OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 3 JULY 1980 [1]

Mr President,
Members of the Court,

The subject-matter of the eight cases, in which I am giving my opinion today and which were joined by order of the Court of 26 October 1978 for the purposes of the proceedings and judgment, is the Commission Decision of 20 July 1978 adopted pursuant to Article 85 of the EEC Treaty. It concerns measures which were and still are applicable to the Belgian market in tobacco products.

In listing the relevant measures a distinction must be made between those prior to 1 December 1975 and those subsequent thereto.

Into the first said period fell measures, which according to the particulars in the Commission decision, were concerned with the following:

— The recognition of wholesalers and retailers of tobacco products by the Fédération Belgo-Luxembourgeoise des Industries du Tabac ("FEDETAB", a federation set up in 1946 to which almost all Belgian and Luxembourg tobacco manufacturers belong), the division of traders into various categories and the allocation of various profit margins to the traders;

— The maintenance of resale prices set by the manufacturers for wholesalers and retailers as determined by certain agreements made between FEDETAB and the Fédération Nationale du Commerce de Gros en Produits Manufacturés de Tabac (hereinafter referred to as "FNCG");

— The restrictions imposed by FEDETAB on the approval of certain categories of wholesalers;

— The ban on resales by wholesalers to other wholesalers and certain retailers;

— The application to wholesalers and retailers of standard terms of payment; and

— The obligation on retailers to stock a minimum number of brands.

On 1 December 1975, and here I come to the period mentioned in the second place, a recommendation made by the governing body of FEDETAB for the sale of cigarettes on the Belgian market entered into force and the seven manufacturers of tobacco products, who are now plaintiffs, announced that they would follow it. It is concerned with:

— The division of the Belgian wholesalers and retailers into categories and the allocation to the latter of different maximum profit margins;

— The application to wholesalers and retailers of standard terms of payment; and

— The granting to wholesalers and retailers of end-of-year rebates.

1 — Translated from the German.

As early as the beginning of 1971 the Commission was fully informed of the first group of measures — I will in future call them the "earlier measures" to distinguish them from the recommendation I have just mentioned — after it had sent a request for information to FEDETAB as a result of a complaint by a Belgian undertaking.

On 2 April 1974 GB Entreprises SA (later to become GB-Inno-BM), which operates supermarkets and is already known from Case 13/77 *NV GB-Inno-BM* v *Vereniging van de Kleinhandelaars in Tabak* [1977] ECR 2115, complained to the Commission about the earlier measures and asked that proceedings be commenced for a declaration that there was an infringement of Articles 85 and 86 of the EEC Treaty. The Commission did so by a decision of 29 July 1974. In the course of those proceedings objections were raised on 18 July 1975 in accordance with Article 2 of Commission Regulation No 99/63 against FEDETAB and its members which includes all the applicants in the present proceedings.

By letters of 10 and 13 October 1975 two further Belgian undertakings, Mestdagh Frères & Cie., which sells foodstuffs in a number of supermarkets and subsidiaries, and the firm of Eugène Huyghebaert, which supplies retailers, announced to the Commission their intention to be associated with the complaints made by GB-Inno-BM. This was done by a formal complaint dated 17 October 1975, which was apparently received by the Commission on 21 October 1975. On 22 October 1975 there was a hearing at the Commission of the proceedings commenced by decision of 29 July 1974; FEDETAB, various of its members and GB-Inno-BM took part. The representative of the firm of Huyghebaert who had also been invited to the hearing was excluded from it at the applicants' wish. Subsequently, on 13 November 1975, the complaints made by Mestdagh and Huyghebaert were forwarded to the applicants for their comments. Their comments were received by the Commission towards the end of 1975 and beginning of 1976 and then there were further comments in July 1976 by the applicants on the reply lodged by Mestdagh and Huyghebaert.

The *recommendation* made by FEDETAB was notified to the Commission on 1 December 1975. In this connexion all the applicants declared that they intended to comply with the recommendation. After the proceedings which were already pending before the Commission were extended to the recommendation by decision of 10 May 1976, further objections were notified on 17 May 1976 and on 22 September 1976 there was a second hearing of the applicants.

All this led on 20 July 1978 to the adoption of the aforementioned Commission decision which was delivered to FEDETAB and the undertakings manufacturing tobacco products, Cinta SA, Éts. Gosset SA, Jubilé SA, Vander Elst SA, Weltab SA, and BAT Benelux SA, all of Belgium, and Heintz van Landewyck Sàrl, a manufacturer of Luxembourg.

Article 1 of the decision found that the earlier measures concerning the organization of the distribution and sale of tobacco products in Belgium represented decisions by the association of under-

takings, FEDETAB, and agreements between seven manufacturing undertakings, the applicants in the present proceedings, and constituted from 13 March 1962, when Regulation No 17 entered into force, to 1 December 1975 infringements of Article 85 (1) of the EEC Treaty.

Article 2 of the decision found that the recommendation notified by FEDETAB and the seven manufacturing undertakings to the Commission and taking effect on 1 December 1975 constituted an infringement of Article 85 (1) of the EEC Treaty. Further it did not qualify for exemption under Article 85 (3) thereof.

Finally Article 3 of the decision ordered the addressees to terminate without delay the infringement referred to in Article 2 and in future to abstain from all acts whatsoever having the same object as the FEDETAB recommendation of 1 December 1975.

On 28 and 29 September 1978 the addressees appealed to this Court against that decision.

It is claimed in Case 209/78 that Articles 1, 2 and 3 (1) of the decision should be declared void and in the other cases it is claimed that the decision should be declared void as a whole.

In Case 124/78 there is an additional claim in the alternative to refer the case back to the Commission with an order to consider the applications for exemption under Article 85 (3) of the earlier measures and the recommendation.

Further Case 215/78 seeks in the alternative that Article 2 of the decision be declared void in so far as it provides that application of Article 85 (3) to the FEDETAB recommendation is not justified and that accordingly Article 3 (1) of the decision be declared void.

Finally it is claimed in the alternative in Case 218/78 that Articles 2 and 3 (1) of the decision should be declared void and that in the alternative a declaration should be made as formulated in the alternative in Case 215/78.

Before I can deal with those claims, which the Commission contends should be dismissed, I should mention that several bodies have been allowed to intervene in the proceedings.

They are, in support of the applicants:

— The Association des Détaillants en Tabac Asbl (hereinafter referred to as "ATAB"), an association founded in 1966 and now comprising 360 retailers;

— The Association Nationale des Grossistes en Produits Manufacturés du Tabac (hereinafter referred to as "AGROTAB"), an association created in 1976 to replace the Association Nationale des Grossistes Itinérants en Produits Manufacturés du Tabac (hereinafter referred to as "ANGIPMT"), which was dissolved in 1976 and which in turn together with the Nationale Vereniging van Familiale Tabakgroothandelsondernemingen (hereinafter referred to as "NVFG") replaced in 1974 the Fédération Nationale du Commerce de Gros en Produits Manufacturés du Tabac (hereinafter referred to as "FNCG"), which had been founded in 1957; and

— The Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes (hereinafter referred to as "FNJ").

Moreover the following intervened in support of the Commission:

— The aforementioned undertakings GB-Inno-BM, Mestdagh and Huy-

ghebaert, who had made complaints to the Commission; and

— The Federation Belge du Commerce Alimentaire (hereinafter referred to as "FBCA").

In considering the quite extensive material I shall proceed as follows:

First I shall consider the grounds of complaint relating to the course of the administrative proceedings before the Commission. Then I shall consider whether the Commission was right in finding that the measures on the organization of the sale and distribution of manufactured tobacco in Belgium fell within Article 85 (1) of the EEC Treaty, that is to say, were agreements between undertakings, decisions by associations of undertakings and concerted practices which might affect trade between Member States and which had as their object or effect the restriction of competition within the common market. Then if necessary the question must be considered whether exemption under Article 85 (3) was rightly refused.

I — The administrative proceedings conducted by the Commission

In the view of the applicants the administrative proceedings before the Commission were not conducted correctly in various respects. Thus their rights of defence were infringed inasmuch as they were not given sufficient opportunity to inspect the administrative documents drawn up by the Commission. Further, the Commission wrongly refused to hear certain associations of undertakings. Moreover it based its decision on complaints by Mestdagh and Huyghebaert without conducting in regard thereto proper proceedings in relation to competition and informing those concerned of the joinder of those proceedings with the others. The Commission was also wrong in publishing business secrets of the applicants. Further not all the officials of the Commission dealing with the matter were continuously present at the hearing. Finally exception must be taken to the fact that in notifying the objections only one of the four conditions laid down in Article 85 (3) was referred to in rejecting the possibility of exemption, whereas in the contested decision mention was made of other conditions for exemption without the applicants' having had an opportunity of giving their opinion thereon. All this must be regarded as infringement of Article 6 of the Convention for the Protection of Human Rights.

1. Alleged insufficient inspection of the administrative documents kept by the Commission

Various aspects must be distinguished here.

(a) In so far as in three actions (Cases 209, 210 and 218/78) there is mention of the fact that the Commission did not grant the request of the applicants made in August 1978, that is *after the contested decision was adopted,* to inspect the administrative documents, the statements of claim in Cases 209 and 218 themselves show that that obligation is not to be regarded as a ground for voidance but as a ground for discovery (Case 218/78) or (as in Case 209/78) as grounds for reserving the right to supplement the

statement of claim if necessary. The same was made clear in Case 210/78, albeit only in the reply, that that was not intended to be the ground for declaring the contested decision void.

It is not necessary to say anything further on the correctness of that view. In fact it relates to the conduct of the Commission after the conclusion of the administrative proceedings leading to the contested decision and thus conduct which could have had no influence on the nature of the decision. Therefore it is not necessary now to consider the quite extensively discussed question whether the Commission's reaction to the said requests — in the proceedings there was talk of oral and written procedure — was sufficient and proper. Our inquiry can be confined to other aspects of that ground of complaint.

(b) As regards the requests made by the applicants *during* the administrative proceedings, the Commission explained that the presumptuous demand had never been made to it to make all the administrative documents available to the applicants. No such request, as the Commission rightly pointed out, is to be discerned in certain phraseology used on pages 18 and 19 of the minutes of the second hearing in September 1976.

On the other hand the Commission has convincingly shown that it sufficiently met the request to inspect certain documents. When at the first hearing objection was made, which can be regarded as the relevant request, that the applicants were not acquainted with the complaints of Mestdagh and Huyghebaert, those complaints were immediately made available to the applicants. Also the letter from the Association Nationale des Grossistes Itinérants en Produits Manufacturés du Tabac of 2 March 1976 (not, as wrongly stated, 13 February 1976) asked for mainly in a letter from FEDETAB of 21 May 1976 (cited at page 27 of the rejoinder) was in fact forwarded to FEDETAB. As regards the reference in the letter from FEDETAB of 21 May 1976 to the forwarding of all other documents, the context should not be overlooked in which that request was made. It related in fact to documents to which the Commission might refer at the hearing. It was said without denial that none were sent because the Commission did not refer to any documents at the hearing. Moreover it is relevant in this respect that apparently before the contested decision was adopted the applicants did not react clearly to the, in their view, insufficient discovery of documents.

(c) Further the applicants claim that because those concerned could not know the exact composition of the administrative documents, the Commission, without regard to whether applications had been made, should be required to disclose all documents containing facts taken into account by it — since it should rely only on facts on which those concerned had been able to comment — and that it is open to objection that the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions was not disclosed to the applicants. As to this the following observations in my opinion should be made:

— As regards the last issue the Commission has no doubt rightly pointed out that the opinion of the Advisory Committee pursuant to Article 10 of Regulation No 17 is not published; it is moreover intended only for the Commission and not for those affected. Accordingly, without special reasons being shown, its production cannot be demanded even in court proceedings simply on the ground that only in such way is it possible for the Court to check whether the Advisory Committee was properly involved.

— As regards the other matters put forward by the applicants I refer to the fact that in the older case-law (Joined Cases 56 and 58/64 *Consten Sàrl & Grundig-Verkaufs-GmbH* v *Commission* [1966] ECR 299, at p. 338) it is expressly stressed that it is not necessary that "the entire content of the file should be communicated" to parties to proceedings relating to cartels; all that is necessary (cf. Case 49/69 *Badische Anilin- und Soda-Fabrik AG* v *Commission* [1972] ECR 713, at p. 729 [paragraph 8]) is that "the undertakings concerned must be informed of the essential elements of fact on which the Commission bases its objections against them". In that respect the applicants were not able successfully to challenge the Commission's allegation that all the facts upon which the contested decision was based were communicated to them and they were not able to cite any important fact or circumstance upon which they were not able to comment in the administrative proceedings.

