consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 16 November 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 21 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

The present proceedings for a preliminary ruling referred by the Belgian Hof van Cassatie (Court of Cassation) concern the interpretation of Article 3 (f), the second paragraph of Article 5, Article 86, Article 90, Articles 30, 31 and 32 of the EEC Treaty and certain provisions of Council Directive No 72/464/EEC (OJ, English Special Edition 1972 (31 December), p. 3) on taxes other than turnover taxes which affect the consumption of manufactured tobacco which entered into force on 1 July 1973.

The following preliminary observations may be made.

In Belgium excise duty and value added tax are imposed on manufactured tobacco. For goods produced in Belgium the producers are liable for the tax whereas for imported products the importers are liable. The tax is levied by means of tax labels which may be obtained from the tax authorities. They may be affixed either by the manufacturer or by the importer; however as they must be affixed under the cellophane cover where such cover exists (and that appears to be the rule for cigarettes) even in the case of imported goods the affixation is usually carried out in practice by the (foreign) manufacturers. The basis of assessment for the tax is the retail price stated on the tax label. In principle it is freely determined by the manufacturers and importers. However it must be noted that because there is State control over maximum trade margins in Belgium price increases must be authorized by the Minister for Economic Affairs. Similarly

1 — Translated from the German.

price reductions must evidently be notified and certain periods must elapse before they can take effect.

For the present proceedings it is of primary importance that the retail trader is obliged to comply with the prices stated on the tax labels. This follows from Article 58 of the Law of 3 July 1969 on the introduction of the value added tax code which reads as follows:

'In respect of manufactured tobacco which is imported into or produced within this country the tax shall be levied whenever excise duty has to be paid in accordance with the relevant provisions of tax laws or regulations. The tax shall be calculated on the basis of the price stated on the tax label which must be the compulsory selling price to the consumer or, if no price is specified, on the basis adopted for the imposition of excise duty.'

Accordingly the Order on excise duty of 22 January 1948 was amended by a Ministerial Order of 9 April 1974 with the result that the order on the taxation of tobacco provides that henceforth the products in question must be sold to the consumer at the prices stated on the tax labels.

The predecessor in law of the appellant in the main proceedings which operates department stores in Belgium did not comply with the provisions of the said Article 58 when in 1972 it sold cigarettes at a price below that stated on the tax label. Consequently the respondent in the main proceedings, the Association of Tobacco Retailers (ATAB) made application to the Rechtbank van Koophandel (Commercial Court), Brussels, for an interlocutory injunction. That application was granted by the President of the said court. Because INNO's conduct was regarded as unfair competition and an infringement of Article 58 of the above-mentioned law that undertaking was ordered to desist from offering for sale or selling cigarettes at a price lower than that stated on the tax label.

INNO appealed against that order on the grounds that the said Article 58 was incompatible with the provisions relating to competition in the EEC Treaty and the Treaty provisions on the free movement of goods and also conflicted with the above-mentioned Council directive under which only maximum prices may be determined. As the Hof van Beroep (Court of Appeal) did not accept INNO's submissions that undertaking subsequently appealed to the Hof van Cassatie (Court of Cassation). It argued that the judgment of the Hof van Beroep infringed Article 3 (f), the second paragraph of Article 5, Articles 85, 86 and 90 and also Articles 30, 31, 32 and 36 of the EEC Treaty and finally the provisions of Council Directive No 72/464/EEC because it assumed the compatibility of Article 58 of the Belgian Law with the EEC Treaty.

Pursuant to that argument by judgment of 7 January 1977 the Hof van Cassatie stayed proceedings and referred the following comprehensive series of questions for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

1. (a) Must Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty be interpreted as meaning that a Member State is prohibited from introducing into or maintaining in force in its legislation *inter alia* a provision whereby, for the sale to consumers of both imported and home-produced goods, a selling price is fixed by the manufacturers or importers if the provision is of such a nature as to encourage the abuse by one or more undertakings of a dominant position within the Common Market within the meaning of Article 86 of the EEC Treaty?

   In this respect does the prohibition cover *inter alia* the introduction

or the maintenance in force of a national legislative provision which encourages the abuse by one or more undertakings of a dominant position which exists because the manufacturers and importers of manufactured tobacco can oblige the retailers in a Member State to comply with the selling prices to the consumer fixed by the former?

(b) Is the introduction or the maintenance in force of a national provision such as that referred to under (a) prohibited even if it is general in scope in that it relates to manufacturers and importers in general, that is, even those which have no dominant position or make no abuse thereof and *a fortiori* if the abuse of a dominant position was neither its aim nor its object nor its effect?

In such a case must not the provisions of the EEC Treaty referred to under (a), possibly in conjunction with others, be interpreted as meaning that the introduction or maintenance in force of such national legislative provisions is by no means prohibited but simply that that provision can have no effect on the scope of application of Article 86 of the EEC Treaty in the sense that abuse of a dominant position remains unlawful even if it is encouraged by this legislative provision in the particular circumstances?

