fixing by a public authority of minimum retail prices for a product at the exclusive expense of consumers does not constitute an aid granted by a State within the meaning of that article.

In Case 82/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof, Amsterdam, for a preliminary ruling in the action pending before that court between

OPENBAAR MINISTERIE (PUBLIC PROSECUTOR) OF THE KINGDOM OF THE NETHERLANDS

and

JACOBUS PHILIPPUS VAN TIGGELE, residing in Maasdam, Netherlands,

on the interpretation of Articles 30 to 37 and 92 to 94 of the said Treaty,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

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

I — Facts and procedure

1. Mr van Tiggele, a licensed victualler, was sentenced by the Economische Politierechter (Police Magistrate for Commercial Cases) of the Arrondissementsrechtbank (District Court), Rotterdam, by a judgment delivered on 18 May 1976 to pay a fine of Hfl 5 000 or to three months' imprisonment in respect of continued infringement of the rules concerning the minimum prices for the marketing of spirits in the Netherlands, in particular Article 2 (1) of the Prijsverordening Gedistilleerde Dranken (regulation concerning the price of spirits) published in the Verordeningenblad Bedrijfsorganisatie No 50 of 31 December 1975 under No G Dr. 5 and issued by the Produktschap voor Gedistilleerde Dranken (Production Board for Spirits) on 17 December 1975.

The Gerechtshof (Court of Appeal), The Hague, by a judgment of 11 October 1976 quashed the judgment of the Economische Politierechter on the ground that price control was not valid under Netherlands law. That judgment was however quashed on 17 May 1977 by the Hoge Raad (Supreme Court) which referred the case to the Gerechtshof, Amsterdam, for a fresh judgment at last instance on the appeal.

2. By an order of 30 June 1977 the Gerechtshof, Amsterdam, suspended the proceedings and requested the Court of Justice, in accordance with Article 177 of the EEC Treaty, to deliver a preliminary ruling on the following questions:

(1) Must Articles 30 to 37 of the EEC Treaty be interpreted as meaning that the fixing of minimum prices for the marketing of spirits in the Netherlands as laid down in the Regulation concerning the price of spirits by the Board of Managers of the Production Board for Spirits on 17 December 1975 is prohibited as a quantitative restriction on imports or a measure having equivalent effect?

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

3. The disputed Prijsverordening Gedistilleerde Dranken laid down for the retail sale of spirits within the Netherlands the following minimum prices:

(a) new hollands gin and 'vieux' (the latter being a cognac-flavoured drink, not to be confused with old hollands gin)

— the 'catalogue price per unit' increased by Hfl 0.60, the total being then increased by value added tax ('VAT') at the rate of 16%. The final price must not in any event be less than Hfl 11.25 per litre (Article 2 (1) of the Prijsverordening).

The catalogue price per unit is the price stated by the manufacturer in his price-lists on 6 October 1975 for unit sales, before deduction of discounts, plus the increase in excise duties of 1 January 1976 (the excise duties being in fact borne by the manufacturer who passes them on to his purchasers) and without VAT. Manufacturers may modify such catalogue prices per unit or fix new catalogue prices per unit in respect of products which were not yet included in their price-

lists on 6 October 1975. Manufacturers must notify the Produktschap of all catalogue prices per unit and modifications thereof;

— If there is no catalogue price per unit: Hfl 11.25 per litre (Article 2 (2) of the Prijsverordening);

(b) for old hollands gin: Hfl 11.25 per litre (Article 2 (3) of the Prijsverordening);

(c) for all other spirits;

The purchase price (that is to say the purchase price actually paid or payable, after deduction of all discounts and without VAT) plus VAT (Article 4 of the Prijsverordening).

All those minimum retail selling prices within the Netherlands are applicable without distinction to spirits produced in the Netherlands and imported products. The prices also apply to products manufactured in the Netherlands which are exported and subsequently re-imported.

Article 8 of the Prijsverordening contains the following provision:

'The President of the Produktschap may in certain cases or categories of cases grant exemption from the application of the provisions of this regulation. Such exemptions may be made subject to conditions.'