The applicants referred to the judgment in Case 85/76 *Hoffmann-La Roche & Co AG* v *Commission* [1979] ECR 461, at p. 512 [paragraph 11], which states that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its allegation that there has been an infringement of Article 86 of the Treaty. That judgment can hardly be regarded as laying down any new principles as suggested by the applicants. The Court's statement cited means in my view that inspection of documents is to be afforded for the purpose of comment on particular facts only in so far as it is indispensable (where for example the evidential value of a document is challenged) for reasonable comment on the facts contained in the document. That however can hardly be said of the documents referred to in paragraphs (101), (102), (127) and (130) of the contested decision to which much reference was made at the hearing. Here it is a question of information from producers on the application of the credit terms and trade margins, of the allegation that the criteria for grading various categories of traders were criticized not only by the complainants but also by the most important association of wholesalers and the alleged impossibility for traders to choose brands of cigarettes, which they wished to sell and to limit the number of brands in accordance with demand. In that respect I refer only to the observation of the Commission that the answers of the producers on the application of the recommendation had no decisive significance on the decision and the fact that in the Commission's

decision the principle of agreement and not the manner of determining the criteria for grading is stressed. Likewise it is difficult to understand why it is only after they have inspected the documents used by the Commission that the applicants can comment on the trend in cigarette sales in Belgium, the peculiarity of the Belgian revenue system and its effects, the number of retailers in other Member States and the comparison of the services which the various traders afford in distribution, in so far as it really is a question, which cannot be said of all those matters, of views upon which the decision depends.

(d) The administrative proceedings cannot therefore be criticized on the grounds that the applicants were refused inspection of documents which was necessary for proper comment on the objections raised against them and which, had it been allowed, could have substantially influenced the course and outcome of the proceedings.

2. *The failure to hear certain associations in the administrative proceedings allegedly resulting in the inadequate establishment of the facts*

There are two matters to be distinguished.

On the one hand there are the requests originating from the associations themselves to take part in the hearing in relation to the recommendation. Those requests were made:

— On 9 June 1976 by the Association des Grossistes Itinérants en Produits Manufacturés du Tabac, an association founded after the dissolution of the FNCG and in turn superseded in 1977 by AGROTAB;

— On 1 July 1976 by ATAB; and

— On 17 September 1976 by the Association des Grossistes "Groupe Tabac", a *de facto* association composed of the most important wholesalers who were formerly members of ANGIPMT and are now members of AGROTAB.

On the other hand there is the request by FEDETAB on 30 June 1976 to hear two associations namely the aforesaid "Groupe Tabac" and NVFG, mentioned at the beginning, one of two associations founded *de facto* after the dissolution of ANGIPMT in 1976.

(a) First as regards the requests made by the associations themselves, Article 19 (2) of Regulation No 17 provides:

"If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted."

Further, Article 5 of Regulation No 99/63 of the Commission states:

"If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 19 (2) of Regulation No 17, the Commission shall afford them the opportunity of making known their views in writing within such time-limit as it shall fix."

Article 7 of the same regulation provides:

"1. The Commission shall afford persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views."

Finally, Article 9 (3) of Regulation No 99/63 states as regards the hearings which the Commission has to arrange:

"Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend . . ."

It follows from these provisions that the Commission has a discretion with regard to the hearing. There is a right to a hearing only if sufficient interest is shown and even then it is basically only a written procedure. Oral hearings are to be arranged only where sufficient interest is shown or where the Commission proposes to impose a fine or periodic penalty payment on those concerned. It is moreover clear, and Article 9 of Regulation No 99/63 must be so understood, that contentious proceedings are not the rule. I cannot moreover see any doubt as to the compatibility of Regulation No 99/63 with Regulation No 17 of the Council as mentioned by the applicants at the hearing with regard to the requirement of contentious proceedings. Nevertheless it may be inferred from the judgment in Case 8/71 *Deutscher Komponistenverband eV* v *Commission* [1971] ECR 705 that as regards applications by third parties to be heard it is sufficient if the opportunity is given to submit written comments under Article 5 of Regulation No 99/63.

In the present administrative proceedings, according to the unchallenged statement of the Commission, written comments were submitted by ATAB on 21 October 1974 and 10 September 1976 and by the "Groupe Tabac" on 17 September 1976 and they related to the complaints by GB-Inno-BM and the objections of May 1976. Further, written comments were sent in on 5 March 1975, 7 October 1975 and 2 March 1976 by ANGIPMT, which was a member of the "Groupe Tabac". Apart from that there were official talks between officials of the Commission and representatives of ATAB on 13 November. 1974 and 18 March 1976, of ANGIPMT on 23 September 1974 and 26 February 1976 and of NVFG on 29 October 1974. Furthermore mention should be made of written comments by the Europäischer Tabakwaren-Großhandelsverband (hereinafter referred to as "ETV") on 21 February 1975 and 7 October 1975 and by the Confédération Européenne des Détaillants en Tabac (hereinafter referred to as "CEDT") on 11 December 1974 and 4 November 1976 and further of talks said to have been held with the representatives of CEDT on 13 November 1974 and of ETV on 18 February 1975.

From this there can scarcely be said to be disregard of the right of these associations to be heard and for the special interest of the trade to be asserted

and moreover as regards the refusal by the Commission to allow representatives of those associations to take part at the oral hearing, it must be borne in mind that ATAB did not by any means represent all specialized retailers but only some hundred of them. It is also significant that apparently no association according to the concluding answer by the Commission and the subsequent letters from the Commission such as those of October 1976 has maintained the allegation that it was not heard. Moreover according to the relevant case-law it seems quite right to hold that there was not sufficient interest for an additional *oral* hearing because the traders had not associated themselves with the recommendation and that is why the objections in that respect had not been served on them. Let me cite again the judgment in Joined Cases 56 and 58/64 *Consten GmbH and Grundig-Verkaufs-GmbH* v *Commission* [1966] ECR 299 where it is expressly indicated [at p. 346] that undertakings which are not parties to an agreement have no right to be heard in proceedings brought by the Commission with regard thereto.

(b) On the other hand as far as concerns in this connexion the application by FEDETAB for the hearing of certain associations, Article 3 (3) of Regulation No 99/63 is decidedly in point; it states:

"They" (that is to say, the undertakings and associations of undertakings upon whom as those concerned objections have been served) "may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts."

Article 7 (2) of that regulation must also be borne in mind as allowing the Commission likewise in other cases to afford any other person the opportunity of expressing his view orally.

Since Article 7 (2), where there is a discretion, can obviously be left out of account, an obligation to accede to applications to be heard can at most be based on Article 3 (3) and presumably then only in cases in which particular persons are cited to corroborate particular facts.

When all relevant circumstances are considered, then it is apparent that that is not the case here according to the letter from FEDETAB of 30 June 1976 (cf. Annex 3 of the Commission's pleading on the observations by AGROTAB). In that letter it is explained in response to a query by the Commission that FEDETAB had no objection to representatives of the Association Nationale des Grossistes Itinérants taking part at the hearing. Then following on it simply stated: "La FEDETAB souhaite cependant pour que la Commission soit complètement éclairée de convoquer également les associations suivantes" (namely NVFG and the "Groupe Tabac"). That certainly did not adequately show that there was interest in hearing the said associations, nor was it moreover so shown at the hearing itself, not only because there was no reference to Article 3 of Regulation No 99/63 but also because the facts which were to be corroborated were not stated. Further in support of the view that the failure to afford the hearing

requested is not to be regarded as a curtailment of the rights of defence, it is significant that not only FEDETAB itself described NVFG as an unimportant association, which nowhere makes its presence felt, but that after the rejection of the application there was obviously no special reaction either from FEDETAB or from the said associations.

(c) The administrative proceedings can therefore certainly not be regarded as irregular on the grounds that they disregarded the provisions in Regulations Nos 17 and 99/63 on the hearing of third parties.

3. The complaints made by Mestdagh and Huyghebaert and the proceedings resulting therefrom

In October 1975 the Belgian undertakings, Mestdagh Frères & Cie and Huyghebaert associated themselves with the complaints by GB-Inno-BM, and that step was registered with a separate file number. As a result of the last-mentioned circumstance the applicants were of the opinion that separate additional proceedings had been started. On that basis they complained that they had never received a decision joining those proceedings with others pending before the Commission and relating to the system of distribution of tobacco products and that in consequence they had not been able to comment on the relevant grounds therefor. They complained also that as regards the proceedings brought by Mestdagh and Huyghebaert and whose independence they had to assume, they were never sent objections after the formal opening of the proceedings, which incidentally did not take place, and that there was no hearing. This leads to the conclusion that the complaints of Mestdagh and Huyghebaert ought not to have been taken into account in the Commission's decision and thus it was improper to terminate three proceedings with one single decision.

(a) As regards this group of objections the Commission to my mind rightly pointed out that the nature of its administrative proceedings was not such as the applicants assumed it to be. Not every complaint of conduct allegedly distorting competition which for administrative purposes receives a separate file number necessarily introduces independent proceedings even if it relates to matters which as a result of a similar complaint are already the subject of proceedings in relation to competition. In such circumstances it is not a question of starting new proceedings but of extending the proceedings which are already pending to the additional complaints as was done in the present case by the decision of the Commission of 10 May 1976. It was therefore not necessary to have any formal decision joining the proceedings for which reasons would have had to have been given and sent to those concerned for comment. It needed only to be sufficiently clear that the additional complaint would be considered by the Commission in relation to the proceedings already pending and those concerned be given opportunity to comment on the additional complaints.

In the present case it is however clear and not open to dispute that the complaints by Mestdagh and Huyghebaert associated with the complaints by GB-Inno-BM dealt at least in part with the same subject-matter — they likewise related to the so-called earlier measures in relation to the distribution of tobacco products in Belgium and their restrictive effects upon competition — and that essentially the same reasons were given for them. Even if then the complaint of unjustified preference of certain traders is the main ground of contention, Mestdagh and Huyghebaert in fact attack the whole system of the collective fixing of trading conditions by members of FEDETAB as unlawful. Further it is significant that not only was FEDETAB's advocate made aware of the position as early as September 1975 as the advocate for Mestdagh and Huyghebaert pointed out at the hearing in 1975 but that also in a letter from the Commission to FEDETAB of 20 October 1975, intended to be brought to the knowledge of the members of FEDETAB, mention was made of the joining of the three complaints and of the fact that Mestdagh ought to be brought into the hearing.

Further, there is still various other evidence that the close connexion between those complaints was quite clear to the applicants. Thus FEDETAB's advocate declared at the hearing in 1975 that it was desirable not to bring fresh proceedings in relation to the complaints by Mestdagh and Huyghebaert but to deal with the matter as a whole. In addition the answers by FEDETAB, Jubilé and Vander Elst to the compaints by Mestdagh and Huyghebaert and the second lot of comments by FEDETAB on those complaints clearly referred to the proceedings commenced as a result of the complaints by GB-Inno-BM. Further in the letters from the advocate for the two applicants to the Commission of 9 June 1976 stress was laid upon the close connexion of the complaints by Mestdagh and Huyghebaert with the problems dealt with in the FEDETAB recommendation and it was emphasized that this would be taken into account in the answer to the second objections. Finally it must not be forgotten that other applicants too stated that the complaints by Mestdagh and Huyghebaert would be taken into account in the comments on the second objections and thereby recognized the connexion which to that extent existed with the FEDETAB recommendation.

I therefore do not see how it is possible to criticize as a procedural irregularity the fact that the Commission did not declare in a formal decision with reasons stated and after specific comment by the applicants in relation thereto that the Mestdagh and Huyghebaert proceedings were to be joined with the GB-Inno-BM proceedings.

(b) If moreover consideration is given to the question whether as a result of what the Commission did the rights of defence of those concerned were disregarded and therefore it is to be regarded as inadmissible to have dealt with the Mestdagh and Huyghebaert proceedings in the contested decision, then in my opinion the answer cannot be as mooted by the applicants.

First it is necessary to bear in mind that according to the case-law (Joined Cases

40/73 and related cases *Coöperatieve vereniging, "Suiker Unie" UA and Others* v *Commission* [1975] ECR 1663, at p. 1930) it is quite possible to deal with several infringements in a single decision concerning competition; it is necessary only for care to be taken that in the decision no objections are considered upon which those concerned have not been able to comment.

