2. Orders the Commission to pay the costs.

Mertens de Wilmars Pescatore O'Keeffe Everling
Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 7 June 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 26 APRIL 1983 [1]

Mr President,
Members of the Court,

This Court has before it an action brought by the Commission under Article 169 of the EEC Treaty for a declaration that by maintaining a system of fixed margins in the marketing of manufactured tobacco the Italian Republic has failed to fulfil its obligations under Article 37 of that Treaty.

I — In order to appreciate what is at stake in this action, it is necessary to place it in its context. The case forms part of a campaign conducted by the Community institutions — in particular by the Commission — for the purpose of creating in the sector of manufactured tobacco products an economic union with healthy competition and features comparable to those of a domestic market, as laid down by Article 3 of the Treaty. [2]

The campaign deals in the first place with taxation, in view of the major share taken by taxes in the retail price of tobacco (70 % on average in the case of cigarettes [3]). On 19 December 1972 the Council adopted its first directive on the harmonization of excise duties on cigarettes (Directive 72/464/EEC), which was subsequently amended several times. In essence, the directive seeks the progressive elimination from taxation on the consumption of tobacco in the Member States of the factors likely to

1 — Translated from the French.

2 — Subparagraphs (a) and (f).

3 — Report by Mr Bouke Beumer to the European Parliament of 3. 11. 1982, Document 1-789/82, para. 9; judgment of the Court of Justice of 29. 10. 1980 in *Van Landewyck* v *Commission* (the so-called Fedetab case), Joined Cases 209 to 215 and 218/78, [1980] ECR 3125, para. 121 at p. 3260.

impede the free movement of tobacco and to distort the conditions of competition, whether at national level or at Community leve.[1] The means employed to that end consist essentially in establishing a standard ratio in all the Member States between proportional excise duty and specific excise duty,[2] and in allowing prices to form freely;[3] the meaning of the latter principle is at present the subject of an action brought by the Commission against the French Republic (Case 90/82).[4]

The campaign is undoubtedly aimed at all Member States, but in the case of those in which the tobacco trade is subject to a commercial monopoly within the meaning of Article 37 of the EEC Treaty the Commission, being responsible for enforcing the provisions of the Treaty, ensures compliance with the specific demands made on such States as a result of that particular provision. In respect of France, the Commission was compelled to issue a reasoned opinion on 22 July 1980, and decided on 28 October 1981 to lay the matter before this Court. However, owing to the progress observed and the measures that were adopted, the Commission decided on 18 December of that year to suspend the proceedings. It took the view that the French Government had undertaken to adopt measures such as would make the French monopoly conform to the provisions of the EEC Treaty.[5]

Similarly, contact was made with the Italian authorities on the subject of the monopoly in manufactured tobacco and matches. Since the attitude of the Italian authorities remained incompatible with Article 37, it was resolved on 28 October 1981 to refer the matter to the Court of Justice; again, subsequent developments enabled the Commission to suspend proceedings on all the points at issue, save the question of fixed margins for tobacconists.[6] In that case, too, certain adjustments were made in the meantime by the Italian Government.[7] The points on which agreement was reached concern warehousing at the wholesale stage, the packaging and presentation of the products, the arrangements for collecting the tax, direct access to tobacconists through authorized warehouses, the abolition of the requirement that tobacconists should be Italian nationals, and the option of creating so-called "State tobacconists".[8] The reasoned opinion of 1980 also related to the monopoly on matches. Although as a result of the agreement reached in late 1980 the Commission had considered that the monopoly in question was now being conducted fully in accordance with Article 37, the present proceedings revealed the existence of a misunderstanding. Like manufactured tobaccos, matches are subject to a standard trading margin at the retail stage. Although the question lies outside the scope of the present proceedings, it follows that whatever solution this Court may adopt in respect of manufactured tobacco will apply equally to matches.

1 — Third recital in the preamble, referred to in the Court's judgment in the Fedetab case (para. 117).

2 — Fifth and sixth recitals.

3 — Seventh and eighth recitals.

4 — Fedetab judgment, at p. 3162 (under Facts and Issues).

5 — *Sixteenth General Report on the Activities of the European Communities in 1982*, para. 238.

6 — *Fifteenth General Report*, para. 224.

7 — *Sixteenth General Report*, para. 239.

8 — *Rivendite di Stato.*

The steps taken by the Community institutions are designed not only to combat interference from Member States with the free movement of goods and the normal workings of the competitive system; they also cover any conduct on the part of undertakings or associations of undertakings which is contrary to fair competition. Thus on 20 July 1978 the Commission adopted Decision 78/670/EEC relating to a proceeding under Article 85 of the EEC Treaty, [1] which was the subject of the actions which culminated in the above-mentioned judgment of this Court of 29 October 1980. [2] It further appears from the Commissions observations in the Fedetab case that as long ago as 1976 the Commission had commenced proceedings for alleged infringement of Articles 85 and 86 in respect of exclusive rights contracts concluded by the French and Italian monopolies (Seita and AAMS) respectively with the majority of foreign manufacturers of tobacco products. [3]

I think it is important to stress at the outset that, according to the Courts judgment in Fedetab, even where national legislation governing one sector of the market brings about a considerable reduction of the scope for manufacturers and importers to compete with one another, [4] in particular because the share of the retail price yielded to the revenue is large, traders nevertheless retain "a *sufficient margin* to allow *effective competition* even with regard to ... products ... in respect of which a very small reduction in the price at the manufacturing or import stage may have a significant effect at the consumer stage". [5]

Seen in that context, the present application may be said to be seeking to enlarge the freedom of action enjoyed by traders. Retail prices of manufactured tobacco are made up of three components: the revenue's share (70% on average), manufacturing costs (accounting for about 20%) and the retailer's share (representing 10% on average). [6] This case will thus enable the Court to examine the compatibility with Community law of a national provision concerning the share taken by retailers, thereby supplementing the Court's case-law on freedom of trade regarding the respective shares of the revenue authorities and the supplier.

Finally, it is relevant to point out that this application is largely of academic interest. As far as the Commission is concerned it is a question of principle, since the measure challanged has not been the subject of any complaint from importers into Italy.

II — In order to substantiate the alleged failure to comply with Treaty obligations, it is necessary to compare the Italian measure under challenge with the requirements of Article 37 of the Treaty. A brief description of the Italian system of which the measure on trading margins is a component is therefore needed.