It is common ground between the parties concerned in the procedure for the preliminary ruling that new hollands gin, old hollands gin and vieux are typical Netherlands products which are scarcely ever imported from abroad. On the basis of the information supplied by the Commission the principal exception is hollands gin imported from Belgium which, according to the estimates of the Produktschap, amounted in recent years to the following quantities (in litres of 100% of alcohol):

1972: 132 753, 1973: 163 885, 1974: 183 086,
1975: 173 504, 1976: 95 640

Other very small quantities of hollands gin were also imported from other sources (other Member States and third countries taken together) (likewise in litres of 100% of alcohol):

1974: 8 569, 1975: 5 541, 1976: 25 727

It is also common ground the parties to the present proceedings that, since no catalogue price per unit was notified for hollands gin imported from abroad, the general floor price of Hfl 11.25 is in fact the sole price applicable thereto.

The Produktschap was empowered to fix such minimum price rules by Royal Decree (Koninklijk Besluit) No 51 of 18 December 1975 (Staatsblad 1975, p. 746). The statement of reasons on which the Royal Decree is based is worded as follows:

'For some time past there have been indications in connexion with the formation of retail prices for spirits which have led us and the Produktschap voor Gedistilleerde Dranken to consider that it is necessary to enact the provisions necessary to empower the Produktschap to fix minimum prices for the sale of spirits on the domestic market. In fact spirits are sold to the public with increasing frequency at prices distinctly lower than the prices prevailing until recently under the system, which has now been abandoned, of individual agreements on resale price maintenance.

Although we are in principle in favour of price competition we consider that the fall in prices which has occurred and which will no doubt continue tends to bring about such a low level of prices that even modern, efficient and well-managed wine and spirit businesses can no longer cover their distribution costs.

We also consider that a continuance of the present situation might ruin undertakings which, if competition on prices

were restricted, would no doubt have the opportunity of adapting their methods of operation and the level of their costs over a fairly short period to those of modern, efficient and well-managed undertakings. It appears to us finally that it is impossible to ignore entirely the particular nature of such products in relation to public health.

There seems to us nothing to indicate at the present time that competition on prices will of its own accord become less intense in the near future. Consequently we consider it necessary to grant the powers requested by the Produktschap voor Gedistilleerde Dranken to fix minimum retail prices for spirits. The Produktschap has indicated that it wishes to apply these powers at the moment only to such spirits as represent a considerable proportion of sales in this sector.

Since it is at present impossible to foresee whether the circumstances which have given rise to this excessive price competition with regard to spirits will continue to have effect in future we consider it desirable to empower the Produktschap to fix prices for a period of three years only. Furthermore we also consider it desirable that the validity of the provisions enacted by the Board of Managers of the Produktschap pursuant to this Royal Decree shall be limited to a period of one year only since the Produktschap will thereby be obliged each year to reconsider whether the system should be maintained.'

In the Netherlands price competition in connexion with wines and spirits distribution was limited by individual resale price maintenance agreements which were applied by mutual agreement by a majority of Netherlands distillers. The President of the Arrondissementsrechtbank, Utrecht, took the view in his judgment of 22 September 1975 on an application for the adoption of interim measures (Nederlands Juristenblad 1976, No 95) that such agreements were not binding since they were prohibited by the Wet op de Economische Mededinging (law on commercial competition).

After that judgment manufacturers abandoned resale price maintenance agreements. This gave rise to a 'price war' which quickly brought about a fall of several guilders in the price per litre of branded spirits.

4. The order of the Gerechtshof, Amsterdam, was recorded in the Court Registry on 5 July 1977.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Mr van Tiggele, the accused in the main action, by the Commission and by the Government of the Netherlands.

Having heard the report of the Judge Rapporteur the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

The first question

The *accused in the main action* emphasizes first of all that Articles 30 and 92 of the Treaty cannot be applied simultaneously to the same case (see the Court's judgment of 22 March 1977 in Case 74/76, *Ianelli and Volpi* v *Meroni* ([1977] ECR 557)).

Since the provisions in question constitute a measure adopted by public authorities it is not subject to the review of the Court under Article 85 of the Treaty (see the Court's judgment of 18 June 1975 in Case 94/74, *IGAV* v *ENCC* ([1975] ECR 699)).

Nevertheless the accused in the main action examines first of all a number of principles laid down by the Court concerning competition law.