2. Must Article 90 of the EEC Treaty be interpreted as meaning that 'undertakings to which Member States grant special or exclusive rights' exist where, as distinct from manufacturers and importers of other products who must notify the Minister for Economic Affairs of any increases in price which they introduce but are not able to fix the compulsory selling price to the consumer, the State imposes the same obligation to notify any price increases they introduce on manufacturers and importers of certain products but, by means of a legislative provision which after notification makes the increased price for sale to the consumer of these products compulsory, gives to them indirectly the possibility of themselves fixing the compulsory selling price to the consumer?

If this question is answered in the affirmative can the retention of the above-mentioned special or exclusive rights be contrary to the provisions of the EEC Treaty namely those referred to in Article 7 and Articles 85 to 94 inclusive?

3. Must Articles 30, 31 and 32 of the EEC Treaty be interpreted as meaning that a 'measure having equivalent effect' within the meaning of the above-mentioned Article 30 includes rules in a Member State whereby a fixed price is imposed for the sale of certain products to the consumer, namely the price stated on tax labels and which, according to the particular case, is determined by the manufacturers of these products who are established in the State or by the importers of the same products in particular from other Member States? Or should these articles be interpreted as meaning that such rules only constitute such a measure when it is in fact certain that it can hinder intra-Community trade directly or indirectly, actually or potentially, a matter which must be determined by the national court in each case?

Is the position different if, after ratification of a price increase and after compliance with a specified waiting period the Member State permits the producers and importers to fix freely the prices including the retail prices, but publishes the prices and, by means of the above-mentioned measure, ensures compliance with them?

4. (a) Do the provisions of Directive No 72/464 of 19 December 1972 of the Council of Ministers, in particular Article 5, have direct effect with the result that, *inter*

alia, individuals have the right to rely on them before national courts?

(b) Must Article 5 of Directive No 72/464 of 19 December 1972 of the Council of Ministers on taxes other than turnover taxes which affect the consumption of manufactured tobacco be interpreted as meaning that the Member States are prohibited from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, that is to say, where it is not possible to exceed the maximum and it is not permissible to sell the product at a lower price?

Before we can examine these questions it should be mentioned that in 1974 INNO lodged a complaint with the Commission for the initiation of competition proceedings against Fedetab, an association of most of the Belgian and Luxembourg tobacco manufacturers which are in part also importers, against NFGT, an association of all the main Belgian tobacco wholesalers and against ATAB, the association of tobacco retailers in Belgium. In so doing INNO was concerned with a number of agreements between 1967 and 1969 which Fedetab had concluded with the association of wholesalers and with Belgian wholesalers and retailers and which covered compliance with the prices stated on the tax label, a ban on price reductions and a refusal to supply traders who did not comply with these price provisions. Consequently in July 1974 the Commission instituted proceedings under Regulation No 17 of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87) and in July 1975 it notified Fedetab of a number of complaints. Apparently those proceedings are still pending with the Commission. It is also of importance that INNO submitted an application to the Commission to have proceedings brought against the Belgian State under Article 169 of the EEC Treaty because of the incompatibility of the aforementioned Article 58 with the provisions of the EEC Treaty and Council Directive No 72/464/EEC of 19 December 1972. The Commission accordingly undertook an examination of the Belgian provisions in the light of Article 30 of the EEC Treaty but evidently reached the conclusion that the bringing of an action was not justified.

As we have seen the court making the order for reference is faced with the question whether Article 58 of the Belgian Law of 3 July 1969 which prescribes compliance with the prices stated on the tax labels is compatible with Community law. In my examination of the individual questions I shall take the liberty of departing from the order in which the Hof van Cassatie has chosen to put them. Because they appear to me to be the simplest I shall begin with the considerations relating to the 1972 Council directive. Afterwards I shall turn to the problems in connexion with Articles 30 et seq. of the EEC Treaty concerning measures having an effect equivalent to quantitative restrictions on imports. Finally I shall also turn to the Community law on competition and examine the solution of the present case in the light of Article 3 (f), the second paragraph of Article 5 and Article 86 on the one hand and of Article 90 of the EEC Treaty on the other.

1. The Hof van Cassatie has referred a question in two parts concerning the Council Directive of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco. On the one hand it asks whether the directive, and in particular Article 5, has direct effect in the sense of the direct applicability of Community law because only if that is the case can a national court use it as a standard for the

examination of national law. On the other hand the Court is asked to examine whether there may be derived from the aforementioned Article 5 the prohibition on Member States against introducing legislative provisions whereby a selling price to the consumer, namely the price stated on the tax label, is imposed.

In examining this question it seems to me sensible to look at the second part first.

To this end I may first refer to the wording of Article 5 (1) of the Council directive. It provides that:

'Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices.'

The appellant in the main proceedings which relied on this provision before the Belgian court takes the view with particular reference to the preparatory documents and the preamble to the directive that the legislature's intention was that only maximum prices should be determined and that for the rest the formation of prices should be free. The addition in the second sentence — 'legislation regarding the observance of imposed prices' — can, if it is to be compatible with the Treaty, only relate to the prices which are individually and contractually fixed by the manufacturer. On the other hand this is not to be regarded as legalizing a collective system in the sense of an authorization for the Member States to fix prices or to give such authority to the manufacturers and importers.