The Italian monopoly in tobacco is a monopoly of a commercial character within the meaning of Article 37 of the EEC Treaty. It constitutes a monopoly both on the production of the product and on its distribution under a national brand-name or a licensed foreign brand-name. The AAMS (Azienda Autonoma dei Monopoli dello Stato) is the only

1 — Short title: "Fedetab Recommendation".

2 — Report by Mr Bouke Beumer to the European Parliament of 3. 11. 1982, Document 1-789/82, para. 9; judgment of the Court of Justice of 29. 10. 1980 in *Van Landewyck* v *Commission* (the so-called Fedetab case), Joined Cases 209 to 215 and 218/78, [1980] ECR 3125, para. 121 at p. 3260.

3 — Fedetab judgment, at p. 3218.

4 — See para. 130 of the Fedetab judgment.

5 — Fedetab, para. 133 (emphasis supplied).

6 — Beumer report (cited above), para. 9.

body empowered to grant the necessary approval to the 80 000 tobacconists which may be obtained subject to compliance with certain requirements laid down in a set of clauses and conditions.

It has been pointed out that, in spite of the existing supervision, American cigarettes (in particular) are the subject of large-scale, organized smuggling in Italy.

Since the Treaty of Rome came into force the Italian tobacco monopoly has been extensively reorganized so as to meet the requirements of Community law, especially Article 37 of the Treaty. The only source of difficulty today is the fixing of a standard margin for retailers. It amounts to 8 % of the retail price charged to the public. [1] Fixing that margin clearly constitutes "the exercise by [the] ... monopoly of its specific function — namely its exclusive right", [2] which therefore falls under the *lex specialis* afforded by Article 37 rather than under the Treaty's general provisions, especially Article 30.

As the Italian Government has pointed out, the margin is not a flat rate whose amount is invariable whatever the selling price may be. It is a standard margin stated as a fixed percentage, which necessarily varies according to the value of the product.

The margin is one of the components of the retail price. The schedules of charges, the latest version of which is to be found annexed to the aforementioned Decree-Law of 1 October 1982, lay down not only the final purchase price but also the component parts of that price accruing to the revenue authorities (excise duties and VAT) and to the retailers. The difference between the final selling price, on the one hand, and the sum of the revenue's share and the trading margin, on the other, indicates the residue intended to cover manufacture and the wholesale trade (the supplier's share).

The retail prices are freely chosen by importers from amongst the prices appearing in tables regularly published in the Gazzetta Ufficiale as annexes to the texts of laws and regulations prepared by the Ministry of Finance. The tables show, against each category of product, a great many different prices. By way of example, the tables annexed to Law No 724 of 10 December 1975 included 36 prices for snuff tobacco, 71 for cigarettes, 91 for cigarillos, 133 for shredded tobacco and 213 for cigars. If none of those prices suits the traders, they may request the inclusion in the schedules of a new price. The system is consistent with the above-mentioned Directive 72/464/EEC. The Italian Government defines it as a system of compulsory prices, in the sense that once the chosen price has been inserted in the schedule the product cannot, in the absence of a supervening amendment, be marketed above or below that price.

The provisions at present in force derive from Law No 825 of 13 July 1965 as amended by Law No 724 of 13 December 1975, and the current scales of charges are shown in the tables annexed to Decree-Law No 697 of 1 October 1982.

1 — See for example the annexes to Italian Decree-Law No 697 of 1. 10. 1982 quoted by the representative of Italy at the hearing of oral submissions.

2 — Judgment of 20. 2. 1979 in *REWE* v *Bundesmonopolverwaltung für Branntwein* (the so-called "Cassis de Dijon" case), Case 120/78 [1979] ECR 649 at p. 662, para. 7.

III — Before considering the validity of that legislation in the light of Article 37, it is appropriate to recall the latter's scope as disclosed by the case-law of this Court. Such a review appears especially desirable in view of the fact that the provision under scrutiny has given rise to controversy which the present dispute continues to reflect.

In fact, it is only the first paragraph of Article 37 (1) which is at issue here. It reads as follows:

"Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States."

The case-law of this Court has progressively defined the ambit of that provision and the objectives which it seeks to attain.

A — The first objective is to prevent intervention by a Member State from creating "discrimination against the products or trade of other Member States" [1] and thus seeks to ensure that equal opportunities are accorded to products imported from other Member States. [2]

B — As is further recorded in the case-law of this Court, the second objective is that of "ensuring compliance with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restriction and measures having equivalent effect in trade between Member States". [3]

The reference thus made by the Court to the concept of a measure having an effect equivalent to quantitative restrictions on imports raises the question as to whether or not that concept should be endowed with the same meaning in Article 37 as it has in Article 30. In my opinion, the Court's case-law requires an affirmative reply to that question.

Such a reply may be inferred from paragraphs 8 and 9 of the Court's decision in *Manghera* [4]. Paragraph 8 is worded as follows:

"... Article 37 (2) refers to the obligation on all Member States to refrain as from the beginning of the transitional period from introducing any new measures likely to restrict the scope of the articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

Article 37 (3), moreover, provides that the time-table for adjustment provided for in paragraph (1) must be harmonized with the abolition of quantitative restrictions on the same products provided for in Articles 30 to 34."

On the strength of the above wording and that of the following paragraph (which forms the conclusion) — as elucidated by the exceptionally clear Opinion of Mr Advocate General Warner [5] — the unity of the concept of

1 — Judgment of 13. 3. 1979 in *Hansen* v *Hauptzollamt Flensburg*, Case 91/78 [1979] ECR 935 at p. 953, para. 9.

2 — Idem, para. 13 at p. 954. Endorsed by: two judgments of 17. 2. 1976, namely *REWE* v *Hauptzollamt Landau*, Case 45/75 [1976] ECR 181 at p. 198, para. 26, and *Hauptzollamt Göttingen* v *Miritz*, Case 91/75 [1976] ECR 217 at p. 229, para. 8: "Article 37 (1) ... prohibits any discrimination, when the transitional period has ended, regarding the conditions under which goods are procured and marketed between nationals of Member States"; judgment of 13. 3. 1979, *Peureux* v *Directeur des Services Fiscaux de la Haute-Saône et du Territoire de Belfort*, Case 86/78 [1979] ECR 897 at p. 912, para. 30, which repeats the paragraphs quoted from the *REWE* and *Miritz* judgments.