Whether the contested rules fixing minimum prices were applied by the sector concerned by mutual agreement or in the form of a concerted practice such an agreement or practice is contrary to the prohibition in Article 85 (1) of the Treaty. This is indeed clear from the actual wording of that provision and it has moreover been confirmed in the judgments delivered by the Court in the dye-stuffs cases of 14 July 1972 (Case 48/69, *ICI* v *Commission* [1972] ECR 619 and the other cases of the same date) and the judgment of 26 November 1975 (Case 73/74, *Groupement des Fabricants de Papiers Peints de Belgique* v *Commission* [1975] ECR 1491).

The fact that agreements or concerted practices are limited to undertakings within a single Member State does not exclude them from the field of application of Article 85. On the contrary the Court of Justice has laid down in its case-law that agreements between undertakings which cover the entire territory of a Member State *a priori* affect trade between Member States (see in this connexion the judgments in the abovementioned Cases 48/69 and 73/74 and the judgment of 14 May 1975 in Joined Cases 19 and 20/74, *Kali und Salz AG* and *Kali-Chemie AG* v *Commission* ([1975] ECR 499)). Such an agreement has the effect of reinforcing the walling off of markets at national level, thereby impeding the economic interpenetration which the Treaty is designed to bring about and protecting domestic production (see the said judgment in Joined Cases 19 and 20/74). For a trade to be affected within the meaning of Article 85 of the Treaty it is sufficient that following the agreement in question trade between Member States develops otherwise than would have been the case in the absence of the restrictions resulting from it (see judgment of the Court of 13 July 1966 in Joined Cases 56 an 58/64, *Grundig and Consten* v *Commission* ([1966] ECR 299)).

In view of the wording of the definition of a measure having an effect equivalent to a quantitative restriction which the Court set out in its judgment of 11 July 1974 in Case 8/74, *Procureur du Roi* v *Benoît and Dassonville* ([1974] ECR 837) and of 3 February 1977 in Case 53/76, *Procureur de la République* v *Bouhelier* ([1977] ECR 197) and having regard to the case-law considered in relation to the rules on competition in the Treaty the rules in dispute must be considered as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 *et seq.* of the Treaty.

The rules in dispute are at least a potential hindrance to intra-Community trade: lower production costs abroad are prevented from making an impact on the Netherlands market; in such circumstances there can be no interpenetration of various national markets; the walling off of the national market has reached an optimum level and national production is effectively protected; the rules in dispute formally pursue the same objective as an agreement on prices between undertakings but the fact that they are governed by public law makes them more effective as regards their restrictive effect on trade and competition.

The fact that the contested rules relating to minimum prices are applicable without discrimination to domestic products and imported products does not mean that there are not in the nature of a measure having an effect equivalent to a quantitative restriction. This conclusion follows from Directive No 70/50/EEC of the Commission of 22 December 1969, based on the provisions of Article 3 (7) of the EEC Treaty, on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, English Special Edition 1970 (I), p. 17), from the reply given by

the Commission on 21 December 1976 to Written Question No 366/76 submitted by Mr Cousté (Official Journal C 27 of 3 February 1977, p. 4) and from the case-law of the Court. In the judgment of 26 February 1976 in Case 65/75, *Tasca*, and in the judgment in Joined Cases 88 to 90/75, *Tasca and Sadam* v *Comitato Interministeriale dei Prezzi* ([1976] ECR 291 and 323 respectively) the Court decided *inter alia* that a maximum price constitutes a measure having an effect equivalent to quantitative restrictions if it is fixed at such a level that it is no longer profitable for importers to import the products in question. The situation is the reverse with regard to the fixing of minimum prices: in this situation if the fixing is to produce the desired effect prices rapidly attain such a high level in relation to the trade in domestic products that it is no longer profitable for importers to import the products in question.

Finally it cannot be argued that the disputed rules are compatible with Community law by relying on the fact that they are intended to protect small undertakings. The Court rejected an argument to this effect in its judgment of 17 February 1976 in Case 91/75, *Hauptzollamt Göttingen* v *Miritz* ([1976] ECR 217).

The accused in the main action thus suggests that the reply to the first question should be as follows:

'Article 30 *et seq* of the EEC Treaty must be interpreted to mean that the fixing of minimum prices by a Member State affecting without distinction domestic products and imported products is prohibited as it amounts to a measure having an effect equivalent to a quantitative restriction on imports.'

The *Government of the Netherlands* observes that the minimum prices laid down in the rules in question were fixed in such a way as to guarantee a minimum return only for undertakings which would be profitable in normal competitive conditions. This claim is borne out by two facts: despite the rules in question only about half the retail wine and spirit businesses in the Netherlands are profitable; after the regulation entered into force the prices of well-known brands of hollands gin and vieux settled at a lower level than before the system of resale price maintenance was abandoned even though value-added tax and excise duties applicable to such products had in the meantime been increased by more than Hfl 2.