This contrasts with the view of those who argue that in that sentence the Council expressly approved a system of compulsory prices; from the fact that no harmonization was thereby sought they conclude that such a system is not to be regarded as an obstacle to the free movement of goods.

A third view lies between the two as it were. For its proponents it is clear both from the genesis and from the wording of the provision that the directive does not only recognize the principle of maximum prices. Moreover such an objective concerning prices would be out of place in a directive concerning taxation. On the other hand on this view the second sentence of Article 5 (1) cannot be understood as expressly authorizing a fixed price system. That would be outside the scope of harmonization. The sentence referred to should rather be understood as a mere reference to the powers of the Member States with regard to price fixing, as a derogation for national fixed price rules whereby prices are either fixed directly or the fixing of prices by the manufacturers and importers is authorized. The question whether such systems could exist must properly be judged in the light of the general provisions of the Treaty from which the Council itself may not deviate.

On this issue it is in my opinion simple to show that the view advocated by INNO is not correct and that therefore the prohibition of the establishment of fixed price rules cannot be deduced from the reference in the directive to maximum retail prices.

It may be said straight away that such an objective relating to competition law would have no proper place in a directive seeking to harmonize the bases for taxation.

Reference may also be made to the wording of the second sentence of Article 5 (1). Because legislation by its very nature has a general scope the

expression 'legislation regarding the observance of imposed prices' certainly supports the assumption that the reference is to collective systems of price fixing and therefore not merely individual, contracturally agreed fixed prices.

Not least the genesis of the provision clearly points in this direction. In the amended proposal for a directive on taxes other than turnover taxes which affect the consumption of manufactured tobacco which the Commission laid before the Council on 20 November 1970 Article 6 (1), which subsequently became Article 5 (1), merely lays down, after the sentence providing that the manufacturers and importers may determine the maximum retail price for each of their products, that 'This provision may not, however, hinder implementation of the national systems of legislation, regarding the control of price levels'. In the Economic and Social Committee which had to give its opinion on the matter it was sought, on grounds to which I shall subsequently return, to replace 'maximum retail prices' by 'fixed retail prices' or 'retail prices'. The version proposed by the Economic and Social Committee for Article 5 (1) and Article 6 (1) read accordingly. In addition the Economic and Social Committee (cf. JO 1971 No C 93, p. 12) proposed the addition to the second sentence of Article 6 (1) in the context of the derogation for national legislation the words 'or for the determination of fixed retail prices'. A draft resolution of the Committee on Finance and Budgets of the European Parliament is in accord with the last-mentioned points and the ground for this is given in the report of 11 October 1971 (European Parliament, Working Document No 117/71 of 11 October 1971), namely that in the wording of the directive it should be made clear that the determination of fixed retail prices is not prohibited. The Parliament itself went beyond this in its decision of 16 December 1971 (JO 1972 No C 2, p. 10). In its opinion as well, as such a system was known to all Member States, both Article 5 and Article 6 of the directive should refer to fixed retail prices in place of maximum retail prices. Apparently in view of the impending entry of three new Member States who did not use such a system the Council was not prepared to accept that but adopted the solution of adding in the second sentence of Article 5 (1) the proviso as to the observance of imposed prices. In my view in the light of the genesis of the directive alone there can exist no doubt that the provision was only intended to refer to the prices fixed by manufacturers and importers and to compelling retail traders to observe those prices.

In addition this is expressly made clear in Council minutes according to which the Council and Commission agree that 'prix imposés' (imposed prices) shall be understood as meaning 'les prix fixés par les fabricants ou les importateurs et, éventuellement, homologués par l'Etat' ('the prices fixed by manufacturers or importers and, if need be, authorized by the State'). In any event it is not possible to accept INNO's view that that wording envisaged only prices which the State declared admissible as authorized maximum prices for in such a case it would have been sufficient merely to refer to legislation regarding the control of price levels.

It is also not possible to rely against this interpretation on the eight recital in the preamble to the Council directive: 'Whereas the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco'. In my opinion that was merely intended to make it clear that the State was as far as possible not to influence the formation of prices. On the other hand in view of the clear objective of the directive, taking account of the wording of Article 5 (1) and the genesis of the directive set out above that rather imprecise consideration is hardly sufficient to show that it was the

intention of the Council that the free formation of prices at the level of retail trade was to be guaranteed.

Accordingly interpretation of Article 5 of the directive does not lead to the conclusion that in principle there may only exist maximum retail prices and that the prices fixed by manufacturers or importers cannot be described as binding. In this connexion that finding is sufficient. In other words we may here leave undecided the question whether the directive sought to indicate that fixed price rules are approved by the Council which, if it was the intention, would necessarily raise the further question whether that is possible under the Treaty or whether objections as to the validity of the directive would arise from the general principles of the Treaty.