It therefore seems to me irrelevant that no particular objections taken from the complaints by Mestdagh and Huyghebaert were forwarded to the applicants. What is decisive is that those complaints were served on all applicants (even on the applicant in Case 209/78 as it admits in its reply) and that they commented on them in letters dated 17 December 1975, 22 December 1975, 5 January 1976, 7 January 1976, 20 January 1976 and 21 January 1976. It is significant too that there were further answers by Mestdagh and Huyghebaert thereto relating moreover also to the recommendation and that they in turn provoked reactions from the applicants in letters dated 27 July 1976, 28 July 1976, 29 July 1976 and 30 July 1976. In addition the objections from the year 1976 on which the applicants were able to comment dealt with the problem of the alleged discriminatory treatment of traders which was raised particularly by Mestdagh and Huyghebaert.

As regards however the question of the oral hearing of the complaints by Mestdagh and Huyghebaert, it may be pointed out that it could have taken place as early as 20 October 1975, as the Commission intended, if the applicants had not objected to the participation therein of Huyghebaert's representative, who could have explained his complaints, which had not yet been served upon the applicants. Moreover there was a second hearing on 22 September 1976 in relation to the FEDETAB recommendation. Since it was preceded by comments from Mestdagh and Huyghebaert dealing also with the recommendation, it may well be assumed that the applicants had sufficient opportunity to deal with the views of Mestdagh and Huyghebaert.

(c) The complaints by Mestdagh and Huyghebaert were not dealt with in the administrative proceedings in a manner to limit the applicants' right of defence as set out in Regulations Nos 17 and 99/63, which would have given cause to declare void the Commission's decision in so far as it concluded the proceedings introduced by the complaints from Mestdagh and Huyghebaert.

4. Breach of business secrets

As we heard in the proceedings the comments of FEDETAB of 22 September 1975 together with annexes were served on the complainant GB-Inno-BM. Those comments and annexes set out market trends of 160 brands of cigarettes in Belgium during the previous five years, the cigarette purchases handled by the main specialized itinerant wholesalers and the credit terms to which the 25 important customers of the largest Belgian cigarette manufacturers kept. In the applicants' view that infringed Article 20 of Regulation No 17 because it naturally related to business secrets and was clearly so shown by being marked "confidential". Because

the complainant was thus enabled to comment on facts not normally available to it, the proceedings were vitiated with the necessary consequence that the resulting Commission decision should be declared void.

The Commission took the view that in truth the contents of the said annexes, of which moreover only two, and not the one concerned with the sale of 160 brands of cigarettes, were marked "confidential", could not be regarded as secret. Even if however that were the case the interest in keeping secrets had to yield before the Commission's interest in full information and establishment of the facts. In any event the proceedings were not so vitiated as to call in question the contested decision.

(a) The question first arises whether the content of the said annexes has in fact to be treated as secret.

It is certainly not decisive that some of the annexes were expressly marked "confidential" and some not. Even from Article 20 (3) of Regulation No 17, which states:

"The provisions of paragraphs (1) and (2) shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings."

it does not necessarily follow that everything else must be treated as secret and may not be revealed. Futher in this connexion, and this is directed against the Commission, it is not possible to rely on the Belgian Arrêté Royal [Royal Decree] of 8 October 1976 according to which undertakings are obliged to publish their turnover. Apart from the fact that that provision has existed only since 1976 and can thus not cover matters in 1975, it is clear that it does not necessarily make particulars of the kind relevant here available to the public. In the same way I cannot accept the Commission's observation that the figures were supplied by FEDETAB and thus could not be regarded as secret among the *manufacturers,* since all the manufacturers had access to the FEDETAB material either through their representatives on the administrative board or through the check they had on terms of payment and end-of-year rebates as provided in the sales system. Even if something is known or easily accessible to manufacturers, this does not mean that there is no interest in keeping it secret from *purchasers* from the manufacturers.

If however the *content* of the annexes in question is considered, then without its being necessary to have recourse to Article 214 of the EEC Treaty, it is not possible to avoid the impression that it was a question of matters which ought not to have been brought in full detail to the knowledge of customers of the manufacturers. In my opinion the applicants' view may be accepted that the Commission was in principle bound not to make the annexes in question available to other circles.

(b) On that basis it is further necessary to consider whether the Commission's desire to establish the facts as comprehensively as possible can justify so

proceeding. In that respect the Commission relies on Article 20 (2) of Regulation No 17 which states:

"Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy."

Article 21 is irrelevant and the fact that the above-quoted provision is without prejudice to Article 19 can only mean that the Commission when hearing other persons, which it may consider necessary to do pursuant to Article 19 (2), may escape the obligation to respect secrets.

In my opinion we do not need now conclusively to determine how it is necessary to proceed in detail in balancing the interest in keeping secrets against the interest in completely establishing the facts as the Commission indeed is required to do under Regulation No 17; *inter alia* the matter is discussed in the judgment of 13 February 1979 in the aforementioned Case 85/76 *Hoffmann-La Roche* v *Commission* 1979 ECR 461, at p. 512 [paragraph 13], where it is stated that the obligation under Article 20 (2) must be reconciled with the right to be heard. It has not been convincingly shown that the complainant GB-Inno-BM could usefully have commented on the applicants' answers to the objections put by the Commission only if the applicants had been provided with a full copy of the aforementioned statement by FEDETAB together with all its annexes. In so far as the provision of such copies seemed proper at all, which may be doubted in regard to the sale trends of 160 brands of cigarettes in Belgium, it would certainly have sufficed to proceed so as not to reveal all the details such as the individual terms of payment and in particular the identity of the undertakings concerned. It can therefore be taken that in the present case the Commission cannot justify the disregard of its obligation to respect secrets by referring to its endeavour with the assistance of the complainant to establish the facts as thoroughly as possible.

(c) That certainly does not mean, as the applicants think, that it necessarily follows that the Commission's decision must be declared void. It depends rather, and authority for this is the judgment of 14 February 1978 in Case 27/76 *United Brands Company and United Brands Continental BV* v *Commission* 1978 ECR 207, at pp. 305 and 306 [paragraphs 284 to 288], whether the infringement of which the Commission is guilty decisively influences the course of the proceedings and whether it may be assumed that had there been no irregularity there would have been a different outcome. That however cannot be imagined in view of the nature of the facts known and the comments thereon by the complainant. On the other hand in my view the applicants are wrong in referring to the judgment in the aforementioned Case 85/76 *Hoffmann-La Roche* v *Commission* 1979 ECR 461, at pp. 512 and 513 [paragraph 14], where it is said that the Commission cannot use facts, circumstances or documents which it cannot in its view disclose to the undertakings concerned. In that respect it must simply be said that the documents in question in the present

case were rightly required from FEDETAB and that the Commission considered itself entitled to forward them to the complainant, as was certainly correct as regards the basic contents.

Thus the disregard of the obligation to respect business secrets, which was rightly criticized, has ultimately no significance for the present proceedings. Whether it can possibly lead to liability on the part of the Community, for which as is known, other conditions must be satisfied, need not be further considered here.

5. Alleged irregular conduct of the oral hearing

The applicants further consider that there are grounds for criticism because for a certain time during the hearing on 22 October 1975, as appears from the minutes of the hearing at p. 58, not all of the officials of the Commission concerned with the case of FEDETAB were present. That infringes Article 9 (1) of Regulation No 99/63 which states: "Hearings shall be conducted by the persons appointed by the Commission for that purpose". Indeed it must be regarded as necessary in the interest of the correct establishment of the facts that the officials concerned with the case and responsible for the preparation of the decision should receive their impressions directly from the hearing if at that time an important issue, namely the determination of the terms of payment, was being discussed, and that they should not be content with reports of the oral statement.

The only person however so *appointed* within the meaning of Article 9 (1) was Mr Thompson, a director, who presented himself as such and was also noted in the minutes in that capacity. It was moreover mentioned in a note sent to the parties before the hearing; accordingly the only person appointed was the official who presided and it was to be assumed that the other officials of the Commission simply *assisted* him. Since however it is not disputed that Mr Thompson, who signed the minutes of the hearing was continuously present, the conduct of the hearing must be regarded as correct and in any event there can be no serious defect in the fact that the officials who assisted him were temporarily absent even if they asked questions at the hearing and were entrusted with the preparation of the Commission decision as rapporteurs.

It is not possible in my opinion to meet this by reference to the Belgian law cited by the applicants, where the rule apparently obtains that in the case of adoption of a decision by an administrative committee all the members thereof must have been present at all the discussions. On the other hand it is much more significant that all the observations made at the hearing were reported and made available to the officials taking part. It also seems to me significant that in the case-law, such as in the judgment of 15 July 1970 in Case 44/69 *Buchler & Co* v *Commission* 1970 ECR 733, it has already been held that in proceedings relating to competition it is sufficient if members of the Commission are given information by the person appointed to conduct the hearing and have available to them the minutes and recordings and the administrative documents. If this suffices in the case of persons responsible

for a decision, a different position can hardly be held to obtain in the case of officials who only prepare a decision, the draft of which is nevertheless the responsibility of their superior officer, who in the present case was continuously present at the hearing.

The decision cannot therefore be declared void on the ground of alleged irregular conduct of the hearing, a complaint moreover which relates only to the decisions in respect of the earlier measures.

6. The alleged incompleteness of the objections made known in respect of the recommendation of 1 December 1975

The applicants further object that in the notice of objections to the recommendation which entered into force on 1 December 1975 refusal of exemption under Article 85 (3) of the EEC Treaty is mentioned only in reference to *one* of the conditions referred to there, namely "which contributes to improving the production or distribution of goods or to promoting technical or economic progress". That is the reason why they had made written observations and oral observations at the hearing before the Commission only in relation to that matter. In the contested decision however it is mentioned that exemption does not come into consideration because other conditions in Article 85 (3) are also not satisfied. The decision thus relies on objections upon which the applicants were not able to comment; that infringes their rights under Articles 2 and 4 of Regulation No 99/63.

The Commission counters that in its first objections in 1975 relating to the earlier measures mention is made of allowing consumers a fair share of the resulting benefit. The second objections were only *supplemental* thereto, because the Commission did not abandon the observations it had made earlier. Moreover it was significant that the applicants had made observations on the said condition at the hearing conducted in 1976; further most of the applicants had given their views on all the conditions in Article 85 (3) in their comments on the first objection and also at the hearing in 1975 and in their observations when the recommendation was notified. There can thus be no question of curtailing their right to be heard.

After this discussion the question arises whether it is indeed necessary in giving notice of the objections to make observations on Article 85 (3), and again whether it is sufficient that a further condition of Article 85 (3) was dealt with only in the first notice of the objections and finally whether it suffices that the applicants made comprehensive observations on Article 85 (3) of their own accord at the beginning of the proceedings and when the recommendation was notified.

Since it is not disputed that the question of improving the production or distribution of goods, which is material to the decision, was dealt with in the second notice of objections, those questions will be relevant only if it appears that the part of the decision concerning Article 85 (3) has to be considered at all and if the

rejection of the exemption on the ground of the said condition is not sustainable, the other conditions of Article 85 (3), which were passed over in the second objections, are in fact of importance. In these circumstances and in view of the anyhow exceptionally voluminous material in the action, it seems to me proper provisionally not to deal with the relevant complaint and to consider it if necessary in the event of its being necessary to say anything at all about the rejection of the exemptions.

7. Infringement of Article 6 of the Convention for the Protection of Human Rights

In their replies certain applicants have put forward in addition the argument that all the infringements dealt with so far relating to the alleged irregular course of the administrative proceedings are to be regarded as disregard of the rights of defence as given by Article 6 of the Convention for the Protection of Human Rights. According to the case-law of the European Court of Human Rights that provision applies when there is a dispute about rights or duties arising under civil law. Application of Article 85 of the EEC Treaty comes within it. Article 6 of the Convention for the Protection of Human Rights requires, and this did not happen in the present case, that cases should be defended at all stages and it must be accordingly regarded as an infringement if, and this relates particularly to the rejection of the hearing of the associations named by the applicants, a claim to hear defence witnesses is not granted.

The immediate question arises whether that objection has not been raised too late and must be disregarded pursuant to Article 42 of the Rules of Procedure. I wish to leave that matter aside for the moment because it may be doubted whether it is in fact a completely new and independent issue — in truth a legal tag is simply put upon matters already contained in the statements of claim — but also because the case-law shows, and this takes some of the significance from Article 42 of the Rules of Procedure, that particularly important issues may be raised by the Court of its own motion.