The Government of the Netherlands further claims that it may be inferred from the definitions of the concept of a measure having an effect equivalent to quantitative restrictions contained in the judgment of the Court in Case 8/74, *Dassonville* and in Directive No 70/50 of the Commission of 22 December 1969 that the provisions concerning minimum prices can constitute measures having an effect equivalent to quantitative restrictions only in so far as they have an effect on imports.

However, provisions concerning minimum prices must in principle be applicable both to imports and to domestic products. This must be so if a system of minimum prices is to be effective; furthermore Article 7 of the Treaty requires that provisions enacted by a Member State with regard to minimum prices must in principle be applicable in like measure to imported products.

The Netherlands Government thus considers that a specific measure, or the implementation thereof, need not be considered as a measure having an effect equivalent to a quantitative restriction unless insufficient account is taken of the situation, which may be different, of imported products in relation to the domestic product. Rules fixing minimum prices thus do not constitute a measure having equivalent

effect within the meaning of Article 30 if, when the minimum price was fixed, account was taken of differences existing in the cost price of domestic products and that of imported products and if the rules provide, either explicitly by providing for the possibility of express exemption in respect of imports, or by implication, by allowing for exemptions of a general scope, for the adoption of special measures concerning imported products if the equality of treatment reserved for domestic products and imported products constitutes and impediment to imports. Only a refusal on the part of the competent authorities to exercise their powers to grant exemptions in favour of imported products, if the circumstances justified such a step, could be considered as constituting a measure having an effect equivalent to a quantitative restriction on imports.

The rules in dispute comply with the abovementioned criteria: they do not constitute an impediment to trade and if the cost prices of domestic products and imported products develop differently in future it will be possible to employ the powers of exemption laid down in Article 8 of the regulation.

In general terms the regulation on prices does not constitute an impediment to imports since imports of hollands gin and vieux are practically non-existent.

The Government of the Netherlands then appraises separately the various provisions concerning minimum prices.

The *prohibition on selling at prices below the actual cost prices* cannot in any way affect trade between Member States. This provision leaves retailers entirely at liberty to pass on to consumers the full benefit of rebates, discounts and provisions concerning prices obtained on purchasing the imported products.

Neither does the regulation, which provides that the catalogue price per unit fixed by the manufacturer shall be increased by Hfl 0.60 and by value added tax, constitute an impediment to imports: the minimum price is fixed individually for each product, not on the basis of the cost price or of the quality of the domestic product; the provision concerning prices applies solely to sales to individuals and does not affect competition between importers and domestic traders; the provision in question even makes cheap offers particularly attractive to retailers since the difference between the purchase price and the minimum price belongs entirely to them; only competition between retailers is restricted, but such restriction has no effect on trade between Member States.

Likewise the catalogue price per unit does not constitute an impediment to trade between Member States: since the prices applied by the manufacturer are taken into account all products are treated alike. It follows that this provision too does not constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 2 (3) (c) of Commission Directive No 70/50 of 22 December 1969.

The Government of the Netherlands emphasizes that it is unnecessary to take account of every difference in price, however small, between the imported product and the domestic product. In fact if that were necessary it would be quite impossible to supervise such provisions concerning prices, in particular where the cost price of the foreign product cannot be established.

The Government of the Netherlands concludes that the rules in question comply with the abovementioned conditions for the conformity of a system of minimum prices with the Treaty: the minimum price was fixed on the basis of the level of prices applied to cheap spirits, which certainly differed from the level of prices of well-known brands of spirits, but within which the

prices of various kinds of hollands gin and vieux did not differ greatly. Article 8 of the regulation furthermore makes it possible to exempt imported products from the provisions of the rules on price-control; however, that provision has not so far been used.

