 (1) which relate in part to (the resale of) imported products must be regarded as agreements relating to imports between Member States within the meaning of Article 4 (2) (1) of Regulation No 17.

I agree furthermore with the Commission's view that an agreement which is exempt from notification is not for that reason alone immune from fines. As I have already stated in the first paragraph of part 10 of my Opinion of 29 June 1983 in the *ANSEAU-NAVEWA* case, it follows from the wording and from the system of Regulation No 17 that the bar on the imposition of fines in respect of agreements which have been notified, provided for in Article 15 (5), refers in part to the voluntary notification provided for in the last sentence of Article 4 (2) of agreements which according to that paragraph are exempt from obligatory notification. That possibility permits interested parties to obtain the legal certainty contemplated in Article 15 (5) in respect of those agreements as well. It is certainly not necessary in order to rely on Article 85 (3), as both the Commission and the Court have recognized in their practice. In support of its opposite point of view the applicant Turmac relies, mistakenly, on the passage cited by it from the third edition of the well-known work of Gleiss-Hirsch. Those authors do indeed share its point of view, but they draw it, incorrectly, from the judgment of the Court in the *Haecht II* case (Case 48/72 [1973] ECR 77). That judgment in no way concerns the possibility of imposing fines on cartels which have not been notified. It deals exclusively with the jurisdiction of national courts to declare automatically void 'old' and 'new' agreements prohibited by Article 85 (1) which may or may not be subject to compulsory notification and which may or may not have been notified. On that point paragraph 13, which Gleiss and Hirsch presumably had in mind in referring to that judgment, states that 'Whilst these considerations' — which thus concern the jurisdiction of national courts to declare agreements automatically void — 'refer particularly to agreements which must be notified in accordance with Article 4 of the regulation, they apply equally to agreements exempted from notification, such exemption merely constituting an inconclusive indication that the agreements referred to are generally less harmful to the smooth functioning of the common market'. According to that paragraph it is thus possible for the sanction of automatic nullity, described in detail in the previous paragraphs of the judgment, to be applied equally to agreements exempted from notification. If it were desired to apply that paragraph by analogy to the imposition of fines, such an application would seem to

militate in favour of the point of view put forward by the Commission in these proceedings, and against that of the applicant.

I therefore conclude that this argument too must be rejected as unfounded.

4.5. The alleged breach of the principles of reasonableness and fairness or the principle of equal treatment

In a third argument the applicants first argue that since fines were imposed they were unjustly treated less favourably than the undertakings in the *Fedetab* case, on which fines were not imposed. Secondly, they argue that Article 85 of the EEC Treaty makes no distinction between price agreements and agreements regarding other contractual provisions, and that the Commission was therefore wrong to draw a distinction between their various agreements.

With regard to the first argument the Commission has correctly pointed out that the *Fedetab* case did not involve any comparable binding agreements on retail prices. In respect of the second argument it will suffice to say with regard to the notified agreements that the Commission gave adequate reasons in paragraphs 163 to 165 of the decision for considering it either impossible or inexpedient (precisely because of the principle of equal treatment relied upon by the applicants) to impose fines for the agreements referred to in those paragraphs. According to the information concerning them given in the decision, the other unnotified agreements and concerted practices referred to in paragraph 169 did not constitute such serious and manifest infringements of Article 85 (1) of the EEC Treaty that the Commission should have dealt with them in the same way as the price agreements in respect of which complaint is made against the applicants. On the basis of the information given in the decision the Commission was therefore entitled to limit the imposition of fines to the price agreements without committing any breach of the principle of equal treatment. I should add, moreover, that it cannot be inferred from Article 190 of the EEC Treaty or from any other rule of law that as a matter of principle reasons must also be given for a decision not to impose fines. In general such reasons need be stated only where the infringement of Article 85 (1) concerned appears at first sight to be so similar to infringements for which fines were imposed in other cases or even in the same proceedings that it is desirable, in order to preclude any suggestion of arbitrariness, to indicate the special reasons for which fines were not imposed. In this case that was in fact done with regard to the notified agreements. As has already been pointed out, with regard to the practices referred to in paragraph 169 it was sufficiently clear from their particular features mentioned in the decision and brought out during the proceedings, that those two groups of practices were not comparable with the applicants' price agreements.

In my view this argument must therefore also be rejected.

4.6. The arguments with regard to the amount of the fines

The *applicants* further argue that should the Court unfortunately decide to impose fines, in fixing their amount it should take into account a number of factors such as the period of validity of the agreements (only three months in the case of the price agreements), the fact that the applicants in

good faith considered them to have been notified and their purely domestic scope. The role of the Netherlands legislation and of the authorities should also be borne in mind. The applicants put forward various other contentions which concern them individually.

Philip Morris and *Batco* thus point out that from 1975 onwards they cooperated of their own accord in the adjustment of the legal structure of SSI. Batco refers in that connection to the decision in the *Floral* case (28 November 1979, Official Journal 1980, L 39, p. 51), where the Commission took into account the fact that the undertakings concerned had put an end to their infringement without waiting for action on its part. They consider that case all the more relevant to these proceedings inasmuch as the members of SSI modified their agreements at a time when it was not clear what the decision of the Commission in the *Fedetab* case would be.