As regards consideration of the complaint in other respects, the observations previously made suffice as regards the question of the incompleteness of the objections in relation to exemption under Article 85 (3). As regards the failure to hear the associations named by FEDETAB, it suffices to recall that according to the relevant letter of FEDETAB already mentioned there is considerable doubt whether it was really a question of citing defence witnesses for particular facts, even assuming, as the Commission itself considers proper, that the Community institutions are bound to respect common principles of justice and the Convention for the Protection of Human Rights, it must not be overlooked that Article 6 of the Convention for the Protection of Human Rights merely provides that everyone is entitled to a fair and public hearing by an independent tribunal. That is no basis for claims in respect to *administrative* proceedings conducted by the Commission; nor does it seem to me possible, as was attempted at the hearing,

to justify the claim that because the Commission is not an independent and unbiased court, such proceedings require all the more respect for Article 6 of the Convention for the Protection of Human Rights. Since however it has been shown that the Commission did not infringe the rules of Community law as contained in Regulations Nos 17 and 99/63, and since it could not be shown that those provisions were not in accord with the Convention for the Protection of Human Rights or that apart from that the Commission had infringed the Convention for the Protection of Human Rights, it must ultimately be concluded here too that such considerations cannot lead to voidance of the contested decision.

II — Application of Article 85 (1) of the EEC Treaty

I now come to the question whether the organization of the distribution of tobacco products in Belgium by means of certain agreements and resolutions of FEDETAB between 13 March 1962 and 1 December 1975 and the recommendation which entered into force on 1 December 1975 relating to the sale of cigarettes on the Belgian market infringed Article 85 (1) of the Treaty.

The numerous arguments put forward in that respect call for an attempt to deal with them in some sort of order. Thus I will first deal with the arguments relating in particular to the *earlier* measures. Then it is necessary to deal with particular objections relating to the recommendation. Finally arguments must be considered which apply to both more or less equally.

A — The particular submissions against the decision in respect of the earlier measures

1. Of interest here in the first place is the observation made by the applicant Heintz van Landewyck that it had signed only the letter of 23 December 1971 laying down the maximum credit terms and no other agreement or measure. In consequence only that letter could be attributed to it; further as regards itself there could not be said to be agreements on competition or concerted practices for in relation to the other measures dealt with in the decision it had merely fitted in with the conduct of other manufacturers because it was compelled so to do by market forces. Here it is proper to mention the general argument put forward by FEDETAB that its members were responsible only for measures and decisions to which they had expressly agreed. Moreover it is necessary to deal in this connexion with the allegation by AGROTAB in the application to intervene that the letter of 23 December 1971 just mentioned was not signed by the applicant Weltab whilst three other companies who had signed it had not been joined by the Commission in the proceedings.

(a) First as regards the allegations to the applicant Heintz van Landewyck, there are good reasons for doubting whether, apart from the letter of 23 December 1971, it applied all the earlier measures only because it was compelled so to do by market forces and that it is therefore wrong to speak in that respect of collective action and concerted practices. On this point the Commission said, and the applicant denied this only in a general way without giving more specific grounds, that some importers active in the Belgian market had certainly marketed tobacco products without observing the rules on distribution objected to by the Commission.

Moreover it was not shown in detail how it was the applicant Heintz van Landewyck who was compelled by market forces to act in line with the Belgian manufacturers. To say that it had a market share of 3 % — according to the Commission's estimates it was nevertheless between 5 % and 6 % — is hardly enough.

It is not necessary to go into that further. The firm of Heintz van Landewyck has been a member of FEDETAB since 1947 and so participated in the adoption of the earlier measures. According to Article 9 of the FEDETAB statutes all members are bound to adhere to decisions adopted pursuant to the statutes and to fulfil obligations arising therefrom. Further the agreements relevant in this connexion were made by FEDETAB in the *name* of the manufacturers and it is apparent from the wording chosen that the obligations were meant to be those of the undertakings. In those circumstances there can be no objection in fact to the Commission's assuming that the manufacturers were bound by the agreements and decisions made by FEDETAB and that it therefore accused the applicant Heintz van Landewyck of conduct distorting competition not only in relation to laying down maximum credit terms but also with regard to the other earlier measures.

(b) That substantially deals with the general argument put forward by FEDETAB that manufacturers can be held responsible only for those FEDETAB measures to which they have expressly agreed. Further it is significant here, and this confirms the correctness of the Commission's assumption that it is proper to speak of collective action and concerted practices in relation to all the earlier measures, that the undertakings in no way distanced themselves from the FEDETAB measures or gave notice of rejection by their conduct, but that, at least on the whole, they put them into practice.

(c) As regards the particular matters put forward by AGROTAB it must moreover be observed that FEDETAB itself declared in relation to the letter of 23 December 1971 concerning the maximum credit terms that it was a collective measure and that the largest manufacturers had appended their signatures to the letter merely to lend extra weight to the measure, although, as must be inferred, it was not absolutely necessary. In addition the Commission said, and this was not challenged, that the applicant Weltab had signed the said letter and the fact that the signature of BAT was missing was only because it had not at the time obtained control of the undertaking Odon Warland. As regards the fact which does not really matter now that the Commission's decision was not served on the companies Laurens, Odon Warland and Tabalux, who had signed the letter of 23 December 1971, the explanation must suffice that those undertakings had come

under the control of the groups to which the applicants belong.

2. A number of other objections to be dealt with in connexion with the earlier measures relate then to the questions whether in fact an agreement may be assumed, whether the letter from FEDETAB of 21 December 1970 (Politique de distribution cigarettes — tabac à partir du 1. 1. 1971) contained mandatory rules and how that is to be reconciled with the fact that certain agreements are said not to have been applied. Moreover some letters mentioned in the decision are said to have been sent by the Association of Wholesalers, FNCG, that is to say, the manufacturers cannot be held responsible for them.

(a) First of interest here is the claim that the model agreement made on 22 May 1967 by FEDETAB and FNCG for a year and relating to the adherence by wholesalers to the prices laid down by manufacturers was never applied and was superseded by a FEDETAB decision of January 1968. Further this is the place to consider the allegation that the additional agreement of 5 October 1967, whereby retailers who did not observe the prices on the labels would not receive further supplies from wholesalers, never had any practical consequences. Mention should also be made here of the allegation that the standard agreement made by FEDETAB with most of the wholesalers on 30 June 1972, which provided an obligation on wholesalers to observe prices fixed by the manufacturers and a prohibition on supplying certain traders, was never applied and was already terminated in 1973. In order to confirm that the agreement was never put into practice AGROTAB said that the association FNCG was already more or less moribund in 1972.

Against that and against the important reference in that connexion by AGROTAB to a letter by FNCG of 8 May 1970 as showing, because it recalled earlier agreements, that they were not applied, the Commission rightly pointed out that Article 85 (1) is not dependent upon whether an agreement is applied. It is sufficient for the purposes of Article 85 (1) if the *object* is a restriction on competition and there can be no doubt about that if the content of the agreements in question is considered.

For the same reasons it is not decisive whether sanctions were applied or not to enforce the agreements. In that respect, quite apart from the fact that a threat of sanctions by powerful associations can be effective, the Commission was able to refer to a letter by FEDETAB of 3 October 1967 in which the wholesalers were asked not to supply certain traders who had not observed the prices and trade margins. Further it could point out that in a supplemental agreement of 29 December 1970 between FEDETAB and FNCG it was agreed strictly to review the application of the agreements and pay the end-of-year rebates only to wholesalers who had observed the obligations under the agreement of 22 May 1967.

Moreover the Commission rightly stresses that the period of validity of the agreements in the present case is irrelevant. This is because the decision is limited to the finding that Article 85 (1)

was disregarded and imposes no sanctions for which the duration and the effects of the restriction on competition are relevant.

(b) Then it is necessary to consider the allegation that certain letters referred to in the decision originated from the FNCG and cannot therefore be attributed to FEDETAB and its members.

First there is a letter of 26 October 1967 in which it was stated that the cigarette manufacturers would no longer supply wholesalers doing business with traders who gave rebates based on quantity. Further there is a letter of 8 May 1970 in which a reminder was issued of the obligation to observe the prices fixed by the manufacturers, only to allow the terms prescribed for them to the retailers recognized by FEDETAB and not to sell to other wholesalers. Thirdly there is the letter of 22 March 1972 in which there was mention of the prohibition on supplying manufactured tobacco to certain wholesalers.

Here too however it is possible to agree with the Commission that those matters had no significance in reaching the decision especially because the said letters were not considered in the decision as independent documents and relevant for the purposes of the law on competition. Indeed it should not be overlooked that the first mentioned letter refers to action contemplated by the *manufacturers.* It was connected with the prohibition for which the manufacturers were responsible on granting rebates and was intended to ensure that the prohibition was observed. Of interest too is the letter from FEDETAB of 3 October 1967 in which the wholesalers were asked not to supply certain traders who were not observing the fixed prices and profit margins. The second letter refers to obligations under an agreement to which the manufacturers were parties at least through FEDETAB. As regards the third letter which has already been mentioned, it is significant that there is mention in it of the additional agreement made with FEDETAB on 29 December 1970 according to which the food trade was to be prevented from strengthening its position in the tobacco market. Secondly the connexion with the standard agreement made by FEDETAB on 30 June 1972 with almost all wholesalers should not be overlooked for that agreement contains the prohibition on supplying certain traders and may altogether be regarded as a consequence of the letter from FNCG.

If the matter is so considered it is indeed not possible to say that documents, which in fact originated from the association of wholesalers, were wrongly attributed to the manufacturers.

(c) As regards the argument put forward by AGROTAB in its application to intervene to the effect that the letter from FNCG of 26 October 1967 refers to the lack of agreement on the matter, it must be admitted that it shows that certain retailers did not observe the prohibition on granting rebates and that certain wholesalers did not observe the prohibition on supplying such retailers. Nevertheless it certainly does not show that the distribution rules did not largely function. Moreover the contested decision which was addressed only to the manufacturers and their association deals

only with their practices. It cannot be inferred that they were abandoned because the rules were not always observed lower down the line; it may even be assumed from the reference in the said letter to the manufacturers' intention to impose sanctions that the intention existed to make the distribution system fully effective. That however makes the said letter in truth evidence for the assessment which the Commission put on the matter.

(d) Finally in this connexion there is the allegation by the applicant FEDETAB to the effect that its document of 21 December 1970 on "Politique de distribution cigarettes — tabac à partir du 1. 1. 1971" was not to be regarded as a mandatory working instrument and that each manufacturer used it according to his own sales policy. That calls for the following observations:

The wording obviously contradicts any such view. The first sentence of the document to the effect: "Les fabricants de cigarettes, membres de FEDETAB, se sont engagés vis-à-vis des grossistes spécialisés en produits manufacturés en tabac à respecter les règles ci-après", means that the rules set out were intended to be the main guidelines. In support of that reference may be made to the arrangements for checking referred to in the decision and the sanctions which are therein criticized. Moreover since it is not disputed that the document substantially influenced the practices of the manufacturers and that they observed those rules on the whole, there can hardly be objection to the fact that the Commission referred to a decision by an association of undertakings and to concerted practices which basically fall within Article 85 (1).

3. A further group of objections which needs special mention relates in substance to the part of the decision concerned with the earlier measures and has as subject-matter the judgment therein on the prohibition of rebates, the laying-down of standard terms of payment, the requirement of a minimum range and the prohibition on certain wholesalers being supplied by other wholesalers.

(a) As regards the prohibition on the granting of rebates it was said that such practices were possible only with large profit-margins which did not exist in trade in manufactured tobacco. Moreover the prohibition was necessary to protect specialized traders whose existence would otherwise be in jeopardy.

I share however the Commission's view that such reasons do not show that Article 85 (1) of the EEC Treaty was wrongly applied to measures whose substantial nature as restricting competition — they relate to price competition between traders — can scarcely be denied.

It must indeed not be forgotten that it is not a question of prohibiting *large* rebates which might be described as unfair and ruinous competition, but excluding any kind of rebate. Further it was not shown that the profit-margins were so squeezed at the time that they did not allow even small rebates. It is not so much a question of the trade practices of large distributors such as GB-Inno-BM, of which there was extensive talk in the proceedings and which,

because they combine the functions of wholesalers and retailers, can aggregate the relevant margins. Of greater interest is the unchallenged evidence of the intervener, the Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes, to the effect that there are apparently still wholesalers who supply such retailers and compete by marking price reductions. That moreover shows that such a practice, at least if it is kept within proper proportions, in no way involves the danger of the disappearance of specialized traders.

(b) As regards laying down standard terms of payment for purchasers from manufacturers (cf. the letter of 23 December 1971) it was stated that it was justified on grounds of self-protection. There was action by large distributors to obtain longer credit terms and when other purchasers sought similar advantages the danger arose that there would be such considerable effects upon the price that it would be damaging to the market. Moreover something similar was said concerning the keeping of minimum ranges by certain traders. It is of interest in this connexion that as retaliation against the refusal to grant longer credit terms, the larger distributors had limited their ranges to less than 60 brands and had done so by boycotting the applicants Weltab and Jubilé, who were regarded as the most vulnerable. That was countered, and must also be regarded as self-preservation, by a refusal of supplies which was aimed at securing the lifting of the boycott and not observance of the obligation in respect of certain ranges.