In fact it is no longer necessary to examine the other part of the question relating to the directive as to whether Article 5 (1) constitutes a provision having direct effect on which individuals may rely before national courts as it has become clear that Article 58 of the Belgian Law of 3 July 1969 is not compatible with the provisions of the directive. The following brief remarks may however be made. Certainly directives as a whole cannot have such effect — this is evident from previous decided cases; it is however possible that individual provisions of a directive may have such effect. A precondition is that they are clear and unconditional provisions, that they prescribe a particular course of conduct, a specific result and that they make no reservation as to discretionary power for the Member States. In this respect I refer to the judgment in Case 9/70 *(Franz Grad* v *Finanzamt Traunstein,* judgment of 6 October 1970 [1970] ECR 825), Case 41/74 *(Yvonne van Duyn* v *Home Office,* judgment of 4 December 1974 [1974] ECR 1337) and Case 51/76 *(Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen,* judgment of 1 February 1977 [1977] ECR 113). However it is clear from what I have stated above that in the case of the first sentence of Article 5 (1) on which the appellant in the main proceedings relies those conditions are not satisfied because the following sentence which must be looked at in conjunction with the first sentence contains a proviso. In the terms of that sentence exceptions to the maximum price rules are possible for Member States in that the Member States are given a discretion either to go no further than regulating maximum prices or to undertake the control of price levels in fixing maximum prices or to declare that the maximum prices chosen by the manufacturers and importers are binding.

To summarize therefore it cannot be concluded from Council Directive No 72/464/EEC that Article 58 of the Belgian Law of 1969 is inapplicable.

2. Before I turn to the further questions relating to the interpretation of Article 30 and the provisions of the EEC Treaty relating to competition it would be useful in my opinion to examine the view put forward by ATAB that the provisions in question cannot be taken into consideration at all in the examination of the fixing of prices in Belgium.

According to that view a high proportional tax such as that which in Belgium is calculated on the basis of the retail price necessarily entails a system of fixed prices. It serves to ensure that the State actually receives the income from the tax on tobacco which is planned in the budget. If, on the other hand, differences in prices at the retail trade level were permitted there would exist the danger because of the small profit margin in this trade that retail traders would not be able to withstand the pressure of competition and it would then be necessary to face considerable loss of tax as happened in Germany at the beginning of the thirties. In addition the consumer is not interested in price competition at the retail trade level. The transparency which exists in the market

in tobacco products in fact ensures that in the event of price cutting the producers themselves introduce general price reductions and that tax labels of a lower value are used. The consequent reduction in tax receipts is however immediately counterbalanced by an increase in the tax on tobacco so that the forward planning can be adhered to; thus in reality the consumer only has a temporary advantage with such price reductions. If however fixed prices to the consumer are thus to be regarded as an essential component of the tax system and in the case of the taxation of tobacco as simply inherent in that system, it would be not inconceivable to deal with this factor solely in the context of the harmonization provided for in Articles 99 et seq. of the Treaty which prevail over the provisions relating to quantitative restrictions on imports and the law relating to competition. In addition it is clear that the harmonization is still in its early stages and at any event in the context of the first stage which has so far been reached has not gone so far as to cover the present issues. In fact various obstacles to the freedom of trade in goods which resulted from the differences between national laws were accepted even after the Council directive of 1972 and that also explains the fact that in Article 5 of the directive the Council expressly permitted fixed price systems.

Although at first glance these arguments appear impressive on closer examination it becomes evident that they are not convincing.

Thus the argument that revenue from the tax on tobacco is only ensured by means of a fixed price system does not really help much. The answer may be given that another system, namely that of maximum prices to the consumer, apparently functioned satisfactorily for a long time particularly in Belgium.

I further regard as important something that was expressly emphasized by the agent of the Council in the course of the oral proceedings, namely that it was not the intention of the Council directive of 1972 to state whether the 'imposed prices' mentioned in Article 5 (1) were in conformity with the Treaty. In fact the striving for harmonization ended where the relevant proviso in Article 5 began; therefore the question of the compatibility of the system of fixed prices with the Treaty had been left undecided.

Moreover it has not been proved to my satisfaction that the conclusion may be drawn from the decided cases cited by the ATAB (Case 74/76, *Iannelli & Volpi SpA* v *Paolo Meroni,* judgment of 22 March 1977 [1977] ECR 557 and Case 111/76, *Officier van Justitie* v *Beert van den Hazel,* judgment of 18 May 1977 [1977] ECR 901) that there exists a tendency to attribute only a restricted significance to provisions relating to quantitative restrictions at least in certain cases. This can definitely not be deduced from the judgment in Case 111/76 in which it was not necessary to examine Article 30 at all because the incompatibility of national measures was evident from a Community regulation (Regulation No 123/67/EEC of the Council, OJ, English Special Edition 1967, p. 63). In respect of Case 74/76, according to which Article 30 does not apply to obstacles for which specific provisions exist, it should be emphasized on the other hand that it related to problems of a different nature, namely provisions on customs duties, Article 95 and also the provisions of the Treaty relating to aids. In respect of the latter it was moreover emphasized that it was clearly possible to carry out an examination in the light of Article 30 of detailed rules of an aid scheme which were not necessary for its aim and function and to determine the existence of an infringement of that provision.