3 — Judgment of 3. 2. 1976, *Pubblico Ministero* v *Manghera*, Case 59/75 [1976] ECR 91 at p. 100, para. 9, and the abovementioned *Miritz* judgment, para. 8. The same idea is couched in different terms in the following judgments: *REWE*, of 17. 2. 1976, mentioned above, para. 20 at p. 198; *Peureux*, of 13. 3. 1979, mentioned above, para. 30 at p. 912; *Hansen*, of 13. 3. 1979, mentioned above, para. 13 at p. 954 and para. 19 at p. 956.

4 — *Manghera*, [1976] ECR 100.

5 — *Manghera*, Opinion at p. 108.

a measure having equivalent effect in Articles 37 and 30 appears, in my view, to be beyond doubt. It seems relevant, moreover, to note that nearly 20 years ago Mr Advocate General Lagrange, speaking on the subject of Article 37, used a phrase which may seem prophetic today: "... the appreciable influence, *actual or potential*, upon either imports or exports between Member States is the only relevant consideration having regard to the purpose of the provisions at issue". [1] I therefore share the views expressed in that regard by Professor Robert Kovar: "The Court of Justice incorporates into that provision [Article 37] the whole range of prohibitions to be found elsewhere relating to encroachments on the principle of the free movement of goods". [2] Again, to quote Professor Aurelio Pappalardo: "Thus, the Court's conclusions [in *Manghera*] derive merely from the application, in the context of monopolies, of the rules on the free movement of goods ... Article 37 [is] therefore a special rule, characterized by an *ad hoc procedure* but identical *in substance* to the other provisions in the same Chapter". [3]

C — The third objective assigned to Article 37 is "to maintain normal conditions of competition between the economies of Member States". [4] It ensures "that ... intervention on the part of a Member State, namely action by a State monopoly ... [does] not distort the conditions of competition within the common market". [5]

That aim assumes a special importance in the present proceedings, since the second objection raised by the Commission is that the fixing of standard trading margins by the State is liable to distort conditions of competition within the common market. The Italian Government's reply is that the objection is inadmissible: in its view, the alleged distortions of competition may not be examined in the context of Article 37 otherwise than in relation to alleged discrimination.

That objection seems to derive in part from a misunderstanding. In my opinion, the adverse effect on competition envisaged by paragraphs 9 and 19 of the *Hansen* decision refers not to any adverse influence exerted on competition by undertakings — which are dealt with by Articles 85 and 86 of the Treaty — but rather to the adverse influence which States, acting through the commercial monopolies which they supervise, determine or appreciably influence, (second paragraph of Article 37 (1)), exert on the fair conduct of competition between their economies as a whole and those of other Member States. That concept of fair competition, mentioned in the preamble to the Treaty and rephrased in the first paragraph of Article 3, may thus serve as a means of interpreting many provisions in the Treaty, including Article 37.

Moreover, it seems advisable to accept that the preservation of fair competition between the economies of Member States is one of the objectives of Article 37,

1 — Opinion of 25. 6. 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at p. 611.

2 — Note initialled by Professor Kovar on the judgments of this Court of 13. 3. 1979 in Cases 86/78, 91/78 and 119/78, recorded in the *Journal de Droit International*, 1981, p. 126.

3 — Position des Monopoles Publics par Rapport aux Monopoles Privés, Semaine de Bruges, 1977, pp. 554 and 555.

4 — Judgment of 13. 3. 1979, *Hansen (supra)*, para. 19 at p. 956.

5 — *Hansen*, para. 9 at p. 953.

on the ground that it complements the maintenance of the free movement of goods between Member States. It is recorded that the authors of the Treaty were reluctant to insert the future Article 37 into the chapter dealing with the rules on competition, which is understandable. [1]

Both the rules on the free movement of goods and those designed to ensure freedom of competition envisage the establishment of a common market (Article 2 of the Treaty), that is to say, a market displaying the same features as a domestic market, or at least features approximating as far as possible thereto. [2] As one of the negotiators who signed the Treaty has written, the artificial partitions between the economies of Member States which "the EEC Treaty as a whole was designed to eliminate" did not manifest themselves exclusively "within the three categories of protectionist measures ... specifically contemplated by the Treaty, namely quantitative restrictions on imports and exports, restrictions on exchange and currency, and customs tariffs, but manifested themselves as a whole range of indirectly protectionist measures, of which public undertakings and monopolies were one of the most dangerous forms."

Article 90 of the Treaty of Rome is to be found in the chapter containing the rules on freedom of competition, a freedom which is useful both to the consumer and to productivity. "Article 37 furthermore aims *in the same manner* to dispense with the protection afforded by national monopolies". [3]

It seems to me that distortions in competition and obstacles to trade are merely different facets of one and the same phenomenon.

That may be observed with particular clarity in the present case.

The Commission claims in particular that a monopoly which is a monopoly both on production and on marketing cannot fail to organize marketing in a manner which gives preference to its own products. That first objection was previously raised in the *Manghera* case, to which I have already referred.

In that case, the Commission concluded that such a preferential system amounted to "a measure having an effect equivalent to a quantitative restriction on imports". [4] In the present case, the Commission bases its argument on a comparison between the situation created

1 — Charles-Étienne Gudin, "Les Monopoles Nationaux à Caractère Commercial dans le Droit de la Communauté économique européenne", a doctoral thesis at the Université de Paris II, 1977, Vol. I, p. 129.

2 — Judgment of 20. 1. 1981, *Musik-Vertrieb membran* v *GEMA*, Joined Cases 55 and 57/80 [1981] ECR 147 at p. 162, para. 14: "... the essential purpose of the Treaty, which is to unite national markets into a single market ..."; judgment of 25. 10. 1977 *Metro* v *Commission*, Case 26/76 [1977] ECR 1875 at p. 1904, para. 20: "The requirement ... that competition shall not be distorted implies the existence on the market of ... the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."