(aa) In regard to those matters it must be observed first of all that it seems highly questionable whether it is admissible in the law on competition to counter allegedly inadmissible pressure by powerful purchasers with a breach of the rules on competition. That could at most be contemplated if no other means could be considered and of this no proof was given.

Further it is of interest, as the Commission rightly pointed out, that the letter cited by FEDETAB on page 30 of its application can scarcely be regarded as evidence that there was common action by several large distributors in relation to the boycott of two manufacturers which could be met only by common action by all the manufacturers. It must also generally be regarded as unlikely that all the manufacturers involved in the action found themselves in a weak position *vis-à-vis* the said distributors. A number of them belong to strong international groups whereas on the other hand GB-Inno-BM, for example, the largest of the distributors involved here, has a share of only 6 % of the cigarette market.

What the applicants did can therefore scarcely be justified as self-preservation.

(bb) As regards keeping a certain minimum range of cigarettes it is necessary moreover to point out that it was in no way simply a question of reaction to the partial boycott by large distributors. If I understand the FEDETAB document "Politique de distribution cigarettes — tabac à partir du 1. 1. 1971" correctly, keeping a minimum range was rather of general significance as being a condition for being allowed certain terms of purchase.

As such it was on the whole rightly regarded in the decision as a restriction on competition because it can restrict the traders' freedom of choice and also involves tying up capital in so far as less popular brands are involved. It cannot be so easily justified on the ground that in that way competition between brands is encouraged, for to set off restrictions on competition by traders against the stimulation of competition by manufacturers can scarcely be approved. It can at most be questionable whether having regard to such trade practices which exist in any event there can be said to be an appreciable restriction on trade. I shall return to that in a subsequent connexion.

(c) Finally as regards the prohibition on supplying certain wholesalers through other wholesalers as dealt with in the decision, certain applicants have said that such a rule must be regarded as absurd. A wholesaler would not in any event buy from another wholesaler because in such a case he would receive too small a profit-margin. Moreover, apart from the fact that department stores and similar distributors cannot be regarded as wholesalers, a difficulty is that demand from food wholesalers and non-specialized wholesalers is too comprehensive for it to be satisfied by specialized wholesalers without serious financial risks.

On that issue too I cannot agree with the applicants. Quite apart from the fact that as regards the application of Article 85, as already stated, in cases which have as their *object* restrictions on competition the question of the effects upon the market can remain open, it must be recalled that the clauses in question were obviously laid down in regard to wholesalers who are not supplied by manufacturers or as regards traders who received only limited quantities. If such wholesalers wished to continue doing sufficient business, they had only other wholesalers as their sources of supply. Obviously there were such supplies from time to time as is apparent from the statement of FNCG of 22 March 1972. Moreover, it must be remembered that there were certain effective embargoes on supplies to large distributors who as economic entities, and that is why the said clause was important, combined the functions of wholesale and retail trade. I refer in that respect to the measures of October 1967, May 1970 and March 1971 mentioned on page 6 of the pleadings of GB-Inno-BM.

(d) The interim result is that none of the particular objections dealt with so far could justify declaring void that part of the decision which relates to the earlier measures.

B — After that I come to certain special objections applying to Article 2 of the contested decision, that is the FEDETAB recommendation on the sale of cigarettes in Belgium.

1. In this respect certain applicants have complained that the decision characterizes the recommendation as an *agreement* between undertakings who have approved it and said that they

would adhere to it. Properly interpreted however, agreements within the meaning of Article 85 (1) of the EEC Treaty are but contracts under national law. The present case is not concerned with such arrangements for there is no binding effect and nothing is provided to ensure that it is adhered to. As authority they cite *inter alia* the judgment in Case 48/69 *Imperial Chemical Industries Limited* v *Commission* [1972] ECR 619 at p. 655 [paragraph 64], where it is stated:

"Article 85 draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition."

I nevertheless have the impression that that judgment in particular shows that the issue with which we are concerned here is basically an unimportant argument of classification. That may be said because the proceedings have shown that in any event a concerted practice within the meaning of Article 85 (1) may be assumed, that is to say, a "co-ordination which becomes apparent from the behaviour of the participants". It is quite beyond dispute that the directives on distribution were not only worked out in common but that they were and are applied. In that respect I refer to the admission by FEDETAB which nevertheless speaks of flexible application. Reference may also be made to the statements of almost all the applicants at the hearing to the effect that they observed the margins laid down in the recommendation.

Further the view may be taken that the concept "agreement" within the meaning of Article 85 (1) is wider than that of contract in civil law. Of relevance in this respect is the judgment on the so-called gentlemen's agreements in Case 44/69 *Buchler & Co* v *Commission* [1970] ECR 733, at p. 754. They were in fact treated as agreements because in the view of the Court it suffices for such purposes if various undertakings mutually declare themselves willing to abide by the gentlemen's agreement and the joint intention of several undertakings with regard to their conduct in the common market is faithfully expressed. That can easily be applied to the present case in which as already stated, representatives of the applicants co-operated in drafting the recommendation on distribution. If then they yet expressly declare their agreement and express their intention of implementing the recommendation then that can be regarded as a mutual agreement within the meaning of the said judgment and thus as an agreement within the meaning of Article 85 (1).

2. It is further objected that the recommendation was treated in the contested decision as a decision by an association of undertakings within the meaning of Article 85 (1). In that respect the intervener AGROTAB pointed out that FEDETAB was a non-profit-making association and as such did not engage in business.

Here too I agree with the Commission's view that that factor is unimportant. First

it is significant that FEDETAB has legal personality, that is it can sue and be sued in its own name. Secondly there is the fact already mentioned that decisions of FEDETAB, as appears from Articles 8 and 9 of its statutes, are binding on the members. However, it should be made clear that on any other interpretation Article 85 could appear to have lacunae: in order to escape application of Article 85 undertakings, instead of mutually agreeing could arrange an appropriate decision by an association having largely similar effect. Thus it was expressly stressed in the case-law (Case 71/74 *Nederlandse Vereniging voor Fruit en Groentenimporthandel and Nederlandse Bond van Grossiers in Zuidvruchten en ander Geimporteerd Fruit* v *Commission* [1975] ECR 563, at p. 583 [paragraph 30]) that Article 85 (1) applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers.

The FEDETAB decision as such, the effects of which were intended to be increased by the fact that certain manufacturers expressly stated that they agreed to it, is thus quite relevant to the rules on competition, that is to say, it can as such, as was the view of the Commission, be caught by Article 85.

3. On the other hand it cannot be objected that the recommendation is not binding and that paragraph 61 of the contested decision wrongly speaks of the recommendation giving rise to a genuine mandatory rule of conduct for all firms in the industry.

In this connexion the Commission rightly reminded us that according to the case-law (Case 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977, at p. 990 [paragraph 21]) the fixing of a target price affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be. It moreover cited Case 73/74 (*Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491) as authority for the rule that the same applied to clauses containing other terms if principal elements in the price are laid down as target figures, which in the present case is so as regards the allowances granted by the manufacturers to their purchasers. Moreover, it should not be forgotten that a number of manufacturers agreed to the recommendation and that manner of agreement gave rise at least to a certain obligation.

When paragraph 61 of the decision speaks of a mandatory rule for third parties it obviously does not mean a legal obligation upon other firms in the industry but only economic compulsion. This may scarcely be doubted when it is borne in mind that the seven firms who approved the recommendation control some 80 % of the cigarette sales in Belgium and thus have considerable influence upon what happens in the market.

4. Finally in this connexion it is necessary to deal with the objection that

the Commission wrongly saw in the recommendation a simple continuation of the distribution system which previously applied. It is said that there were in fact quite clear differences in the effects. The recommendation does not expressly and particularly classify dealers or place any restriction on the class recognized as wholesalers. There are no prohibitions on selling to others in the same class and no collective measures to enforce the terms of payment. Further it confines itself to laying down *maximum margins* and leaves the manufacturers every freedom as regards other allowances. It is also significant that it applies only between the manufacturer and his immediate buyer; no terms of resale are placed on dealers and therefore it is incorrect to speak of restrictions on competition down the line. Since the Commission did not take account of those matters it must be held that the decision wrongly judged the recommendation on the false facts.

As regards this objection it must first be said that it does not appear valid in so far as it argues that the recommendation applies only between manufacturers and their immediate customers. In my view the Commission has convincingly shown on pages 80 to 90 of its rejoinder that that is not so and that it is intended to apply as between wholesalers and retailers. In support of that it may be pointed out, and this is not meant to be exhaustive, that the notification of the recommendation speaks of maximum rates for *intermediary allowances.* It is significant that margins are laid down for retailers who in number (several tens of thousands) represent the largest class of customers and at the same time it is stressed that almost all would receive supplies direct from wholesalers. Reference may also be made to the answer by FEDETAB of 29 July 1976 to the observations of Mestdagh and Huyghebaert; in that answer it is said that when food shops are supplied by wholesalers the normal rate of 7.25% for non-specialized retailers will be allowed.

On the other hand it must be admitted that the recommendation does not have such powerful effects between wholesalers and retailers as the earlier system in which there were strict agreements between manufacturers and wholesalers. That also explains why wholesalers do not apparently always keep to the recommendation. In any event it may not be doubted, and the representative of the Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes explained this, that wholesalers compete when fixing their sale prices.

I have, however, the impression that the Commission recognized that the recommendation differed in that and other ways from the earlier measures. It must in fact be observed that the decision describes separately on the one hand the earlier measures with all their details and on the other hand the content of the recommendation. In the same way the legal position is considered separately. If in this respect there is reference on one or other issue to the assessment of the earlier measures that is hardly ground for objection. In this respect it is significant that the applicants when giving notice of the recommendation, which was worked out after objections

were made to the earlier measures, declared that the recommendation was intended to *replace* the earlier measures. It is also probably beyond dispute that the subject-matter of the measures is largely of the same kind and that, because the essential elements were retained and the applicants applied on the whole both the earlier measures and the recommendation, the measures had similar effects on the market and on competition.

Pertinent criticism of the decision in relation to the FEDETAB recommendation can therefore scarcely be based upon the ground that the recommendation was inappropriately assessed in its relationship to the earlier measures.

C — Now that I have dealt with the objections which relate specially to Article 2 of the decision and shown that they are not valid I must turn to the criticism which in relation to Article 85 (1) concerns the decision as a whole, that is to say, applies basically both to the part which deals with the earlier measures and to the part in which the recommendation is judged.

1. Of importance here in the first place is the applicants' allegation that it is necessary to have regard to the fact that the aim of the measures which are objected to is the maintenance of the traditional marketing with a fine network giving a chance also to the small and little-known brands which contribute to increasing competition. For this specialized wholesalers are indispensable and if their services were not specially rewarded by the maintenance of a certain price-level they would not be able to stand up to competition from other wholesalers whose turnover is tending to increase. As authority for such an aim Case 26/76 (*Metro SB-Großmärkte GmbH & Co KG* v *Commission* [1977] ECR 1875 at p. 1897 *et seq.*) is cited. According to that decision price competition has no absolute priority. In particular separation of the functions on the one hand of the wholesale trade and on the other of the retail trade accords with the right of competition if it is done on the basis of objective criteria. Further the judgment stresses not only that a selective distribution system may be compatible with Article 85 (1) but also that the desire to maintain a certain price level for the specialist trade and the continued existence of that channel of distribution does not necessarily infringe Article 85 (1). The Commission did not properly take that into account in considering the distribution system applying in Belgium to manufactured tobacco.

In my opinion those observations call in the first place for the comment that the Commission has nothing against the classification of dealers into various categories if it is done according to objective criteria applied equally to all nor does it object to different margins being laid down for them. It is therefore not true that it insists on competition on equal terms between specialized wholesalers and other wholesalers which must lead to the disappearance of the specialized wholesaler trade, that is to say, of a traditional channel of distribution, upon which the smaller manufacturers are particularly dependent. The

decision is primarily concerned with the fact that the most important manufacturers pursue this policy as cartels and exclude competition in this respect among themselves.