The *Commission* takes the view that there is no doubt that even rules fixing price and profit margins which apply without distinction to domestic products and imported products may also constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30. In this connexion it refers to Article 3 of Commission Directive No 70/50 of 22 December 1969, which states that measures applying without distinction to 'the marketing of products' come within the prohibition on measures having an effect equivalent to quantitative restrictions where 'the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules'. Article 3 further states that: 'This is the case, in particular, where the restrictive effects on the free movement of goods are out of proportion to their purpose' and where 'the same objective can be attained by other means which are less of a hindrance to trade'. Article 3 does not indeed refer to measures governing prices and profit margins as examples of such 'trade rules'; nevertheless it is clear that with regard to such measures criteria must be adopted which are at least identical to, if not more stringent than, those mentioned in the directive since they exercise a direct influence on the operation of the market and on competition, and this indeed often their express purpose, as in the case of the disputed Netherlands price rules.

In the present case it is of prime importance to establish the effect which the contested regulation has 'directly or indirectly, actually or potentially' on imports from other Member States (see the judgment of the Court in Case 8/74 *Dassonville*, the judgment of 23 January 1975 in Case 31/74, *Galli* ([1975] ECR 47), the judgment in Case 65/75, *Tasca*, and the judgment delivered in Joined Cases 88 to 90/75, *Sadam*.

With regard to the fact that exports to the Netherlands from other Member States constitute only a very small percentage (0.5 to 1%) of domestic sales of new and old hollands gin and vieux the Commission emphasizes that the applicability of Article 30 *et seq.* of the Treaty does not depend on the volume of the imports affected by the restrictive measure.

The Commission maintains that minimum prices, unlike maximum prices, of necessity distort price competition between the products on the market. Viewed in this light a system of minimum retail prices like the one in question may thus be compared to a collective system of resale price maintenance agreements, freely entered into.

Collective resale price maintenance agreements to which manufacturers, importers and traders in the same Member State are parties generally come under Article 85 (1) of the Treaty. Even if each party fixes freely the level of his prices such systems in fact lead to horizontal agreements whereby the persons concerned, in this case manufacturers and importers participating in such agreements, undertake to apply the system of maintained prices to the resale of their products. The participation of importers means that international trade must inevitably be affected, especially if the most important importers are parties to the agreements.

The Commission then examines each of the three systems of minimum prices in dispute in order to establish whether they are capable of influencing trade between Member States.

The *general floor price* excludes all competition on prices at the retail trading stage. Where imported products

could, but for this minimum price, be retailed at lower prices it depends on a number of factors whether the floor price constitutes an impediment to imports.

In this connexion the Commission observes first that it must be determined how the retail prices of domestic products of a comparable price and quality would develop if there were no floor price.

If the opportunities for price competition at retail level were more restricted for imported than for domestic products comparable in price and in quality there would in any event be an impediment to imports which would fall under Article 30 of the Treaty. However, a restriction of price competition affecting to the same degree domestic products and imported products would also impede trade between Member States. Imported products generally have to attain their place on the market through a more aggressive policy and by their nature have a greater need for competition and, moreover, are more inclined to be competitive.

Although the general floor price leaves prices entirely free to find their own level at the production, wholesale and import stages such freedom is not capable of cancelling entirely any restrictive effect on imports caused by the general minimum price to the consumer; at the most it can only alleviate this effect somewhat and even this is doubtful. In fact, although the retail trade may have an interest in stimulating the sale of the foreign product because the retailer obtains a wider profit margin chiefly through the floor price it is doubtful whether the retail trade can induce the consumer to forsake the domestic product in favour of spirits at the same price distilled abroad.

It follows that the general floor price in fact restricts price competition between cheap hollands gin and vieux on the one hand and more expensive branded products on the other without at the same time protecting the profit margins enjoyed by the retail trade in respect of these cheap spirits. This floor price thus principally promotes the interests of Netherlands distillers of branded products.

Whether the imported products could be offered more cheaply to consumers if there were no floor price and whether a floor price limits price competition in respect of cheap imported drinks more than for home-produced drinks is a question of fact which must be settled by the national court.

With regard to the *rule that the catalogue price per unit fixed by the manufacturer must be increased by Hfl 0.60 and value added tax* the Commission maintains that this is in fact a rule fixing minimum profit margins. It excludes at the retail stage all price competition on prices within each brand of new hollands gin and vieux whilst permitting such competition to operate freely between the various brands.

With regard to imported products that rule is in fact applied only to branded Netherlands products exported to other Member States for subsequent resale to Netherlands retailers because the manufacturers established in those other Member States did not notify the catalogue price per unit.