3 — Baron Snoy et d'Oppuers, "La Notion de l'Intérêt de la Communauté à l'Article 90 du Traité de Rome sur le Marché Commun", *Rivista di Diritto Industriale* 1963, pp. 247 and 248 (emphasis supplied).
Further endorsed by: (1) In general: Wortley, *An Introduction to the Law of the European Economic Community*, Manchester 1972, Chapter 6 (Monopolies under the EEC Treaty), p. 67; (2) On the particular point of the equivalence of "affecting trade between Member States" (Article 85 (1) of the Treaty) to the concept of obstacles to trade within the Community as contained in this Court's classic definition of a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty: observations submitted on behalf of the Commission by van de Haar and Kaveka in Joined Cases 177 and 178/82; (3) As regards tobacco: the above-mentioned Beumer report, para. 6.

4 — *Manghera*, at p. 95.

by the monopoly and an agreement or practice amongst undertakings in restraint of competition within the meaning of Article 85 (1), as censured by the judgment of this Court of 29 October 1981 (Fedetab). [1]

The Commission's second objection is that the system under challenge distorts the *conditions of competition* on the common market by introducing an element of *discrimination.* In its view, to require the same margin for new products as for products which are already known on the market is tantamount to treating different situations identically, without any objective justification.

The attribution by the case-law of this Court of a wide scope to the first paragraph of Article 37 (1) must also be approved on general grounds, first on account of the point at which the provision occurs in the Treaty, and hence because of the fundamental character of the principle of market unity, together with its corollary, the free movement of goods; [2] and secondly on account of the special vigilance enjoined by the existence of bodies as potentially dangerous to trade — as Baron Snoy (in the article to which I have referred) has stressed — as State monopolies of a commercial character.

Those are the principles to be borne in mind as we now consider the two objections raised by the Commission to the Italian system of trading margins, and the arguments by which the Italian Government has endeavoured to refute them.

IV — A. In the Commission's view, when a Member State with a production monopoly (and at the same time a trading monopoly) imposes the same trading margin on the products of its competitors from other Member States as it does on its own products, it is discriminating, contrary to Article 37, against the imported products. It is, in effect, giving the same treatment to different situations, that of the goods which it produces and that of imported goods. Article 37 sets out precisely to prevent a Member State with a *production* monopoly from taking advantage of its *distribution* monopoly in order to create such a state of affairs.

The Italian tobacco monopoly is indeed a monopoly both on production and on distribution. As a distribution monopoly it fixes the margin for manufactured tobacco on the basis of the sales policy pursued by it in respect of its own products. That margin, however, applies equally to imported products. Whilst it is undeniably suited to the circumstances of the monopolized products, it is not necessarily suited to those of imported products, since it would appear difficult for a State not to seek to favour the marketing of its own products. Thus, not only are importers no longer at liberty to grant retailers whatever remuneration they may consider to be most appropriate, but they are forced to remunerate them in the manner stipulated by their direct competitor, the Italian State as holder of the production monopoly. The Commission finds it difficult to imagine a situation in which discrimination

1 — Reasoned opinion of 13. 11. 1980, p. 9.

2 — A principle acknowledged in particular since this Court's judgment of 14. 12. 1962 in *Commission* v *Luxembourg and Kingdom of Belgium* (the so-called "Gingerbread" case), Joined Cases 2 and 3/62 [1962] ECR 425; see also *inter alia* the judgment of 9. 12. 1981 in *Commission* v *Italy* (the so-called "Wine-vinegar" case), Case 193/80 [1981] ECR 3019 at p. 3033, para. 17.

regarding the conditions of supply and marketing would be more blatant.

The monopoly therefore creates a situation analogous to that of the private producer seeking to impose on his competitors the margin which he himself fixes for the retailing of his own products; yet an arrangement between undertakings in the Belgo-Luxembourg market having the effect of prohibiting the parties thereto from "negotiating with wholesalers individual margins and more advantageous benefits according to the market situation" was held to be a restriction on competition prohibited by Article 85 (1) of the Treaty. [1]

Lastly, foreign products are on the whole more expensive than domestic products. It follows that imposing a fixed margin which is expressed as a percentage, and which therefore varies according to the retail price, weighs more heavily in real terms on the expensive product, which is generally the imported one, than on the Italian product, which is usually cheaper. If, however, in order to eliminate that disadvantage, importers wish to reduce the remuneration of their retailers, they could not do so: the system of fixed margins prevents them from doing so.

B. The fixing by the State of standard trading margins is also liable to distort competition within the common market, especially on Italian territory. The reason is that it favours brands of tobacco which have already been introduced and are familiar in that territory, as opposed to new brands which suppliers in other Member States migth wish to market there. The Italian system prevents them from negotiating with distributors larger margins, in the form of marketing premiums. The system thereby restricts the choice of marketing strategy; it precludes the possibility of adapting strategy to the individual character of the markets in each of the various tobacco products and to developments occurring on any of those markets.

The disadvantage is aggravated by the ban on all forms of advertising in that field. The Commission considers that the fixing of standard margins is liable to distort competition and that it adversely affects the *equality of opportunity* which must be accorded to products imported from other Member States, in relation to national products. [2] That concept brings us back to discrimination: dictating that the same margin shall be applied to new products as to products already known on the market is equivalent to treating different situations identically without any objective justification.

V — In the interests of clarity, I have classified the replies of the Italian Government to the above objections into three categories, as follows:

(i) Replies covering both objections;

(ii) Replies to the first objection;

(iii) Replies to the second objection.

A — 1. By way of a general reply, the Italian Government states that the measure at issue may not be considered discriminatory and hence contrary to the

1 — Judgment of 29. 10. 1980 in the Fedetab case, mentioned above, para. 110 at p. 3257 and paras 131 to 134 at pp. 3263 and 3264.

2 — Para. 13 (cited above) of the judgment of 13. 3. 1979 in *Hansen*, Case 91/78, at p. 954.

first paragraph of Article 37 (1) merely because it applies without distinction to foreign and to domestic products.

However, the Commission contended in its reply that in the common market as a whole the standard margin discriminates against producers in other Member States.

It does not appear to be necessary for me to express any views as to the merits of the Commission's assertion that it is at Community level that the examination should be conducted as to whether or not there has been an infringement of Article 37, since this Court has established that that provision prohibits measures having equivalent effect to quantitative restrictions on imports. It is therefore sufficient to determine whether the imposition of the same fixed percentage margin for both products from other Member States and products subject to the monopoly is capable of constituting an impediment — albeit an indirect and potential one — to imported products on the Italian domestic market. In other words, the objection is inadmissible because it rests on too narrow a view of Article 37, and one which has been repudiated by this Court.