It is therefore clear to me that in the present case and particularly as regards the last-mentioned point of view the judgment in the aforesaid Case 26/76 (*Metro*) does not support the applicants' argument. Although it must be admitted that it contains observations on the compatibility of a selective distribution system with Article 85 (1), it is however of significance that it was concerned with a selective distribution system relating to highly developed consumer goods and to the selection of certain dealers according to their qualifications. To that extent it may rightly be asked whether it may freely be applied to the distribution of manufactured tobacco where those kinds of special features are lacking and moreover there is no selection on the basis of qualifications. Further it is significant that the said Case 26/76 was concerned with an individual distribution system of *one* manufacturer. There were no horizontal arrangements but on the contrary competition with other forms of distribution by other manufacturers remained. Contrary to the present case the freedom of the dealers to negotiate was untouched, that is to say, there was no uniformity of price-fixing within the selective distribution network but competition remained in that sector. Further it should not be overlooked that the Commission decision in question in that judgment was largely based on Article 85 (3) of the EEC Treaty which allows certain restrictions on competition if they appear necessary in the interests of achieving certain aims considered worthy of protection. The Commission was expressly required in the judgment to ensure that the "structural rigidity is not re-enforced, as might happen if there were an increase in the number of selective distribution networks for marketing the same product". That obviously refers to making the terms of competition between the various manufacturers uniform as is doubtless so in the present case.

In view of the special nature of the present case it thus certainly does not seem possible to cite the *Metro* judgment as authority for the view that the Commission wrongly held that competition was affected within the meaning of Article 85 (1).

2. The further question then arises whether the Commission *in assessing the distribution system for manufactured tobacco in Belgium* in fact sufficiently and correctly took account of all the essential circumstances and accordingly rightly found a perceptible restriction on competition within the meaning of Article 85 (1).

In that respect the applicants, as is well known, referred to the special circumstances of competition characterizing the market for manufactured tobacco. For them the determining feature is the levying of a high proportional tax based on the retail sale price fixed by the manufacturer or importer and that means that competition by undercutting prices is limited by a minimum tax. Further the rules applicable in Belgium concerning price review did not necessarily allow price increases and as regards manufactured tobacco the fixed price rule of Article 58 of the Belgian Law of 3 July 1969 applied there. That rule has already played a part in Case 13/77 *GB-Inno-BM* v *Vereniging van de Kleinhan-*

delaars in Tabak [1977] ECR 2115. Moreover it must be borne in mind that according to Belgian law it is not possible to acquire various tax labels for one brand of cigarettes and that health provisions also influence competition. In the applicants' view the Commission did not or did not properly take that into account. In its assessment of the perceptibility of the restriction on competition it took no account in particular of the fact that the scope for competition was already substantially restricted by the said rules — some were even of the opinion that competition was practically excluded — and that distortion of competition caused by the government which prevented workable competition must be countered by measures governing the market on the part of the firms concerned.

(a) In my view it is expedient to begin the inquiry into this dispute with a short exposition of the assessment by the Commission of the measures governing the distribution of manufactured tobacco from the point of view of the law on competition as set out in the decision. Although the inquiry will cover all such measures, nevertheless it will be necessary to conclude with some special observations on the earlier measures.

(aa) The earlier measures

— First the Commission sees in the classification of dealers into categories and the determination of certain profit margins for them a restriction on competition between manufacturers in relation to the profit margins granted by them. Further it also considers that there is a restriction on the scope of competition for wholesalers. This is because, since the criteria for classification did not take account of the other services and efforts on the part of individual dealers, there was accordingly no competition as regards the services rendered for manufacturers and because the wholesalers did not compete with one another in fixing their resale prices.

— The Commission regards the adherence to the sale prices for wholesalers laid down by the manufacturers and to the resale prices for retail traders so laid down as a further restriction on price competition which would have been possible for one and the same brand.

— The Commission further regards the restriction placed on the number of wholesalers eligible for approval as constituting a barrier to market entry for those who were not approved.

— The Commission regards the fact that approved wholesalers were prohibited from supplying other wholesalers and certain retailers as preventing intermediaries from making certain sales and improving their position on the market; further their customers were prevented from obtaining larger quantities on more favourable terms.

— The Commission points out that the fixing of maximum credit terms for wholesalers has effects on the profit margins of manufacturers and dealers.

— Finally the Commission criticizes the requirement that retailers should stock a minimum range of brands inasmuch as

this prevented them from pushing a particular brand and forced them to tie up their working capital in stocks of various slow-moving brands.

(bb) The Commission considers in the same way the similar type of *measures adopted by the recommendation.*

— As regards the classification of dealers into categories and the fixing of profit-margins the Commission also speaks of manufacturers and dealers being subject to restraints on competition. In so far as the number of brands sold is significant for classification, that is to say, a certain requirement to sell a range of brands, this is said, just as in the case of the earlier measures, to constitute restriction on competition for those dealers.

— The Commission takes the view that the end-of-year rebates system effectively stifled all competition in this field between manufacturers. It moreover stresses that because the rebate is based on the total turnover with all manufacturers there is no incentive for intermediaries to make greater competitive efforts with a view to obtaining improved benefits from manufacturers or to take their custom exclusively to one manufacturer quite apart from the fact that such a system imposes a financial burden on any manufacturer wishing to enter the market and thus makes market entry more difficult.

— Finally it is observed that the uniform determination of terms of payment has the effect of preventing competition in this area just as did the corresponding measures of the earlier system.

(b) Since in the applicants' view — and the Commission did not basically challenge this — any judgment in relation to the restrictions on competition depends on certain governmental rules and practices influencing the market — the manufacturers in this respect speak of compulsion to which traders are subject — it seems useful first of all to set them forth in detail and on the basis of the factors which came to light in the proceedings to attempt an assessment of their effects.

(aa) The Belgian tax system

The tobacco trade is characterized by a high proportional tax which is calculated on the retail price fixed by the manufacturer or importer, who is the taxpayer. As we learned at the hearing, this was always so. Nothing changed in that respect after the adoption of the Council Directive 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), p. 3). According to that, for the first stage of harmonization the specific excise duty might not be lower than 5% to which Belgium has kept; the same rate applied to the second stage albeit value added tax was then included. Furthermore it does not seem that in the foreseeable future there will be any greater shifting in the relationship between proportional excise duty and specific excise duty in favour of the latter. In that respect I refer to Directive No 77/805 with which the second stage of harmonization began on 1 July 1978 and to the observations at the hearing on the foreseeable further development as regards this issue.

The decisive effect of such a system of taxation is that any change in the cost factors other than the excise duty and value added tax, which is also proportional, has a multiplicative effect upon the retail price; in this way, as the applicants explain, the significance of any competitive dealing is multiplied. In this respect it is common to speak of a "multiplier". As regards the Belgian system it falls between a factor of 4 and 5 and, as was shown, between 1972 and 1978 it showed no tendency to diminish, as would accord with the aim of harmonization, but rather did it increase. The applicants, and the Commission too at the hearing, impressively demonstrated in detail with the aid of illustrative figures what that meant in real terms economically. Thus the increase in *one* cost factor such as the manufacturers' share or the dealers' margin leads to a disproportionately sharp increase in the retail price which in the case of different profit margins and a correspondingly different breakdown of the retail price would lead to a very great competitive advantage for the forms of distribution which are less cost intensive. On the other hand a reduction in the cost factors would lead to a disproportionately sharp reduction in the retail price, because any concession by the manufacturers or dealers would be multiplied by a reduction in excise duty. This justifies speaking of an effect distorting competition to the disadvantage of cost-intensive products, such as new brands, small brands, brands of small manufacturers, and to the disadvantage of cost-intensive forms of distribution. This is moreover expressly recognized in the recitals in the preamble to Directive No 72/464; it was said there that the taxes affecting consumption existing at the time on tobacco goods were not neutral from the point of view of competition but were likely to distort the conditions of competition whether at national level or at Community level. The Economic and Social Committee discusses that in its opinion on the proposal for the Fifth Council Directive on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal C 204 of 30 August 1976, p. 1). The distortion of competition is to a certain extent increased by the fact that Article 10 of Directive No 72/464 provides for the introduction of a minimum excise duty, as has happened in Belgium, the amount of which may not be higher than 90% of the aggregate amount of the proportional excise duty and the specific excise duty on the most popular brands of cigarettes. That obviously prevents the multiplier effect applying downwards in favour of cheaper products.

In such circumstances the manufacturers are in practice prevented from making price reductions having regard to trade stocks. Because dealers will not forego their margins, trade stocks would have to be disproportionately — that is to say many times what the manufacturers are prepared to forego — relieved of burdens at the expense of the manufacturers or the latter would have to take the goods back for the purpose of tax allowance and for fresh price labels to be attached, which is excluded on the ground of costs.

In such circumstances in which products burdened with high costs have only considerably reduced chances in the market because of the multiplier effect in increasing the price, there is obviously another consequence, namely a levelling

of squeezing effect in the field of the manufacturers' share and the distribution costs. This is shown by the fact that 80% of the cigarettes sold in Belgium fall within or below the most popular price range; this was at one time BFR 41 whilst the cheapest cigarettes cost BFR 38. Reference may also be made in that respect to the table to be found on page 81 of the Commission's rejoinder according to which the part of the sale price of cigarettes for which the industry and the trade are responsible is lowest in Belgium of all Member States with the exception of Luxembourg. Moreover reference in this respect may be made to extracts from a report of the English Price Commission to be found on page 18 of the reply in Case 215/78 according to which the multiplier effect of a high proportional excise duty — the report mentions one of 30% — involves the necessity of keeping the costs as low as possible.

Accordingly it may be assumed that a system of excise duty with a very high proportional component considerably restricts the scope of competition by traders and is associated with distortions of competition which cannot be overlooked in applying Article 85 (1).

(bb) The Belgian price review provisions

According to the Arrêté Ministériel [Ministerial Order] of 22 December 1971 price increases must be notified to the Minister for Economic Affairs two months before they are to take effect. The Minister makes a recommendation which has the effect that the price increase must be postponed if it exceeds the scope laid down in the recommendation. Having regard to that rule the slowing-down effect of which cannot be denied and having regard to the assessment of what it does, two circumstances are particularly significant in the tobacco sector. The rules are obviously scrupulously and strictly applied because they influence the price index which plays an important part in many sectors. The Finance Minister is also involved in the negotiations in the tobacco sector and has quite a decisive influence, because in certain circumstances new price labels must be prepared and a new minimum excise duty laid down and also because the tax revenue could be affected. The Finance Minister is concerned, especially in recent years in which there has been a considerable increase in taxes, to see that the revenue's share in any price increase is secured even if at the expense of the other parties. He will further also seek to prevent sharp price increases because they could lead in part to a reduction in consumption and thus to a reduction in tax.

These circumstances mean that all factors of the price, including the various profit margins, are carefully examined. Thus it is apparent from the documents produced, including a letter and decision of the Price Commission in 1976, that a quite definite increase in the trade margin, especially the margin of the wholesalers, was approved. Further it was shown that on a price increase of BFR 5 in 1977 the largest part was reserved to the State and only a small fraction allowed to the retailers. It is also of interest that in 1978 the pricing

authority stayed well below the level sought by the parties; the manufacturers were awarded only BFR 20 instead of BFR 28 and the trade only BFR 8 instead of BFR 12. That led to a percentage reduction in the margins.

The special features as mentioned of the procedure of price review, namely the participation of the Finance Minister, mean that, although individual notifications by single firms and individual price measures are possible, the government prefers collective negotiations with associations, that is to say, a measure of concentration. The example mentioned by the applicant BAT of the introduction of a new brand at a particularly low price is typical; I refer for details to the statements at the hearing but it is apparent that after the general price increase in 1977 it was only upon special insistence and then for only a short time that the manufacturer was allowed to retain the lower price level it sought.

It may thus be seen that the procedure of the price review provisions favours a common approach to the fixing of prices and the factors therein. On the other hand because the implementation of the rules very adversely affects the manufacturers' share and the margins — the slump in sales caused by the tax increases in 1979 had to be made good — it may be said that they contribute to a considerable restriction on the scope for competition.

(cc) The Belgian taxation policy

In this connexion the applicants have added particular observations with regard to the Belgian taxation policy. The excise duty on tobacco represents an important source of revenue. Because it is planned for in the budget its measure must be reliably predictable. Finally there is a tendency towards an increase in revenue as shown by the fact that taxation has increased five-fold in ten years.

In fact it cannot be denied, and this was already intimated in dealing with the issue of price review, that the taxation policy contributes substantially to restricting the field of action of firms. Let me refer once again to what was said regarding the efforts of the applicant BAT to maintain a particular price for a brand which it had recently introduced. Of relevance moreover in this respect are statements made by the Belgian Government in proceedings brought against it pursuant to Article 169 of the EEC Treaty. According to those statements it is apparent that in a situation in which there is a reduction in the retail price, for example, because of the special efforts of traders who give particular attention to a brand and are rewarded for so doing, the Finance Minister would not accept any associated reduction in the tobacco duties but would seek compensation perhaps by way of a high special tax.