By excluding all price competition within each brand and imposing minimum profit margins this rule protects retailers whose cost prices are relatively high against undertakings whose cost prices are not so high, as well as against large stores and discount shops. In fact the price control prohibits passing on via the selling price discounts obtained on purchase and reducing the selling price by rebates in the case, for example, of self-service sales or large-scale purchases.

On the other hand the rule does not exclude price competition between brands. Such competition is however rendered less intensive by the fact that it is concentrated at distillery level. In fact the distillers determine by their own price policies the minimum prices to consumers and thus limit the influence on competition which the price policy of an active and independent retail business might exert.

The fixing of minimum profit margins thus constitutes an impediment to intra-Community trade even though the domestic products are subject to the same restriction on price competition.

The Commission also claims that the *prohibition of sales at prices below the actual cost price* also constitutes a kind of rule fixing minimum profit margins.

It is difficult to consider such a prohibition on sales at a loss as a restriction on competition since 'special offers' involving a loss are rather symptoms of distortion of competition on the market. Likewise it cannot be claimed that imported products require 'special offers' at a loss to acquire a place on the domestic market. Thus it cannot be considered that this part of the contested price-control rules can impede imports.

The Commission observes with regard to the rules on competition in the Treaty that, although they are only applicable to undertakings the Member States cannot ignore them.

The Commission maintains that, whilst it is impossible at the present time to deny to the Member States any power to impose minimum price systems it is necessary, in order to appraise the compatibility of such systems with Article 30, to take into consideration the principles set out in the rules on competition in Article 85.

The Commission thus reiterates the argument which it put forward in Case 13/77, *G.B.-INNO-B.M.* v *Vereniging Kleinhandelaars in Tabak* (judgment of 16 November 1977).

The Commission next considers whether the Netherlands rules in dispute are compatible with Article 30, having particular regard to the criteria laid down in Article 3 of Commission Directive No 70/50 of 22 December 1969, of the judgment delivered in Case 8/74, *Dassonville*, and of the principles set out in Article 85 of the Treaty.

In its view the objective which the Netherlands authorities assigned to the fixing of prices appears legitimate and not unreasonable. Article 85 (3) furthermore states that the prohibition on agreements between undertakings set out in paragraph (1) may be declared inapplicable if the agreements contribute to improving the distribution of goods.

The *general floor price* may be said to have a limiting effect on imports out of proportion to its purpose. In fact a rule fixing profit margins which applied also in respect of cheap spirits would not only afford better protection for the retail trade but also would entail less restriction of price competition between the different brands and varieties. The Commission recalls in this connexion the criterion set out in Article 85 (3) in accordance with which an agreement may not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives of the agreement.

The *rule imposing minimum profit margins* on the other hand appears not to restrict competition and intra-Community trade more than is necessary to attain the objective in view, always provided however that the profit margin fixed is not excessive. This is a question of fact which the national court must settle. The system restricts competition at the retail stage and allows it to have full effect at the production, importation and wholesale stages. Seen from this point of view also this rule does not entail a greater degree

of restriction than Article 85 (3) permits for an agreement ('which does not... afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question').

The Commission concludes from this that the general floor price must be considered as a measure having an effect equivalent to a quantitative restriction on trade prohibited by Article 30 of the Treaty in so far as it is applied to products imported from other Member States which, if that floor price did not exist, could be supplied to the consumer at a lower price. On the other hand the rule imposing minimum profit margins and the prohibition on sales at a loss does not fall within the prohibition set out in Article 30.

The Commission accordingly proposes that the reply to the first question should read as follows:

'National rules, applicable without distinction to domestic products and imported products, fixing minimum prices for retail sales on the domestic market of a product for which there is no common organization of the market constitute, in so far as their application to products imported from other Member States is concerned, a measure having an effect equivalent to quantitative restrictions on imports if the price is fixed at such a level that, taking into account both the prices for this product prevailing in other Member States and the general conditions of competition between domestic products and the imported products in question, it has the effect of impeding imports directly or indirectly, actually or potentially, and if such restrictive effects on imports are out of proportion to the legitimate purpose of the price-control rules.'

The second question

The *accused in the main action and the Commission* observe that the Gerechtshof's second question is submitted in case the Court of Justice replies in the negative to the first question.