2. The Italian Government goes on to maintain that the present system is not discriminatory, because it enables traders to calculate all the constituent parts of the retail price, including the amount of the margin, whenever they select that price. The system is thus a "transparent" one as regards the various components of the ultimate price.

Whilst it is clear that when importers select a retail price for their products they know how much the trading margin will be because the latter is a fixed percentage of the former, it would appear difficult to infer from that that the system at issue does not ultimately restrict trade or distort competition.

3. The Italian Government ventures further, contending that the abolition of the system of standard margins would actually be discriminatory because it would make it possible for retailers to favour certain suppliers to the detriment of others.

That is allegedly so because only the largest manufacturers would be in a position to grant high margins which would attract retailers. They could thereby gradually oust the smaller manufacturers from the legal market, and such manufacturers might then be tempted to sell their products on the black market.

It is, in the first instance, wrong to deny that Italian retailers of tobacco may influence marketing. After all, they are at liberty to recommend a given product from a given manufacturer rather than some other product, in spite of the ban on advertising, either by word of mouth or (for example) by the arrangement of their displays.

In the second place, it is difficult to imagine that the abolition of the present system whereby the State dictates a fixed margin and its replacement by, for example, a system whereby margin is freely chosen from within a given range, could have the slightest influence on the volume of smuggling in Italy. The latter is adequately explained by other factors which I need not recite here.

None of the general arguments put forward by the Italian Government in its defence, therefore, appear to me to be convincing.

B — I shall now turn to the arguments specifically directed to the Commission's first objection.

1. The Italian Government contends that it did not fix the percentage of the "agio" [margin] by reference to the sales policy which most favoured the products subject to its monopoly, because it must take account of a whole series of other factors, in particular the demands of tobacconists and the repercussions of tobacco prices on the cost of living and — via the indexation clauses ("scala mobile") — on wages. It also points out that since foreign products are on average more expensive and since the margin varies according to the price, it is on those products that retailers collect the largest margin in absolute terms.

2. Those arguments of fact, although in some ways relevant, are insufficient in themselves.

As to the supposedly greater interest on the part of retailers in selling foreign products rather than domestic ones, it should be observed that those retailers must be approved by the monopoly and are consequently liable to be asked by the latter, as a *quid pro quo*, to give preference to its own products in spite of the financial advantage alluded to. The retailers, moreover, are not the only group affected by the question at issue; the advantage described by the Italian Government may be neutralized by the drawbacks experienced by traders higher up in the marketing process.

However, leaving aside the question as to whether retailers do indeed have an interest in selling foreign products rather than domestic ones, or whether the monopoly fixes prices to suit its own iterests and therefore to the detriment of its foreign competitors, the main point to be ascertained is whether the system organized by the monopoly may be exploited in a discriminatory, or at least obstructive, manner in terms of trade within the Community. As Mr Advocate General Warner emphasized in his Opinion in the *Manghera* case, [1] Article 37 precludes, in just the same way as Articles 30 to 36, *potential* restrictions on trade between Member States. [2] The textual argument used by Mr Advocate General Warner, relying on "the use in Article 37 (1) of the word 'ensure' ", assumes its full value here: "The abolition of something is not 'ensured' if the possibility of its occurrence remains".

The case-law of this Court has demonstrated the logical consequence of the fact that a measure having equivalent effect is exactly the same in Articles 37 and 30.

That line of argument leads me to sympathize with the Commission's attitude. Nevertheless, its reasoning cannot be accepted in its entirety: the fact that the Italian monopoly is a monopoly both on production and on distribution does not indicate *ipso facto* that it organizes the marketing of the products so as to favour its own goods and place those of its competitors in other Member States at a disadvantage. That is a mere allegation, unsupported by the slightest shred of evidence. But I

1 — Reference given above, at p. 108

2 — Endorsed by the Opinion of Mr Advocate General Lagrange in the case of *Costa* v *ENEL*, cited above.

do take the view that the situation described is dangerous and may lead to abuses, and in particular that the monopoly's fixing of a standard margin for its own products and those of its competitors *may* have discriminatory or obstructive effects as far as importers of manufactured tobacco from other Member States are concerned.

I refer here to the arguments of Mr Advocate General Roemer in his Opinion in the case concerning milk centres in Italy, [1] and I share his view: "When bodies mentioned in Article 37 of the Treaty possess an exclusive right of sale, the question should consequently be asked whether discrimination with regard to nationals of other Member States *necessarily* follows therefrom. As the Commission has shown, that question required an affirmative answer, at least as regards the *possibility* of discrimination, where the State reserves to itself the exclusive right of sale, *since it is possible that in so doing that State is seeking to defend interests which are not purely economic.* This is *a fortiori* the case where the exclusive right of sale is granted to a body which itself produces or processes the goods which it distributes. In applying these considerations to the facts in the present case, taking account of the fact that as a general rule only processed milk may be the subject of international trade, it may be assumed in fact that the milk centres which have an exclusive right of sale will give preference to the sale of the milk which they have themselves processed". [2]

The Opinion is all the more worthy of attention in that the monopoly at issue in that case was likewise — as the Court will have observed — a monopoly both on production and on marketing, and that the Commission's objection there was similar to the one which it has expressed in the present case.

C — The replies directed by the Italian Government specifically to the Commission's second objection remain to be examined.

1. I shall merely remind the Court of the argument adduced (somewhat as a preliminary) by that Government concerning the inadmissibility of the second objection. As I have said, the Court's judgment of 13 March 1979 in *Hansen* refutes the notion that alleged distortions of the conditions of competition — at least of the kind I have specified — may not be examined in the context of Article 37 otherwise than in relation to alleged discrimination.

2. In the second place, the Italian Government claims that competition has not in fact been distorted, since the market share of imported tobacco has been increasing considerably in Italy for a number of years. In support of that contention the Government put forward in the course of the written procedure figures which differ appreciably from those produced by the Commission. In response to the request made by this Court at the oral hearing, a complete set of statistics for the period from 1970 to 1982 was supplied which does indeed bear out its claims. However, the basis on which the data were calculated is contested by the Commission because products manufactured in Italy under licence from abroad, in particular, are treated as foreign products, an objection which is not entirely irrelevant.

1 — Opinion delivered on 23. 2. 1972 in Case 82/71, *Pubblico Ministero* v *Sail* [1972] ECR 119, at pp. 143 and 144.