However in respect of that judgment and the last-mentioned finding in particular it should be recalled with regard to the

arguments of ATAB that the system of fixed prices is a necessary element of the system of taxation on tobacco and for that reason it should not be dealt with under the general provision of the Treaty, Article 30, but solely in the context of the provisions relating to harmonization in Article 99 et seq. thus in certain circumstances with the aid of a recommendation from the Commission pursuant to Article 102 of the Treaty. In the light of what has become evident in the course of the proceedings the impression must exist that the argument that the Belgian system of fixed prices is an important and indispensable component of the system of the taxation of tobacco has not been sufficiently brought out.

In this respect I regard it as significant that in the course of the oral proceedings the representative of the Luxembourg Government expressly stated that the introduction of the system of fixed prices in Luxembourg in the autumn of 1975 was not effected for tax reasons; it was rather reasons of competition which were the decisive factor and in particular the attempt to protect retail trade in tobacco products from competition from large chain stores or department stores.

It is also significant that the Netherlands Government sought to justify the system of fixed prices in the same way with considerations solely relating to competition and of policy with regard to small firms and traders. Central to its arguments is the fact that the number of retailers of tobacco products, who are facing great difficulties, has fallen sharply and that any further reduction is unacceptable because of the effects on the wholesale trade and small manufacturers and also in the interests of the consumer who wants to be offered a wide choice.

Finally, as I have already mentioned, in Belgium itself the system of taxation on tobacco has worked for more than 20 years solely with rules relating to maximum prices and thus without fixed prices. At the time of the introduction of the rules relating to fixed prices it was expressly admitted that they also served an economic purpose.

If one abides by the strict principles which may be derived from the judgment in Case 74/76 in respect of the disregarding of general provisions of the Treaty it would be difficult to accept the view that the rules relating to fixed prices in connexion with the taxation of tobacco products may only be covered in the context of the harmonization of taxes. In fact this is not a situation in which special rules, as provided by Commission Directive No 70/50/EEC (OJ, English Special Edition 1970 (I) p. 17) to which I shall return subsequently, may allow provisions relating to quantitative restrictions on imports to be disregarded. The Commission is certainly correct when it points out that the mere finding that a system was adopted to some extent for *tax purposes* must not, unless an undermining of fundamental Treaty provisions is to be accepted, lead to the general Treaty provisions concerning measures having an equivalent effect and to the rules on competition being disregarded as the yardstick by which to work.

3. Accordingly although the interpretation of the other provisions of the Treaty referred to by the Hof van Cassatie is certainly not rendered unnecessary, as I stated, I should first like to examine the problems relating to Article 33 et seq. of the Treaty in the light of which it is necessary to clarify whether a national rule under which fixed prices determined by manufacturers or importers for the sale of tobacco products to the consumer are laid down can be regarded as a measure having an equivalent effect. I regard it appropriate to give a certain priority to this matter in my examination because it is clearly of fundamental importance to the case and also because it was the subject of the most detailed arguments.

The problem of measures having an effect equivalent to quantitative restrictions on imports has repeatedly come up in decided cases. In that way a number of points have been clarified and I can now start with these.

For example I may recall that on a number of occasions the Court of Justice relied on the definitions which were developed at an early stage in Commission Directive No 70/50/EEC. Instances are to be found in Case 155/73 *(Giuseppe Sacchi,* judgment of 30 April 1974, [1974] ECR 409) and Case 74/76. From the decided cases it is also clear that it is not only measures which relate directly to imports which must be taken into consideration. Those which indirectly influence imports such as measures which concern production or other stages of marketing must also be taken into account. In this respect reference may be made to the judgment in Cases 3, 4 and 6/76 *(Kramer,* judgment of 14 July 1976, [1976] ECR 1279) or the judgment in Case 65/75 *(Riccardo Tasca,* judgment of 26 February 1976, [1976] ECR 291). Accordingly it is not surprising that the general definition of measures having an equivalent effect which has often been repeated in the recent decided cases is very comprehensive. In the terms of that definition (cf. for example the judgment of 11 July 1974 in Case 8/74, *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837 at p. 852) all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Before I begin to examine the situation at issue in the present case in the light of the decided cases I think it would be appropriate to draw two conclusions which may be reached without difficulty on the extensive discussion.

It will be remembered that in the course of the proceedings reference was also made to the decided cases relating to rules fixing maximum prices such as Case 65/75 *(Riccardo Tasca)* and Cases 88 to 90/75 *(Societa SADAM and Others* v *Comitato Interministeriale dei Prezzi and Others,* judgment of 26 February 1976, [1976] ECR 323). To me it is evident that these cannot directly assist in the present case because they are not on all fours with it. The aforementioned judgments concerned maximum prices fixed by the state the level of which was capable of having restrictive effects on import trade. There are no such effects in the case of the rules relating to fixed prices of the kind at issue here as the maximum prices, which then apply as fixed prices, are freely determined by the importers, if we confine ourselves to them, that is to say, it is for the importers themselves to determine the prospects of selling the imported products by their choice of the level of prices.