The *accused in the main action* considers that the second question should have been worded as follows: 'Must Articles 92 to 94 of the EEC Treaty be interpreted as meaning that the fixing of minimum prices ... is to be regarded as an aid within the meaning of Article 92 for which, before it is put into effect, the procedure laid down in Article 93 (3) must be followed?' In this connexion he claims that the establishment of an aid without following the procedural requirements of Article 93 (3) cannot be justified by arguing, as in the present case, that the measure is not or ought not to be incompatible with the Treaty. The concept of an 'aid' must be interpreted widely in accordance with the objective referred to in the relevant provisions and must encompass all aids whatever which, regardless of their form, are intended to favour certain undertakings or certain productions. According to the case-law of the Court, namely the judgment of 2 July 1974 in Case 173/73, *Italy* v *Commission* ([1974] ECR 709); judgment of 22 March 1977 in Case 78/76, *Steinike and Weinlig* v *Germany* ([1977] ECR 595), Article 92 does not draw any distinction on the basis of the causes or objectives of the measures in question; it considers them solely in terms of their consequences; the measure in the present case thus constitutes an aid within the meaning of Articles 92 and 93 of the Treaty and, before this measure was put into effect, the Commission should have been informed in accordance with the procedure laid down in Article 93 (3).

The *Government of the Netherlands* claims that it may be inferred from the case-law of the Court, in particular the judgment of 2 July 1974 in Case 173/73 and the judgment of 12 July 1973 in Case 70/72, *Commission* v *Germany*

([1973] ECR 813) that exemption from a charge can constitute an aid only if the following conditions are fulfilled: the charge in question must be of a financial nature, it must be imposed by the public authorities and the exemption must have been granted by the public authorities. A system of minimum prices does not fulfil any of these conditions.

The *Commission* considers that the rules in dispute do not constitute an aid within the meaning of Articles 92 to 94 since they entail neither the provision by the public authorities, directly, indirectly or *a posteriori*, of a benefit in cash or in kind, nor the renunciation by the authorities of the imposition of taxation or other benefits in cash or in kind owed to them.

III — Oral procedure

1. At the hearing on 24 November 1977 the accused in the main action, represented by B. Greve, the Netherlands Government, represented by A. Bos, and the Commission, represented by its Legal Adviser, R.C. Fischer, acting as Agent, submitted their oral observations.

2. The Court had requested the parties and the Commission to give their views at the hearing on certain statistics set out in the Commission's statement. The Commission had indicated that imports of hollands gin from Belgium, which amounted to 173 504 litres in 1975 fell to 95 640 litres in 1976. At the same time imports from other States rose from 5 541 litres to 25 727 litres. In this connexion the Court had noted that the new rules entered into force on 6 January 1976.

The *accused in the main action* and the *Commission* declared that they were unable to explain these facts.

The *Government of the Netherlands* observed in this connexion that the total sales of Netherlands spirits on the domestic market in 1976 were some 33% lower than the 1975 level. This fall was principally due to the purchase of stocks in the last four months of 1975 in anticipation of the increase in the excise duty on alcohol with effect from 1 January 1976 and also to the very fierce competition after September 1975 when individual resale price maintenance agreements were abolished.

3. The *accused in the main action* supplemented his written observations stating *inter alia* that, since proceedings in connexion with the alleged infringement of the relevant Netherlands rules had been stayed pending the judgment of the Court, he was for the time being in a position to sell white hollands gin, made in Belgium, at Hfl 9.90 per litre. He had also received an offer from Germany of white hollands gin, made in Germany, at Hfl 8.95 per litre. This price is carriage paid and does not take into account quantity discounts.

The *Advocate General* delivered his opinion at the hearing on 13 December 1977.

Decision

1 By an order of 30 June 1977 which was received at the Court on 5 July 1977 the Gerechtshof, Amsterdam, submitted, pursuant to Article 177 of the EEC Treaty, two questions on the interpretation, first, of Articles 30 to 37

of the Treaty concerning the elimination of quantitative restrictions on trade between Member States and, secondly, of Articles 92 to 94 of the Treaty concerning aids granted by States.

2 Those questions were submitted in connexion with criminal proceedings instituted against a licensed victualler who was accused of selling alcoholic beverages at prices below the minimum prices fixed by the Produktschap voor Gedistilleerde Dranken pursuant to the Royal Decree of 18 December 1975 (Staatsblad No 746).

3 The regulation of the Produktschap of 17 December 1975 concerning the price of spirits, approved by the Minister for Economic Affairs on 19 December 1975, established within the country a system of minimum retail prices which varied according to each category of spirits.