2 — Emphasis supplied.

Be that as it may, the figures supplied by the defendant government do not enable me to concur with the conclusions which it draws from them. Even if the market share of foreign products has increased under the system of standard margins, it has not been demonstrated that some other system could not have led to a higher rate of growth. In other words, the test proposed by the Italian Government does not furnish the desired proof.

In this case it is necessary, as I have said, to determine whether or not the measure under challenge is "capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States." [1]

For the reasons which make up the Commission's first objection, the reply is in the affirmative. The further point made by the Commission in its second objection, namely that importers are at present prevented from negotiating with retailers margins other than those imposed by the monopoly — marketing premiums in particular — clearly cannot but endorse, if endorsement is needed, that reply.

3. As for the total ban on advertising which, in the Commission's view, puts the less familiar foreign products at a disadvantage, the Italian Government puts forward two separate arguments:

(i) The ban is breached in the case of foreign products;

(ii) The ban has not in fact put them at a disadvantage.

On the first point, the allegation is in keeping with the fact. Moreover, it is undoubtedly reasonable to view the ban on advertising as a further factor which combines with the system of standard trading margins to increase the difficulties of market penetration experienced by any new product in Italy.

The Italian Government may therefore rightly take the view that, as the ban is partially breached in the case of foreign products but is not so breached in the case of national ones, it is the latter which are handicapped, in exact proportion to the gravity of the breach of the law committed by importers. None the less, it does seem that such breaches demand penalties for contravention of the law rather than the maintenance of discriminatory measures such as the standard trading margin — a procedure which, if the reasoning of the defendant government be pursued to its logical conclusion, one might attempt to justify by reference to the need to compensate for the breaches of the law banning advertising.

As for the second point, the argument is not relevant. The economic efficiency of some traders who manage to counteract the effects of legislation which is at least potentially protectionist does not appear to me to be adequate justification for its retention. Furthermore, the argument put forward by the Italian Government is not

1 — Judgment of 13. 7. 1966 in *Consten and Grundig* v *Commission*, Joined Cases 56 and 58/64 [1966] ECR 299, at p. 341; as the Court is aware, the judgment relates to competition, but very similar wording was adopted with reference to measures having equivalent effect in the Court's judgment of 11. 7. 1974 in *Procureur du Roi* v *Dassonville*, Case 8/74 [1974] ECR 837 at p. 852, para. 5.

very convincing. If the most widely sold foreign cigarette today was already on the market in 1962 (that is, before the law banning tobacco advertising came into force), whereas the most widely sold cigarette of domestic manufacture, today was not, that does not justify the inference that the ban on advertising has favoured the foreign product. The most that can be said is that foreign cigarettes have difficulty in establishing themselves on the Italian market, which was not the case with what is today the most widely sold cigarette of domestic manufacture.

4. Finally, the Italian Government is of the opinion that the absence of restrictions on competition is in any case demonstrated by the fact that importers are free to offer their product for sale at a more competitive price without their having to alter the retailer's margin.

However, like the Commission, I take the view that the fact that competition exists in retail prices does not permit its elimination in the matter of the retailer's margin of remuneration to be regarded as lawful. After all, it might be in manufacturers' interests to increase the margin rather than to reduce the resale price to the general public; yet, whereas the Italian State, as holder of the monopoly on both production and distribution, may alter either the margin or the resale price to the public as it pleases, importers may alter only the price, since apart from that they must abide by the margin which best suits the Italian monopoly.

It follows that even if Article 37 is construed in its most restricted sense, the measure under challenge is clearly incompatible with that provision. It may further be observed that the Court has rejected the strict interpretation, according to which the article prohibits only straightforward discrimination in the narrow sense of the word, excluding any impediment to trade and any restriction on competition between the economies of the Member States.

D — However, in view of the ambit of Article 37 now recognized in positive law, encompassing as it does in particular measures having equivalent effect to quantitative restrictions on imports in the same manner as Article 30, only one last point requires examination.

The prohibition laid down by Article 30 is limited by the saving clauses contained in Article 36, on the one hand, and by the trade legislation of Member States governing domestic and imported products without distinction and "recognized as being necessary in order to satisfy mandatory requirements", [1] on the other. Like the saving provisions in Article 36, such legislation must pursue non-economic ends. In my opinion, the unity of the chapter dealing with the elimination of quantitative restrictions — or at least, the relatedness of the matter [2] — dictates that the same should apply to measures inconsistent with Article 37.

It is, admittedly, impossible to justify such measures by referring expressly to Article 36, because the latter must be strictly construed and because its wording ("the provisions of Articles 30 to 34 shall not preclude ...") unambiguously rules out that course. Nevertheless, I think we may consider whether, in the context of Article 37,

1 — 20. 2. 1979, *REWE* v *Bundesmonopolverwaltung für Branntwein*, Case 120/78 [1979] ECR 649 at p. 662, para. 8.

2 — To quote Mr Advocate General Roemer in the *Sail* case mentioned above, [1972] ECR 119, at p. 145.

the exceptions listed in Article 36 and, in certain cases, other mandatory requirements make it "possible ... to say that [the measures in question] are not measures having an effect equivalent to quantitative restrictions on imports within the meaning of that article". [1] In other words, I would invite the Court to take the assimilation of Article 37 to Article 30 a step further by extending to the former the approach initiated by the Court in the so-called "Cassis de Dijon" judgment and subsequently clarified, in particular, by the so-called "Irish souvenirs" judgment and in the very recent judgment concerning Italian vermouth. [2]

Applying those principles to the present instance, the Court will find that only one of the arguments put forward by the Italian Government warrants *a priori* consideration in that connection, namely the argument based on consumer protection. However, a reading of the submissions on that point discloses that a study of its merits is unnecessary. The Italian Government alleges that the invariability of the margin protects consumers inasmuch as it safeguards them from uncontrolled price increases. The argument therefore relates to the economy and as such is inadmissible.

VI — The Italian Government puts forward in the alternative one last defence based on Article 90 (2) of the Treaty.