The second comment which I should like to make at the outset relates to an argument which is to be derived from the aforementioned Commission Directive No 70/50/EEC in support of the Belgian rules relating to fixed prices. In that directive a distinction is drawn between measures which are not applicable equally to domestic and imported products (Article 2) and measures governing the marketing of products which are equally applicable to domestic and imported products (Article 3). In the context of Article 2, paragraph 3 expressly lists in subparagraphs (a) to (e) measures which relate to prices. From that and from the fact that the Belgian measures do not fall under Article 2 because they are equally applicable to domestic and imported products but must fall at any event under Article 3 it was thought possible to draw the conclusion that because Article 3 does not expressly refer to rules in the prices sector they could not be regarded as measures having equivalent effect. However this conclusion does not appear

to me to be persuasive and not only because in general terms such deductions *a contrario* must be treated with caution. What I think is more important is that, because Article 3 refers to marketing in general terms, there is certainly no reason because of the use of that term to exclude measures relating to prices. In addition it is relevant that the arguments brought may at once be countered by reference to the quite wide definition of measures having an equivalent effect which has been developed in the decided cases.

Thus if the two considerations set out above cannot contribute to the solution of the present problem there remains to consider what may be derived from the aforementioned general definition formulated by the Court of Justice. In this respect we may restrict ourselves to the determination of prices by importers and leave out of consideration those fixed by domestic producers. For inter-state trade the latter would only be relevant if the retail trader who is bound by the price-fixing carried out export transactions. In fact this does not happen because of the rules relating to tax labels which are correctly described by the Commission as a legitimate measure of control; in any event there is only a quite insignificant disposal to frontier residents crossing the border which may certainly be left out of account in our examination of the rules.

In respect of the determination of prices by importers the Commission in particular maintains that inter-state trade is thereby affected even if the measures are not aimed directly against imports. Without the price rules retail traders would be able to pursue their own price policies and thus, by means of price reductions in particular in frontier areas, effect increased disposals and so increase trade. If the measure is retained however the position is made considerably more difficult. It should be taken into account that the mere carrying out of parallel imports is not possible because tobacco products with Belgian tax labels are not in free circulation in other Member States. The possibility of importing tobacco products obtainable on foreign markets must also be left out of account because the refund of foreign tax on tobacco is an extremely complicated process – under the German law relating to tax on tobacco for example the tax labels must be destroyed under official supervision and the cigarettes must then be repacked. Either a retail trader must rely on the co-operation of importers, and as regards them only powerful customers can carry through their own price policies, or another possibility is that retail traders themselves become importers within the meaning of the Belgian law and subsequently determine prices themselves by obtaining the appropriate tax labels. In this respect account must be taken of the fact that such a change of function in economic terms is difficult and costly and can therefore only be considered by powerful market operators. It should further be remembered that traders who are themselves importers are dependent on the co-operation of foreign manufacturers in affixing tax labels because of the rules relating to tax labels which must be regarded as lawful. A consequent problem for the traders is the impossibility of putting into effect their own ideas as to prices in face of the often different price policies of the manufactuers; furthermore because of the existence of exclusive contracts with other importers the problem arises of a refusal of supplies. This was evidenced in the course of the proceedings by an exchange of letters with foreign manufacturers and exclusive importers submitted by INNO. Finally a substantial obstacle in efforts to that end is constituted by the fact that it is impossible to obtain from the Belgian tax authorities tax labels showing a lower price. Indeed the competent authorities take the view, as is shown by a letter sent to INNO from the Belgian Inspector General for Excise Duties of 14 June 1977 that cigarettes of the same make

and the same quality cannot be brought onto the market at the same time with differing tax labels. In that respect reliance is placed on the Belgian order on the taxation of tobacco but also on the 1972 Council directive under which more than one maximum retail selling price for *one* product is inadmissible. For all those reasons it must be recognized that a retail trader faces considerable problems in applying his own price policy in an attempt to increase sales. For foreign brands the problem is all the more serious as they must first fight for a share in the market; thus for those brands the existing price rules are more burdensome than for domestic products.

A further point is that a considerable proportion, more than half in fact, of imports into Belgium is effected by Belgian tobacco manufactures who can scarcely have the same interest in increasing sales of foreign products as would completely independent importers.

In any event it is unrealistic to assume that small retailers in tobacco goods have any significant desire to pursue their own price policy by granting price reductions. In this respect they are constrained by the small profit margin which in Belgium for cigarettes is apparently approximately 7·5 % of the price stated on the tax label. Thus the reason given in the preamble to the abovementioned proposal made in the Economic and Social Committee for referring only to fixed retail prices in the Council directive, was that tobacco products were least suitable for price reductions; in retail trade reductions are quite impossible because of the very small profit margins; only department stores are in a position to make them but that is regarded as unfair competition. The department stores have lower costs because of self-service, more favourable bulk purchasing opportunities and the opportunity of using the profit margin of 10 % applicable for wholesale and retail sale as a whole. Accordingly in Belgium attempts to deviate from the prices stated on the tax labels are only made by large department stores while the association of tobacco retailers emphatically defends the system of fixed prices. Seen in this light it cannot be argued that parallel imports with their own price formation are rendered more difficult by the fact that it is not simple to change from the rôle of retail trader into that of importer. Certainly this is not correct for undertakings such as the appellant in the main proceedings.

The following remarks may be made in respect of the problems with which INNO was confronted in its attempts to effect imports with lower prices on the tax labels itself.