In my view it is quite clear that such attitudes stultify efforts at competition and should be taken into account in applying Article 85.

(dd) The Belgian rules on fixed prices

According to Article 58 of the Belgian Law on value added tax which entered into force on 1 January 1971 and with which we are already familiar from Case

13/77, there is the obligation to adhere to the price stated on the tax labels.

That obviously means that it is not only difficult but impossible for a trader who makes special efforts with regard to a brand to do so by reducing the retail price. The rule thus prevents competition in respect of one and the same brand at the retail level and cannot be circumvented, as the Commission wrongly thinks by giving away cigarettes, since Article 5 of the regulation which the Commission has in mind and which was adopted as an annex to the Belgian Regulation of 22 January 1948, in truth covers only perquisites for the staff of the manufacturers and importers. That must also be taken into account in considering the attitude to competition of those engaged in the trade in manufactured tobacco products.

In my view that is not refuted by reference to the judgment in Case 13/77 [1977] ECR 2115 *et seq.* in which the said Article 58 was considered from the point of view of adversely affecting trade between States. The Court confined itself to saying that the national court had to decide whether fixed retail prices were compatible with Community law and in particular "taking into account the fiscal obstacles affecting the sector of the products in question, whether such a system of fixed prices is in itself likely to hinder, directly or indirectly, actually or potentially, imports between Member States" [p. 2419, paragraph 56]. Accordingly it cannot be assumed, and I tried to show this in my opinion in the said case, that Community law prevents application of the said Article 58 as being incompatible with Community law.

In the event of its being considered that Article 58 is inapplicable or that traders might be able indirectly to have an effect upon the fixing of low retail prices, it may moreover be added in this connexion that even then it scarcely appears conceivable that there would be appreciable competition with regard to the retail prices of one and the same brand. In this respect the thought cannot be dismissed out of hand that manufacturers are scarcely inclined to pay taxes on the basis of a price higher than that paid by the consumer and that in the event of a price lower than that on the label being charged they will endeavour to bring prices into line generally by making reductions and the transparency of the market encourages that. Moreover it is pertinent to recall the previous observations on the tax policy to the effect that in such a case the revenue will endeavour to make good any reduction in taxes so that any efforts in competition would be of benefit to the consumer for only a short time.

(ee) The prohibition of different tax labels for one brand of cigarettes

In the proceedings it was further explained — I refer to a letter from the Belgian Finance Minister of 25 June 1979 and the answer of the Belgian Government to a question from the Court — that manufacturers and importers are not allowed to market cigarettes of the same brand, quality and

packaging with different price labels. Apart from the already mentioned case of perquisites for the staff of manufacturers and importers, the principle of equal taxation applies. An important motive for that principle is that otherwise the revenue from taxation could not be forecast with sufficient reliability. After the adoption of Council Directive No 72/464 the Belgian Government relies, and it must be recognized that the argument is persuasive, on Article 4 thereof to the effect that the proportional excise duty must be based on the *maximum* retail selling price and there can be only one such.

That also certainly places a restriction on the opportunities for competition which must be taken into account. In fact it is not possible in this way for traders lower down the sales line than manufacturers, such as firms with small distribution costs, to forego part of their margin, which might be conceivable on the basis of special sales efforts, and give effect to such action by a special price label and to pass on what they forego to the consumer.

(ff) Health provisions

Finally it is necessary to deal with certain requirements mentioned by the applicants which are said to arise from the health provisions in Belgium. Mention was made of the requirement, which impedes sales, of placing on cigarette packets a reference to the dangerous effects of smoking on health and to certain measures concerning in particular advertising, which in the applicants' view is a main field of action in competition in the cigarette market.

I have however the impression that they cannot seriously be taken into account in considering the matter from the point of view of the rules on competition.

Quite apart from the fact that it applies to all products in a similar manner, it may well be doubted whether the compulsory warning notice is a serious obstacle to sales, that is to say whether, by reducing the readiness to buy, it decisively influences the conditions of the market.

As regards other measures and in particular restriction on advertising, no governmental measure up to the time of the contested decision could be cited as having such an effect. The voluntary restriction by firms mentioned in the applicants' reply can hardly be regarded in this light, for according to the Commission's undisputed statements, even if it was accepted by the Minister, it did not exclude advertising. The rules which entered into force only after that time, namely a Law of 24 January 1977 according to which the Minister can adopt restrictive measures, and in particular the Regulations of December 1979 and March 1980 referred to at the hearing, of which only the latter relates to advertising must doubtless be left out of account in the present proceedings.

(c) If after all that we turn to the question whether the assessment *vis-à-vis* the rules on competition which the Commission made of the Belgian distribution system for manufactured tobacco is valid or contestable, then various considerations have to be taken into account.

(aa) First the applicants have claimed that the decision contained certain errors and have attempted to show that the Commission in part assumed certain incorrect facts and circumstances which had an influence on its assessment.

In paragraph 1 of the preamble to the decision it was said that cigarette sales were increasing steadily where in fact they increased only from 1967 to 1973 and since then sales declined, as could be shown statistically. In paragraph 11 of the preamble to the decision it was said that in Belgium *ad valorem* excise duty was charged on manufactured tobacco in place of value added tax, whereas in fact value added tax was levied *in addition* to excise duty. Further it was said in paragraph 88 that the tobacco industry was not *alone* in being heavily taxed. As was made clear in the court proceedings, that was an obvious reference to the taxation of mineral oils, alcohol and alcoholic drinks, but it was not borne in mind that those goods were subject only to a specific tax, which did not have a multiplier effect. Not least in importance, and this relates to the statements in paragraph 81 of the decision, wholesalers had the possibility of competing with one another in the services they rendered to the manufacturers because the wholesalers could react to benefits in a form other than the uniform trade-margins.

As regards these allegations it must certainly be said that in judging the conditions of the market and of competition it is naturally of importance whether there is an expanding market, as the Commission thinks is generally the case for the consumption of cigarettes, or whether total sales are declining and thus the maintenance and development of shares in the market are more difficult. Further in judging the situation as to competition, and this relates to the issue lastly referred to by the applicants, the question is whether apart from the trade-margins there are other benefits afforded by the manufacturers where there is competition they do not relate to the restriction on competition. It was emphasized to us that that was the case and reference was made to frequency and speed of deliveries, special premiums in introducing new lines, support with displays and advertising, the giving of free samples and legal advice and help in temporary difficulties. Therefore there is quite lively competition, and in this respect I refer once again to what the association of newsagents said, between wholesalers as such who belong to the same category, namely in fixing sale prices, the granting of credits, the frequency of deliveries, the range of products, advice *inter alia* on book-keeping or taking back unsold goods. This is revealed by the fact, and certain observations in the statement on the first objections support this, that among wholesalers there are considerable changes in the trend in turnover.

Moreover the fact cannot be disregarded that the findings in the decision relating to the taxation of manufactured tobacco were rightly criticized by the applicants. That applies first to paragraph 88 of the decision. If, as appears, the Commission

considers the taxation of alcohol and crude oil as comparable with the taxation of manufactured tobacco, then it has obviously not seen the essential distinction between specific taxes and proportional taxes — the latter apply only to manufactured tobacco — and has thus disregarded the multiplier effect, which in fact considerably distorts the conditions of competition. The same applies to paragraph 11 of the decision from which it is evident that the Commission has obviously not considered that value added tax is levied *in addition* to excise duty and that because the value added tax is a proportional tax, the multiplier effect is increased.

In my opinion those matters are certainly of importance in judging the decision even if on their own they scarcely suffice seriously to upset the decision.

(bb) The applicants also claim that the Commission in considering the case did not have regard to the special features of the Belgian tobacco market which must have led to the conclusion that competition in the field of the margins was practically precluded as a result of the said rules or that the scope for competition was at least so narrowed that the measures objected to could not be regarded as an *appreciable* restriction on competition. They claim that the Commission in assessing the compatibility of the measures with the rules on competition proceeded on the basis of a wrong point of view for the following statement in paragraph 88 of the decision:

"If national legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant"

is not compatible with established case-law. Moreover they claim that in paragraph 83 of the decision in which there is mention of the Belgian system of fixed prices the Commission is wrong in citing the judgment in Case 13/77 as authority for the statement that Article 85 (1) applies even if a restriction on competition is *encouraged* by national legislation.

In my opinion the following may be said in that respect:

— The grounds stated in the preamble to the decision do in fact give the impression that the Commission's inquiry was insufficient because paragraph 88 of the decision speaks only of the amount of taxation and the system of notification of increases in resale prices and profit-margins but does not mention other characteristics of the Belgian tobacco market to which I have previously referred and which are also relevant. In view of the grounds stated in the preamble to the decision the question may properly be asked whether inquiry was made at all into what scope traders still have for competition having regard to the special features of the Belgian market as described. In that respect the words "*If* national legislation has the effect of restricting competition ..." are significant. The Commission's attitude is to be explained from the argument set out in the following words to the effect that if national legislation has the effect of restricting competition "the added effects of private arrangements restricting competition can only be the more significant" and thus in any event caught

by Article 85 (1). That reveals a serious mistake. According to the case-law (Case 26/76 *Metro SB-Großmärkte GmbH & Co KG* v *Commission* [1977] ECR 1875) Article 85 pre-supposes that there is workable competition. Accordingly even if various rules considerably restrict the scope for competition, careful inquiry must be made how far that is so and whether there still remains scope for workable competition which is appreciably restricted by private measures.

— The basic concept which the Commission obviously assumed in relation to the question of appreciable restriction on competition must also be criticized. I refer in that respect to the words of paragraph 88 of the decision, which I have already cited, according to which if national legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant. I refer further to the Commission's statement in its reply that according to the case-law the criterion is the parties' position in the market, that is to say, their share in the market. In that respect it is however significant that the members of FEDETAB, to which almost all the Belgian manufacturers belong, had a very large share of the market (ten brands of the applicants accounted for two-thirds of the Belgian sales) and it is also significant that most of the Belgian manufacturers are controlled by multinational companies and that seven of the applicants belong to four large international groups.

Against that the applicants cite the well-known sugar cases (Case 40/73 and related cases *Coöperative Vereniging "Suiker Unie" and Others* v *Commission* [1975] ECR 1663, at p. 1912 *et seq.* They were concerned *inter alia* with the protection of the Italian sugar market and concerted practices to check sugar supplies to Italy. It was held that the common organization of the market in sugar with its quotas allowed competition only a narrow scope. Further it was stressed that the Italian rules and measures adopted by the Italian authorities had an additional restrictive effect on competition. The scope of the rules on competition were so basically restricted that the practices objected to by the Commission could not have appreciably affected competition.

Although it may be admitted that that case-law does not necessarily apply to the present case, there may nevertheless be inferred from it *one* essential concept on the assessment from the legal point of view of infringements of the rules on competition in circumstances such as the present. According to that case-law the position in the market cannot be the sole criterion, for the Italian sugar manufacturers had a considerable share of the market and the parties to the agreement were responsible for three-quarters of the Italian imports. The decisive factor is that careful inquiry must be made as to what scope for competition national rules leave and thereafter an assessment of whether there is appreciable restriction on competition must be made.

In the present case that was not done satisfactorily. On the other hand, after all that we have heard, it is not impossible that the special features of the Belgian market lead to a quite considerable restriction on the scope for

competition even for producers in the fields relevant to the decision. Since the necessary findings could subsequently be made only inadequately in the court proceedings in which several issues were still in dispute, the applicants' complaint to the effect that the Commission's decision was based on a serious error must be regarded as justified, because there was no consideration or at least not sufficient consideration of the question whether the contested measures *appreciably* affected competition.

The Commission is also open to criticism in this connexion, and this relates to paragraph 83 of the contested decision, for wrongly basing its decision on the statement in Case 13/77 [1977] ECR 2115, at p. 2140 *et seq.* that Article 86 also applies if abuse is encouraged by national legislation. In that respect the Commission stated that the applicants had in no way shown that the factors dealt with in the FEDETAB recommendation were fixed by governmental rules or that the Belgian rules discussed encouraged the various contested restrictions on competition. However even if that were so, it was said that because of the findings in the *Inno* case any such encouragement would not render Article 85 inapplicable.