Under that provision, "undertakings ... having the character of a revenue-producing monopoly shall be subject to the rules contained in [the] Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

The provision is thus an exemption clause enabling activities which would normally conflict with the Treaty to escape from the prohibition which, as a general rule, results from that conflict. The Italian Government therefore relies upon it only in the alternative, that is to say, should the Court — like myself — consider the contested measure to be contrary to the first paragraph of Article 37 (1). Article 90 (2) constitutes an exemption clause and must be interpreted restrictively. [3]

As the Court is aware, the question of whether a Member State is entitled to rely on Article 90 to escape the application of Article 37 is a subject of doctrinal controversy. Thus, in Professor Franceschelli's view, "Article 37 must always take precedence over Article 90 inasmuch as if some of the monopolies falling within the broad scope of Article 90 introduce discrimination into the conditions under which goods are procured and marketed, they too must be adjusted so as to eliminate those disparities by the end of the transitional period, and thereby observe the principle of non-discrimination which is rightly said to be a fundamental principle of the Treaty ... Article 90 must, since it is a

1 — 17. 6. 1981, *Commission* v *Ireland*, Case 113/80 [1981] ECR 1625 at p. 1639, para. 9 (the so-called "Irish souvenirs" case).

2 — 20. 4. 1983, *Schutzverband gegen Unwesen in der Wirtschaft* v *Weinvertriebs GmbH*, Case 59/82 [1983] ECR 1217 at p. 1227, para. 11.

3 — 27. 3. 1974, *BRT* v *Sabam and NV Fonior*, Case 127/73 [1974] ECR 313 at p. 318, para. 19.

permissive rule, be subordinated to Article 37, the first paragraph of which contains a *mandatory rule*". [1]

Similarly, van Hecke (a senior French barrister) takes the view that "in its relation to Article 90, Article 37 must be seen as a special provision taking precedence over the more general provisions of Article 90". [2]

However valid those arguments may be, I concur with that great authority Colliard, in particular, in thinking that "the joint effect of the two texts ultimately gives priority to Article 90, which comprises wider-reaching and more definitive exemptions." The opposite solution seems, indeed, to deprive Article 90 of some of its utility.

Once that initial obstacle has been overcome, the following three conditions must also be satisfied before the provision may be invoked in this particular case:

(i) the Italian tobacco monopoly be a revenue-producing monopoly within the meaning of that article;

(ii) if it were not for the system of fixed margins, the monopoly's revenue-producing aim would be defeated;

(iii) the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

The Commission maintains that none of those conditions is satisfied.

I therefore propose to examine them one by one.

A — Is the Italian tobacco monopoly a revenue-producing monopoly within the meaning of Article 90 (2)? The question gives rise to another one: what is a revenue-producing monopoly within the meaning of that provision?

In the Commission's view, the Italian tobacco monopoly is not a revenue-producing monopoly, and the Italian Government has no right to invoke Article 90 (2). A monopoly may not be described as a revenue-producing one when its function is to levy a tax on consumers for the benefit of the exchequer. Moreover, its essential aim must be to maximize tax revenue. However, the tax revenue derived from tobacco sales in Member States in which there is no marketing monopoly is no lower than the revenue collected in States which do hold such a monopoly. Indeed, a study carried out on tax revenue from manufactured tobacco in 1978 revealed that the two States holding a marketing monopoly did not head the list of Member States in terms of tax revenue derived from manufactured tobacco, irrespective of the criterion chosen.

The Italian Government puts forward many arguments to refute that. It begins by adopting Professor Pappalardo's remark that, "in practice, all undertakings having the character of a revenue-producing monopoly pursue, in parallel with the objective which marks them as such, other and different objectives which can hardly be divorced from the first one in view of the fact that a modern revenue-producing monopoly is an ensemble of measures serving a number of purposes which are closely interrelated". [3] Thus, as Professores Frignani and Waelbroeck have also noted, "revenue-producing monopolies are State monopolies the purpose (even if not the sole purpose) of which is to obtain tax revenue". [4]

1 — *Les Monopoles dans le Marché Commun, l'Article 37 du Traité de Rome*, Report (1965-67) of a study group of the International League Against Unfair Competition, Milan 1968, p. 75.

2 — "Government Enterprises and National Monopolies under the EEC Treaty", *Common Market Law Review*, Vol. III, 1965-66, No 4, p. 454.

3 — Commentary on Article 90 in *Commentario CEE* by Quadri, Monaco and Trabucchi, Milan 1965, p. 696.

4 — *Disciplina della Concorrenza nella CEE*, Naples 1978, p. 120.

The Italian Government goes on to criticize the restrictive approach taken by the Commission. It contends that a monopoly remains a revenue-producing one even if its objective is not to maximize tax revenue.

The Commission concedes that its interpretation is a restrictive one, but considers that such an interpretation is dictated by the dispensatory character of Article 90 as compared with the principle of the Treaty.

The Commission's position here would appear to be extremely difficult to support. Admittedly, it is undeniable that Article 90 (2), being a saving clause, must be interpreted strictly. Similarly, there is no real dispute as to whether a monopoly may be both a commercial monopoly within the meaning of Article 37 and a revenue-producing monopoly within the meaning of Article 90, because the Commission has admitted as much in its reply. Indeed, it is in my view impossible to support the contrary view. [1]

In the circumstances the crux of the matter is whether the aim of maximizing tax revenue constitutes an indispensable component of a revenue-producing monopoly. I think not. As the Italian Government has pointed out, it may be that that aim is not the one primarily pursued over a more or less lengthy period of time on grounds of general economic policy (to fight inflation), of social policy (priority given to raising direct taxation) or of sectoral policy (for example, the revival of the consumption of manufactured tobacco under pressure from raw tobacco producers, who are influential in certain regions). The monopoly does not necessarily thereby lose its revenue-producing character. In my opinion, it is sufficient, for a monopoly to be regarded as a revenue-producing one, that it should have been created for the purpose of obtaining more revenue than could have been obtained without it.

Furthermore, the lower levels of tax revenue in countries having a monopoly, as compared with the revenue in countries having no monopoly, is obviously not sufficient proof that a monopoly is not a revenue-producing one. The lower levels may be due to numerous factors unconnected with the existence of the monopoly. Some examples which may be cited, amongst many others, are the tax structure (the shares taken by VAT and excise duty respectively, and the share taken by the specific and the proportional — *ad valorem* — components of the excise duty), the way in which production and distributation are organized (in the latter case, the rules on advertising for example), or indeed, merely the habits of the consumer.