As we have heard either foreign manufacturers relied on exclusive contracts with Belgian importers or they refused to allow differing prices for their products. Belgian importers refused to apply differing prices relying on the argument that this was not possible as Belgian law stood. The latter view moreover corresponds with the attitude of the Belgian tax authorities as expressed in the aforementioned letter submitted by INNO.

If we turn first to the last-mentioned point it is clear that the Belgian authorities were not relying on Article 58 of the Law of 1969 which is at issue in the main proceedings but on the Belgian order on the taxation of tobacco and the Council directive of 1972. Thus the obstacle resulting from the attitude of the Belgian tax authorities originates not in the fixed price rules on tobacco products but in other provisions. Moreover in this connexion it may be stated that the Belgian authorities were incorrect in basing their standpoint on the Council directive; it is impossible to see how they may derive from that directive the principle that only *one* maximum retail price is possible for a product. With regard to the aforementioned Belgian order concerning the taxation of tobacco

it is further important, particularly because the events which the Hof van Cassatie has to assess occurred in 1972, that as a basis for their view the tax authorities relied solely on the version as amended in 1974. In respect of the earlier text on the other hand it is quite clearly stated in the abovementioned letter that the question of the affixing of tax labels showing a lower price had not arisen because at that time sales under the price stated on the tax label had not been prohibited.

The other obstacles referred to originate in part from the conduct of foreign producers which as the Commission rightly pointed out may be regarded as an abuse within the meaning of Article 86 of the Treaty in view of their technical monopoly for the affixing of tax labels. In part they originate in the fact that the manufacturers have exclusive contracts with Belgian undertakings for the supply of the Belgian market in which respect doubts must be entertained not only in respect of the fact that parallel imports, which the Commission regards as indispensable in that situation, are impossible because of the peculiarities of the tax law but also because of the fact that to a great extent Belgian manufacturers act as sole importers of tobacco products.

On the other hand the fixed price system cannot be regarded as itself actually rendering parallel imports more difficult and thus as having an adverse effect on trade.

In my opinion as the adverse effect on trade only arises from the combined effects of the fixed price rules and the conduct of other operators on the market and national administrative practice for which no basis can be found in the fixed price system itself the fixed price system cannot be regarded as incompatible with Article 30 of the Treaty. It would be more appropriate to counter the evident obstacles in another way for example by means of measures against foreign manufacturers in reliance on Article 86 of the EEC Treaty, by taking a more strict view on sole distribution contracts which exclude parallel imports and by prohibiting the Belgian administrative practice in respect of differing prices on tax labels.

In order to round off these comments as it were may I add one last but equally important consideration.

In the course of the proceedings it became evident that the fixed price system for tobacco products in Belgium also serves an economic policy objective: the protection of the retail trade against the competition of the big department stores partly in the interest of the consumer who thus has available a sufficiently tight distribution network with a comprehensive selection. The fundamental justification of this argument is not doubted by the Commission. It does however take the view that it could be pursued by other means which would be less detrimental to interstate trade and it suggests as a possible measure the prohibition of sales below the purchase price, a restriction of discounts which can be granted in retail trade or a system of licences for retail trade whereby tobacco products may only be sold in specialized businesses. In this respect the Commission is clearly making reference to Article 3 of its Directive No 70/50/EEC of 22 December 1969 in which reference is made to measures governing the marketing of products which are applicable equally to domestic and imported products which are to be regarded as measures having an equivalent effect if their restrictive effects on the free movement of goods exceed the effects intrinsic to trade rules.

In the light of the assessment of the various measures which may be taken into account from the point of view of adverse effects on trade such a

consideration raises the question whether in a situation in which adverse effects on trade arise from a fixed price system combined with other circumstances (the market conduct of other economic entities and administrative practice in issuing tax labels) it would not seem more appropriate to take steps to deal with the attendant circumstances mentioned which do not present any particular difficulties and to rule that the fixed price system is appropriate within the meaning of Article 3 of the Commission directive rather than to decide to abolish the fixed price system and to introduce simultaneously the substitute measures recommended by the Commission. If it is borne in mind that in this respect the Commission conceives of measures which extend to the issue of licences for retail trade in tobacco products I have no doubt that the first-mentioned possibility would be preferable as encroaching less on economic life. Accordingly, even taking account of the fundamental principles set out in Commission Directive No 70/50/EEC, it cannot be concluded that the Belgian fixed price system for tobacco products is to be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty.

Thus, since it does not seem necessary to examine in greater detail the various individual point of the questions raised by the Hof van Cassatie, the problem relating to Article 30 of the Treaty has been dealt with in sufficient detail.

4. The next question to which I shall turn relates to Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty. I shall not here repeat its extensive wording although it would be useful in order to show that with its various subdivisions the question is not easy to understand and that certain difficulties arise in grasping its sense. That also explains why in the course of the proceedings the parties submitted the most varied arguments in this respect which it is difficult if not impossible to arrange logically.

Irrespective of the exact purport of the questions it is relatively simple to draw some conclusions as to the problems they raise. I shall begin with those.