In my view there may well be considerable doubt whether the statements made in the *Inno* case in regard to Article 86 necessarily apply to Article 85. As regards Article 86 it must not be overlooked, that because where there is a dominant position competition is already practically impossible, the problem of an appreciable effect does not arise or does not arise to the same extent as in the case of Article 85. It is however even more significant that the applicants do not claim that there is any such *encouragement.* They base their case on the fact that the Belgian provisions discussed and in particular the high proportional tax with its multiplier effect, which since 1973 can find support even in Community law, that is to say, Directive No 72/464, lead to a serious *distortion* of the conditions of competition. To counteract that there are certain national provisions on compliance with the prices on the labels and the prohibition of the provision of various labels for a single brand which may be regarded as a consequence of the distortion of competition caused by the proportional tax. One of the main aims of the measures objected to by the Commission is to counterbalance such distortion, to mitigate the distortion in the differences in costs and to ensure that the trade rebates are to a certain extent at a flat rate.

In my opinion it is hard to say that such considerations are not justified or to challenge the applicants' view that if in Community law a conflict between the rules on competition on the one hand and fiscal policy on the other hand is discernible, then in applying the rules on competition, which have no priority over other areas of the Treaty, account must be taken of whether and how far measures, which could be regarded as objectionable from the point of view of competition, are directed only against distortion of competition resulting from tax law. That supports the view to the effect that it is important in connexion

with considering the appreciable effect of restrictions on competition and the Commission must be regarded as in error in not taking it into account.

— Accordingly the conclusion is obvious — although it is true, as will be shown at once, that it cannot yet be definitive in respect of the decision on the earlier measures — that the Commission's judgment in applying Article 85 (1) to the Belgian distribution system for tobacco goods must be regarded as open to challenge.

(cc) It is in fact no longer necessary to discuss detailed criticism made by the applicants in the assessment of particular factors in the system. If however this is done, contrary to the Commission's view that the system must be regarded as a whole, because it cannot necessarily be assumed that parts of the system would not be kept if other parts were found to be contrary to the rules on competition, then the following observations are called for:

— *Determination of maximum credit terms*

In this connexion the applicants challenge the finding in the decision that the credit terms are increasingly reduced and that they are never longer than 14 days. In truth there is a flexible and non-uniform application — some applicants maintain that their practice involves cash payments — and therefore there is competition in this field. Secondly in view of the speedy turnover of cigarettes and the fact that more than 70 % of the Belgian price consisted of tax, which manufacturers and importers had to pay in advance, joint efforts to avoid excessive credit terms, to which it was above all strong customers who attached importance, are to be seen in the first place as countering excessive competition and as indicating the dangers associated with such practices having regard to the very sharply increased bank interest.

In that respect it is probably not necessary further to discuss what the Commission said in respect of the *application* of those measures. The applicants' observations on the fact that the proportion of tax in the price is no genuine parameter of competition and on the effects of long credit terms on the retail price for which they have adduced figures by way of example seem to be convincing. Accordingly it can be recognized that the efforts of the manufacturers in this field are mainly concerned with avoiding distortion of competition and that therefore the rules on credit terms, in so far as they cannot be said to be concerned with competition deserving protection, at least must be regarded as not having an appreciable effect on competition.

— *The requirement of a minimum range as a condition for receiving certain advantages*

On this issue in considering the matter from the point of view of the rules on competition it is certainly not so much a question of the applicants' argument that in this manner competition between manufacturers, that is to say, between the various brands, is encouraged and that small brands which would otherwise have to disappear from the market in view of their costs of distribution have a chance of selling. It must however be borne in mind that the indirect requirement to maintain a varied range at the retail level is of importance only for a small fraction, namely 2 000 of

some 80 000 retailers. It is moreover of interest that according to the statements of representatives of the association of newsagents that all such traders who are responsible for some 60 % of cigarette sales in Belgium in any case have more than 60 brands in supply to meet their customers' requirements and that large traders as is apparent from the statements of Mestdagh and Huyghebaert easily include some 90 brands in their turnover. Since moreover the stocking of a few less readily saleable brands hardly ties up capital to an appreciable extent and hardly prevents the pushing of the sales of one or more brands — in that respect it is significant that in Belgium 17 brands make up some 70 % of the market and that almost the whole consumption is confined to some 30 brands — it is quite possible to take the view that on that issue there cannot be said to be an appreciable effect on competition.

— *The end-of-year rebate*

As far as this issue is concerned, although I find of no special importance the applicants' statement to the effect that it is normal in the cigarette market for a trader not to concentrate on *one* manufacturer and that in consequence specific rebates for quantities were not provided for, the fact cannot be dismissed that this rebate is of a relatively small amount and obviously at most can account for only a fraction of 1 % of the turnover. If this is borne in mind then it is in fact difficult to conceive that in this manner access to the market for newcomers with their own rebate policy is made more difficult. Moreover it is perhaps necessary to interject that this is more likely to be feared if the rebate were to be calculated on the basis of the quantities obtained from individual manufacturers. Since moreover, as we have seen, manufacturers are not prevented from rewarding special services, it is doubtful even here whether there is an appreciable restriction on competition.

3. The applicants' objections to the assessment of the Belgian distribution system for tobacco goods from the point of view of fulfilling the conditions of Article 85 (1) apply in substance both to the earlier measures and to the recommendation in so far as the applications are not expressly confined to the part of the decision relating to the recommendation. Nevertheless certain additional observations are now required on the question whether the previous asssessment in fact suffices not only for the voidance of Article 2 but also of Article 1 of the decision, first because the distribution system created by the recommendation differs to some extent from that which previously obtained and secondly because Belgian law, which had to be discussed at length, has been subject to certain amendments.

I call attention only to the fact that the earlier measures provided not only for the classification of traders into various categories with different profit margins, the fixing of maximum credit terms for wholesalers and the keeping of a certain minimum range of cigarettes, but they were also concerned, and this was no longer the case under the recommendation, with the adherence by wholesalers and certain retailers to resale prices determined by the manufacturers, a restriction on the admission of the wholesalers to certain categories and the prohibition on supplies to wholesalers

and certain retailers by approved wholesalers. Since the contested decision, in so far as it concerns the earlier measures, relates to a period from 1962, it must further not be overlooked that the Belgian rules on fixed prices (Article 58 of the Value-Added Tax Code) entered into force on 1 January 1971 and that the Community rules (Directive No 72/464) which allowed a higher proportional tax applied only as from 1973, whereas there were provisions for price review obviously already before the Ministerial Order of 22 December 1971, that is to say, since October 1959.

(a) My impression is however, and allow me to anticipate the results of my reflections, that those circumstances do not require any basically different assessment of that part of the decision relating to the earlier measures.

— It is significant that the scope for competition in the Belgian market in manufactured tobacco was always considerably restricted and that the distortion of competition of which there was mention is not only of recent date.

This is mainly due to the high proportional tax which, as we heard at the hearing, has always existed in Belgium. Of significance also is the fiscal policy, which aims at high revenue from the consumption of tobacco and attaches importance to the forecast of such revenue being as reliable as possible. On the other hand the fact that the high proportional tax was covered by Community law from 1973 is not decisive, for it was certainly not open to objection from the point of view of Community law before the introduction of the efforts at harmonization. It must also be recognized that the aim of containing the effects of the high proportional tax in distorting competition, which the fixed price rules of 1971 pursued, had previously to be pursued by measures under private law, of which it must in addition be said that they could not have the same effectiveness as national provisions providing for penalties.

— Apart from the errors which the applicants have revealed in the decision and which at least in part relate to the earlier measures, the Commission is mainly criticized for having assumed a false basis on the question of the appreciable restriction on competition. This is shown by paragraph 88 of the decision. The Commission can rightly be reproached for not having thoroughly investigated what scope national provisions for competition in the market in tobacco products in Belgium allow and whether nevertheless it may be said that the contested measures had any appreciable effect. That applies in the same way to the recommendation and to the main parts of the earlier measures.

— At least in so far as the recommendation and the earlier measures are substantially the same, in my opinion the view may be taken that Article 1 of the Commission decision may be criticized for the reasons previously set forth — reference may be made in any event to the special observations on the credit terms and the requirement in respect of the varied range.

(b) Although the inadequate consideration by the Commission as far as concerns the appreciable nature of the restrictions on competition obviously relates to the case as it has to be judged as a whole, if nevertheless the view should be taken that the considerations put forward do not in any event justify criticism of the assessment from the point of view of the rules on competition of the part of the earlier measures concerned with the quantitative restriction of the recognition of wholesalers of certain categories and the prohibition on resale by wholesalers to other dealers, it would still be necessary to consider how far the other condition referred to in Article 85, the likelihood of trade between Member States being affected, is satisfied and that too must be appreciable (cf. the judgment in Case 28/77 *Tepea BV* v *Commission* [1978] ECR 1391).

In that respect the decision (at paragraph 91) refers to the fact that the largest cigarette manufacturer in Luxembourg, the applicant Heintz van Landewyck, is a member of FEDETAB and that all its sales in Belgium were subject to the restrictions on competition falling under the decision. Further it was stressed that a large proportion of the cigarettes and cigars imported into Belgium were imported through manufacturers who belonged to FEDETAB and therefore distributed the imported products under the same conditions concerning restrictions on competition as their own products which they manufactured in Belgium. Moreover it must be assumed that even if importers and manufacturers had not adhered to the contested distribution rules, they were nevertheless subject to the restrictions which the rules involved if they re-sold to traders who were observing the rules; that was almost always the case because the members of FEDETAB and the members of the association of wholesalers were in such a strong position.

In my view there must be considerable doubt whether those considerations, even assuming that the said two clauses are concerned with appreciable restrictions on competition, suffice for the assumption that they are also likely appreciably to affect trade between States. No evidence was produced in the proceedings and the decision contains insufficient particulars of what scope the contested practice of restricted recognition of traders of certain categories had and how important was the prohibition on supplying certain traders by recognized wholesalers. For the above-mentioned condition in Article 85 (1) to be satisfied it would be necessary to show that if the conditions of sale were otherwise, that is if recognition of wholesalers were unrestricted and if there were no restrictions on sales by wholesalers to other wholesalers, trade across frontiers would have developed differently to an appreciable extent.

If therefore it is considered that the objections previously put forward on the appreciable nature of the effect on competition cannot apply to the earlier measures, as I have called them, as a whole, nevertheless the applicants' objection to the Commission decision must be recognized as justified because there are not sufficient factors to show an appreciable effect upon trade.

4. The objections put forward to the application of Article 85 (1) to the

Belgian distribution system for manufactured tobacco whether in relation to the earlier measures or in relation to the recommendation of 1 January 1975 must be recognized as valid with the consequence that for those reasons the whole decision must be declared void — the refusal to grant exemption under Article 85 (3) presupposes that Article 85 (1) does apply.

III — The remaining issues

As will be recalled, arguments in the proceedings went a long way beyond the issues so far dealt with. Thus in a quite general way, that is to say, in relation to all the measures objected to by the Commission and from diverse points of view, the question was discussed whether in fact an appreciable effect on trade could be assumed. It was further objected that the Commission in applying Article 85 (1) to the Belgian market had disregarded the principle of equal treatment of public and private firms, because it had not proceeded promptly and effectively enough against the more serious obstacles to the business activity of foreign manufacturers in the monopoly countries of France and Italy. Also it did not take into account, and this relates equally to the application of Article 85 (1), the Belgian Law of 27 July 1961 on the unilateral termination of exclusive sales contracts, which aims at protecting licencees and is compatible with the EEC Treaty. Further it did not have regard to the fact that the contested distribution system involved guarantees to the manufacturers, the disappearance of which would have an adverse effect on the common organization of the market in raw tobacco because it would necessarily lead to a reduction in the prices for raw tobacco, increased intervention and to an increase in exports with the aid of refunds.

Finally objection was made that the Commission had wrongly refused to grant exemption under Article 85 (3). In that respect, as far as the earlier measures are concerned, it was said that the Commission had not investigated the possibility at all of exemption because it had disregarded the fact that a letter from FEDETAB in January 1971 in fact was to be regarded as notice and because it overlooked the fact that the measures in question were exempt from the requirement of notice. In relation to the recommendation of 1 January 1975 it was further objected that there was no mention in the objections to all the conditions of Article 85 (3), the Commission had wrongly refused the application and had not given sufficient reasons for some of them because it had not discussed all the arguments put forward by the applicants.

Nevertheless in view of the extent of the examination I have so far made and the result to which I have come in relation to the application of Article 85 (1), I do not wish to discuss all those questions which in my opinion are no longer relevant.

IV — After all that I have said my concluding *proposal on what the decision should be* is as follows:

The applications should be granted and accordingly the contested decision declared void in its entirety.

The costs of the proceedings, including the costs of the proceedings for an order for interim measures in which the applicants were also successful, should in principle be borne by the Commission. In addition the interveners in the proceedings on behalf of the Commission should be ordered to bear their own costs and the part of the applicants' costs caused by the intervention.