Niemeyer likewise argues that in setting the amount of the fines the Commission took insufficient account of the circumstances of the case. With regard to its own situation it refers to the serious decline in its market share.

In support of its argument that no fine should have been imposed on it *Reynolds* raises the following points. Reynolds arrived only later on the Netherlands market and at that time found itself confronted with government measures such as the Prices Orders and the excise duty legislation which obliged it, along with its colleagues, to engage in the coordinated discussions. Nevertheless it did not take part in two of the agreements to which the Commission took exception (the agreement regarding the approval of wholesalers and the agreement on rules of conduct in the cigarette trade), and although it signed the master agreement, it did so because it thought that that agreement would only come into force after its notification to the Commission. In imposing a fine on Reynolds the Commission failed to take those differences into account. That is all the more detrimental in so far as the fines imposed in this case were much higher than in previous cases of resale price maintenance agreements.

At the hearing all these arguments were again explained in detail.

4.7. Assessment of these arguments

Nearly all these arguments in fact relate to points which I have already dealt with in another connection. This time, however, the arguments on those same points are not raised in order to deny the existence of infringements of Article 85 (1), but as mitigatory or exculpatory factors in connection with the fines imposed. To that extent the arguments are therefore subsidiary in nature.

With regard to the short period of validity (three months) of each of the price agreements the Commission, to refute that argument, correctly pointed out that in each case that short period of validity covered precisely the period after the adoption of a Prices Order during which manufacturers and importers normally decide how and to what extent to apply the permitted price increases.

In Sections 4.2 and 4.4, above, I have already held unfounded, in another connection, the argument that the applicants

were entitled in good faith to regard the price agreements as notified or as exempt from notification because of their domestic nature.

With regard to the influence of the Netherlands legislation and the pressure applied by the authorities, I can refer in the main to my analyses of those points in the introductory part of this chapter. There I found in the first place that neither the excise legislation nor the successive Prices Orders resulted in any duty or practical necessity actually to apply the permitted price increases in their entirety. In Section 1.4 I further found, it is true, that in 1974 and 1975 in particular the authorities clearly pressed for a price increase, but that it has not been shown, nor has it otherwise appeared, nor may it even be assumed, that with regard to the fixing of retail prices the Netherlands authorities departed from the principle of the individual freedom of manufacturers and importers on this point, laid down in the first harmonization directive, by requiring them to enter into strict agreements such as those now in issue. It has not been proved by the applicants, nor is it otherwise to be assumed, that the statement made in paragraph 167 (c) of the decision is incorrect. It is striking, furthermore, that in support of this argument the applicants, even at the hearing, relied in part on points which could at most have been relevant to their trade margin policy. I am thinking, for example, of the arguments regarding the alleged contradiction between the excise legislation and the price measures. The resulting problems could at best be relied on by dealers in defence of their decision whether or not to pass on lower purchase prices. The Commission did not however impose fines with regard to the agreements concerning trade margins. The present issue, the fixing of retail prices as such, is in no way affected by that alleged contradiction.

With regard to the particular mitigatory circumstances concerning the applicants Philip Morris, Batco, Niemeyer and Reynolds, I can again refer in the main to what I have already stated in Section 4.2 of this chapter of my Opinion. With regard to the arguments raised by the two first applicants, I should add that in my view they are wrong to rely on the decision in the *Floral* case (Official Journal 1980, L 39, p. 51). The Commission is quite entitled to impose fines for breaches of Article 85 of the EEC Treaty such as those now in issue, which it discovered after the bringing of the proceedings in question and which produced their full effects before the proceedings were brought. The fact that after the proceedings were brought the applicants entered into no *new* price agreements of the same nature cannot be regarded as a mitigatory factor. With regard to the applicant Niemeyer, the fall in its market share cannot as such constitute mitigation. Furthermore, the standard applied in assessing the level of fines imposed on the applicants in this case, in accordance with Article 15 of Regulation No 17, implies in itself that the fall in Niemeyer's turnover was taken into account.

The argument raised by the applicant Reynolds that it was a newcomer on the Netherlands market does not detract from the fact that it too must be considered guilty

of at least negligence. I have already pointed out that in applying a relatively very low level of fine in this case the Commission in my view clearly based itself on the lowest degree of negligence encountered, which perhaps corresponded in fact to that displayed by Reynolds, whilst in all other cases there was a rather greater degree of negligence or perhaps even intentional fault. I should nevertheless think it conceivable that the Court might in fact reduce the amount of the fine imposed on Reynolds, on the basis of the argument now under discussion. Since I am of the view, however, that the low level of fine applied takes sufficient account of the degree of negligence attributable to Reynolds, I can see no reason myself to propose to the Court a reduction of the fine in this case. As I have already said, if such a practice of the Court had already existed, I would instead have considered it appropriate to propose higher fines for those undertakings which on the whole put forward less significant special circumstances affecting them individually or none at all.