Moreover, even if the Commission's restrictive approach were accepted such a finding would not be conclusive. A monopoly does not cease to be a revenue-producing one merely because tax revenue is actually lower than had been sought by the creation of a monopoly clearly intended by its authors to have a fiscal role. The opposite view confuses the purpose and the effect of creating a monopoly — in other words, it confuses intention with result.

Again, although I prefer an autonomous Community definition of the term

1 — It may be noted that in the *Manghera* case the positions of the Commission and Italy were reversed: see the Opinion of Mr Advocate General Warner, at p. 106.

"revenue-producing monopoly" to reliance upon national definitions, I consider it relevant to note that in Italian law the tobacco monopoly is regarded as "the very model of a revenue-producing monopoly". [1] The same, indeed, applies to the French tobacco monopoly under French law. [2] It therefore comes as no surprise that the Italian Court of Cassation has already held the Italian tobacco monopoly to have a revenue-producing character and thereby to fall within the ambit of article 90 (2). [3]

In any event, even proceeding on the basis of an autonomous definition, it is my opinion, for the reasons I have given, that the first condition for the application of Article 90 (2) is satisfied: the Italian tobacco monopoly is indeed a revenue-producing monopoly within the meaning of that provision.

B — In order for the exemption in Article 90 (2) to be applicable, it is further necessary that without recourse to standard margins, "the performance ... of the particular tasks assigned to [monopolies]" would be obstructed. In my view it is for the Member State relying upon that clause to demonstrate that; it is on it that the onus of proof lies. [4]

The above formula actually imposes two conditions. First, the legal exemption applies solely in respect of certain activities connected with the special aim of the revenue-producing monopoly. [5] Should that condition be fulfilled, the exemption cannot operate unless the application of the normal Treaty provisions, including Article 37, frustrates the special role assigned to the monopoly. In other words, the normal Treaty provisions cannot be escaped merely on the ground that their enforcement would make the monopoly's purpose more difficult to achieve. Further, there must be no alternative, if the monopoly is to carry out its purpose, but to infringe the other provisions of the Treaty. There can be no doubt about that in view of the wording used: "*ver*hindert" in German and Dutch, "fait échec" in French ["obstruct" in English]. [6] The conditions in question are therefore extremely restrictive ones, which should be satisfied only in very exceptional cases.

I do not consider that they have been satisfied in this case.

As far as the Italian Government is concerned, the fact that the margin is a fixed one contributes decisively to ensuring that public resale prices for the products subject to the monopoly remain transparent and verifiable, and to controlling the phenomenon of smuggling. It further guarantees the neutral and equal standing of the retailers: neutral, in that they must be perfectly unbiased as regards the products which they sell; equal, in that there must be no competition between them.

It will be observed that the Italian Government is merely repeating the arguments which it has already employed against the Commission's objections and which I did not consider to be well

1 — Observations of the Italian Government in *Manghera*, mentioned above, [1976] ECR 91, at p. 95.

2 — Statement by the representative of the French Government in Case 90/82.

3 — Corte di Cassazione, Sezione III, judgment of 17. 1. 1975, mentioned in Eversen and Sperl, 1975, No 1048; endorsed by Deringer in *The Competition Law of the EEC*, New York 1968, No 888, p. 252.

4 — Professor Arved Deringer agrees: op. cit., No 894.

5 — Deringer, op. cit., No 892.

6 — Deringer, op. cit., No 894.

founded. Replacing the present system of uniform margins with a system consistent with Article 37 cannot prevent the Italian tobacco monopoly from achieving its aim of producing revenue. I am not even sure that a system of variable margins decreases — all things being equal — the tax revenue produced by the monopoly.

Under a system such as that it is indeed probable that the importers would increase the margin on some of their products, as the Italian Government claims to fear, but the increase would be bound to create a corresponding increase in tax revenue. Even if the importers were to reduce the "aggio" on other products of theirs, thereby causing their retail prices to fall, it would not necessarily result in lost tax revenue because the fall in the prices might be offset by an increase in the volume of sales.

C — Since the Italian Government cannot avail itself of the right, granted in certain circumstances by the first sentence of Article 90 (2), to derogate from the legal rules generally applicable under the Treaty, it is pointless to consider whether the qualification of that right in the second sentence of the same article is such as to preclude it from relying on that right in this particular case. Should the Court reach the opposite conclusion, however, I consider that the wording of the second sentence does not prevent the first sentence from applying here, the reason being that in order for the normal operation of the Treaty provisions to resume where the conditions set forth in the first sentence of Article 90 (2) have been fulfilled, the exclusion of those provisions must affect the development of trade to such an extent as would be contrary to the interests of the Community.

There is no need to decide the controversial question as to the meaning of the latter concept; it is sufficient to note that the system of uniform trading margins has not affected the *development* of trade between Member States. As the Italian Government has rightly observed, the wording is appreciably more restrictive than that which appears in this Court's classic definition of measures having equivalent effect to quantitative restrictions on imports. There, emphasis is placed on the expansion of trade within the common market; the condition in question will not therefore be satisfied unless the negative effect which the contested measure has on the development of trade is substantial. [1] A measure which is liable to impede trade within the Community, and which is therefore incompatible with Article 37, will not affect the development of trade within the meaning of Article 90 (2).

That is precisely the case with the uniform trading margin for manufactured tobacco in the Republic of Italy. The figures supplied by the Italian Government in response to the request made by this Court during the hearing prove at all events, even if the Commission's criticisms concerning their basis of calculation are endorsed, that the volume of manufactured tobacco products imported from abroad and sold in the Republic of Italy (see Table 5, Column 4) has expanded more than the volume of the same products made in that country either under a domestic brand-name or under foreign licence (same table, Column 2, for domestic

1 — See also: Deringer, op. cit., No 900.

products; Column 3, for products under foreign licence).

Nevertheless, as the Italian Government has failed to adduce evidence that the system of uniform trading margins is indispensable to the achievement by its national monopoly on tobacco of its aim of producing revenue, its attempt to elude the prohibition contained in Article 37 on the strength of Article 90 (2) must fail.

I therefore conclude that this Court should hold that:

1. By maintaining a system of fixed percentage margins for retail sales of manufactured tobacco, the Republic of Italy has failed to fulfil its obligations under the first paragraph of Article 37 (1) of the EEC Treaty.

2. The Republic of Italy must pay the costs of the proceedings.