4 The minimum price for spirits of the kind known as 'new hollands gin' and 'vieux' is calculated on the basis of the manufacturer's catalogue price per unit increased by Hfl 0.60 and by value added tax, the total of which must in no case be lower than a specific amount, namely Hfl 11.25 per litre.

5 The minimum prices of spirits of the type known as 'old hollands gin' is fixed at Hfl 11.25 per litre.

6 The minimum price for all other spirits is the actual purchase price increased by value added tax.

7 Pursuant to Article 7 of the regulation the minimum price, which had at first been fixed at Hfl 11.25, was increased to Hfl 11.70 because of the rise in costs.

8 Article 8 authorizes the President of the Produktschap to grant exemption from the provisions of the regulation in certain cases or categories of cases.

9 It is clear from the statement of reasons on which the Royal Decree of 18 December 1975 is based that the power conferred upon the Produktschap to issue such rules was intended to promote the adaptation of the wine and spirit trade to normal competitive conditions and that such power was to be limited to a period of three years.

The first question

10 The first question asks in substance whether Articles 30 to 37 of the Treaty must be interpreted as meaning that the prohibition which they set out covers price-control rules such as those concerned in the present proceedings.

11 Article 30 of the Treaty prohibits in trade between Member States all measures having an effect equivalent to quantitative restrictions.

12 For the purposes of this prohibition it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

13 Whilst national price-control rules applicable without distinction to domestic products and imported products cannot in general produce such an effect they may do so in certain specific cases.

14 Thus imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.

15 These are the considerations in the light of which the question submitted must be settled since the present case concerns a product for which there is no common organization of the market.

16 First a national provision which prohibits without distinction the retail sale of domestic products and imported products at prices below the purchase price paid by the retailer cannot produce effects detrimental to the marketing of imported products alone and consequently cannot constitute a measure having an effect equivalent to a quantitative restriction on imports.

17 Furthermore the fixing of the minimum profit margin at a specific amount, and not as a percentage of the cost price, applicable without distinction to domestic products and imported products is likewise incapable of producing an adverse effect on imported products which may be cheaper, as in the

present case where the amount of the profit margin constitutes a relatively insignificant part of the final retail price.

18 On the other hand this is not so in the case of a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price.

19 This is the conclusion which must be drawn even though the competent authority is empowered to grant exemptions from the fixed minimum price and though this power is freely applied to imported products, since the requirement that importers and traders must comply with the administrative formalities inherent in such a system may in itself constitute a measure having an effect equivalent to a quantitative restriction.

20 The temporary nature of the application of the fixed minimum prices is not a factor capable of justifying such a measure since it is incompatible on other grounds with Article 30 of the Treaty.

21 The answer to the first question must therefore be that Article 30 of the EEC Treaty must be interpreted to mean that the establishment by a national authority of a minimum retail price fixed at a specific amount and applicable without distinction to domestic products and imported products constitutes, in conditions such as those laid down in the regulation made by the Produktschap voor Gedistilleerde Dranken on 17 December 1975, a measure having an effect equivalent to a quantitative restriction on imports which is prohibited under the said Article 30.

The second question

22 The second question asks in substance whether Articles 92 to 94 of the Treaty must be interpreted as meaning that price-control rules such as those in the present case constitute an aid granted by the State.

23 Article 92 states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Common Market.

24 Whatever definition must be placed upon the concept of an 'aid' within the meaning of that article it is clear from the wording thereof that a measure characterized by the fixing of minimum retail prices with the objective of favouring distributors of a product at the exclusive expense of consumers cannot constitute an aid within the meaning of Article 92.

25 The advantages which such an intervention in the formation of prices entails for the distributors of the product are not granted, directly or indirectly, through State resources within the meaning of Article 92.

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

Costs

27 The costs incurred by the Government of the Kingdom of the Netherlands and the Commission of the European Communities which have submitted observations to the Court are not recoverable.

28 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Gerechtshof, Amsterdam, by an order of 30 June 1977, hereby rules:

1. **Article 30 of the EEC Treaty must be interpreted to mean that the establishment by a national authority of a minimum retail price fixed at a specific amount and applicable without distinction to domestic products and imported products constitutes, in conditions such as those laid down in the Regulation made by the Produktschap voor Gestilleerde Dranken on 17 December 1975, a measure having an**

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

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

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 24 January 1978.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

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

1 — Translated from the Italian.