The contention of the applicant Reynolds that it did not take part in two of the agreements objected to by the Commission must in any event be rejected since the fine related neither directly nor indirectly to them.

All the arguments raised with regard to the amount of the fines imposed must therefore in my view be rejected.

4.8. The alleged infringement of Article 85 (3) of the EEC Treaty

An argument alleging infringement of Article 85 (3) of the EEC Treaty is raised by only three of the applicants.

According to *Reynolds* the price agreements should have been exempted since they were intended to protect the structure of the distribution network. That policy was beneficial to the consumer since it maintained in existence a large number of sales outlets. Such a policy protecting retail trade cannot be put into effect by consumers but only by the undertakings concerned, in consultation with the authorities. All the SSI agreements in fact serve that purpose.

Laurens points out first that this is only an alternative submission, since it considers that the 1978 price agreement was notified and regards the other agreements in question as exempt from notification. According to Laurens the conditions for exemption are met so long as the distortions of competition arising out of domestic legislation have not been eliminated. Council Directive, 72/464 offers no real solution for that situation. On the contrary, the Commission promotes a system of *ad valorem* excise duties which in the absence of the agreements at issue would have led to the collapse of the distribution network. In the long run that would have been harmful for consumers, since the Netherlands Government would have had to increase excise duty in order to compensate for the fall in tax revenue. Moreover, products of lower quality would have driven higher quality products from the market (that in fact is why in France and Italy supermarkets and discount shops are excluded from the distribution of tobacco products). In support of its argument Laurens points out that in the United Kingdom and Ireland, where the specific component of taxation is predominant, the industry and the trade have not had to resort to practices restrictive of competition.

Finally, *Turmac* argues that Article 85 (3) of the EEC Treaty must be sufficiently flexible to deal with exceptional situations such as that of the cigarette sector. The substantial elimination of competition must not be regarded as the sole criterion unless it is desired to make crisis measures impossible.

4.9. Assessment of this argument

In assessing this argument it must first be pointed out that in view of what is said in paragraph 143 of the decision paragraphs 144 to 148, challenged here, are in fact superfluous since, as I have already stated, the price agreements in question would have had to be notified in order to be eligible for exemption under Article 85 (3). In this case there was no such notification, as has also been pointed out already.

Even if notification had not been an essential condition for the exemption of those price agreements, the Commission, acting within its discretion, was certainly entitled to take the view that such exemption should be refused. It is a fixed practice of the Commission to refuse exemption for price agreements which prevent manufacturers from passing on individual cost advantages to their customers, and I have been unable to find any case in which the Court was persuaded to declare such a refusal void. The arguments put forward in this case by these applicants are relevant at best to the first of the grounds for refusing exemption set out in paragraphs 144 to 148. I have found no attempt in their applications to refute the four other grounds for refusal set out in those paragraphs. Assuming it to be true, as Reynolds asserts, that the price agreements resulted in the maintenance of a large number of sales outlets, that in itself would certainly not necessarily lead to improvement in distribution; nor is it necessarily in the interests of consumers, as the Commission, referring to paragraph 184 of the *Fedetab* judgment, correctly pointed out. The supposition that the alleged distortions of competition arising out of the domestic legislation could in themselves justify exemption from the prohibition of agreements, decisions and concerted practices finds no support in Article 85 (3) or in the previous judgments of the Court. Since the relevant points of the decision are not based on the negative requirement laid down in Article 85 (3) (b), *Turmac*'s argument based on that requirement can be disregarded here. The other arguments concerning the applicability of Article 85 (3) raised at the hearing related exclusively to the assertion that the price agreements were intended to reduce the effect of the alleged distortions of competition. I have already dealt with that argument but I should like to add, with regard to the example put forward at the hearing of the draft regulation establishing a block exemption for the motor vehicle industry (Official Journal 1983, C 165), that the problems of parallel imports and re-exportation of the products concerned, relevant in that context, play no role in the present proceedings.

This argument must therefore also be rejected.

5. *The fourth submission: the alleged infringement of Article 190 of the EEC Treaty, inasmuch as the Commission failed sufficiently to consider the applicants' arguments*

According to the applicants the Commission ignored their arguments at every stage of the proceedings. No trace of those

arguments, they say, can be found in the decision.

On the basis of paragraph 66 of the *Fedetab* judgment I agree with the Commission that this fourth submission of the applicants must be rejected. I should add that the factual and legal elements referred to in that paragraph, on which the legality of the decision depends, or on which the applicants say it depends, were in fact established with particular precision in this case and mentioned in the decision, and it appears from the documents in the proceedings that due regard was had to the arguments of the applicants. The statement of the reasons which led the Commission to adopt the decision in question must also be regarded as sufficiently complete to meet the requirement laid down in Article 190 of the EEC Treaty. As became sufficiently clear during these proceedings, the statement of reasons in no way interfered with the actual ability of the applicants to take the matter further.

This fourth submission must therefore also be rejected as unfounded.

V — Conclusion

Since I have come to the conclusion that all the submissions of the applicants must be rejected as unfounded, I propose that the Court:

(1) Dismiss the primary and the alternative claims of the applicants;

(2) Order the applicants to pay the costs.