It is important first to point out that in the present proceedings pursuant to Article 177 of the EEC Treaty we are only concerned with an *interpretation* of Community law and that we may not reach findings of fact which fall within the sphere of *application* of Community law. This observation is appropriate in view of some extremely persuasive arguments brought by INNO. As the Court is aware INNO referred to agreements concluded by FEDETAB with Belgian wholesalers and retail traders in the years 1967 to 1969 which are allegedly incompatible with Article 85 of the EEC Treaty. From that INNO concludes that under Community law it can also not be possible to get the same result — a type of compulsory cartel (Zwangskartell) — by means of legislative measures. Similarly INNO referred to the dominant position held by FEDETAB in co-operation with the Belgian association of wholesalers and argued that by the exercise of pressure that position had been abused in order to ensure the maintenance of the prices fixed by the producers. However it must also be regarded as impossible that by governmental measures — with the aid of legislation — the State should prescribe such a result and thus as it were legalize the abuse. In the context of proceedings under Article 177 we can certainly not examine these questions of fact and thus we cannot determine whether a dominant position does exist and is being abused. Similarly in the context of these proceedings we may not examine whether specific agreements infringe Article 85 of the Treaty and whether they cannot be exempted under Article 85 (3) of the Treaty, a question which evidently is still being examined by the Commission. Proper care must be

taken not to accept the said facts as proven, that is to say we cannot base our interpretation on the facts alleged by INNO without more ado.

It may further be concluded without difficulty that it is certain that a statutory position of power — in the present instance the ability of the producers and importers to determine compulsory retail trade prices — does not as such necessarily constitute a dominant position within the meaning of Article 86 of the Treaty. In this respect I refer to the judgment of 8 June 1971 in Case 78/70 *(Deutsche Grammophon Gesellschaft GmbH* v *Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 487) in which it was emphasized that the holder of a right related to copyright does not occupy a dominant position within the meaning of Article 86 merely by exercising that right. With regard to the facts in the present instance it must not be forgotten that the abovementioned possibility exists also for small producers and small importers. If Article 86 is held to be applicable further facts of a technical nature about the market must be established as has been repeatedly ruled to be necessary in the decided cases with regard to the possibility of excluding competition.

Thirdly it may be asserted straight away that the Treaty by no means prohibits the establishment of dominant positions on the market and in particular it does not exclude their creation by legislation. This is also supported by the decided cases. Accordingly it would not be correct to deduce from Article 86 the obligation for Member States to take no measures which might jeopardize competition.

If we attempt to give further aids to interpretation for the solution of the problem which it appears are being sought by the Hof van Cassatie in its questions, the following conclusions may be drawn in respect of the important point at issue whether obligations for the Member States may in fact be deduced from the abovementioned provisions.

It is evident that Article 86 is only applicable to undertakings and lays down limits for their conduct. Direct application to States and governmental measures is therefore not conceivable. It should also be clear that as Article 3 begins with the words 'the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein ...' Article 3 (f) is directed to the Community institutions. In any event as was emphasized in Case 6/72 *(Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities,* judgment of 21 February 1973, [1973] ECR 215) and Cases 6 and 7/73 *(Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v *Commission of the European Communities,* judgment of 6 March 1974, [1974] ECR 223) it may be taken into account in interpreting Articles 85 and 86. Even that article does not give rise directly to obligations for the Member States.

On the other hand the possibility is not to be dismissed out of hand that a combination of those provisions with the second paragraph of Article 5 of the Treaty might mean that in this context measures adopted by the State are subject to certain restrictions; under the second paragraph of Article 5 Member States are to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Accordingly in the judgment in Case 78/70 it was stated that the second paragraph of Article 5 lays down a general duty, the actual tenor of which depends on the provisions of the Treaty and also on the rules derived from the general scheme of the Treaty. In addition the judgment of 13 February 1969 in Case 14/68 *(Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1) contains the significant statement with regard to the relationship between

national competition law and the competition law of the Community that Member States may not introduce measures capable of prejudicing the practical effectiveness of the Treaty.

On that basis the fundamental principle must be recognized that the effects of Community law must be allowed to develop and that the Member States are accordingly obliged to do nothing contrary to that law. With regard to Article 86 — it is not necessary to state the position with regard to Article 85 because no question was asked in that respect and because it is evident that it did not come within the scope of the matters considered by the Hof van Cassatie — the conclusion is therefore certainly justified that the Member States are obliged not to put undertakings outside the ambit of Article 86 and not to create by State measures positions which undertakings are prohibited from creating under Article 86.

Nevertheless it is somewhat difficult to give an appropriate answer to the Hof van Cassatie on the question referring to State provisions which may facilitate an abuse of a dominant position.

It would appear admissible, certainly, to agree with what was stated by the Commission and hold that States which, by means of legislation, create a binding price system such as that in the present instance are obliged to take measures to prevent possible abuse of the situation. In other words such States are subject to the obligation to ensure that there are no abuses of the fixing of prices with binding effect. I have doubts however whether this is, in fact, what was envisaged by the wording of the first question of the Hof van Cassatie. In particular it must not be overlooked that such precautionary measures already exist in Belgian law because alterations in the prices of tobacco products must be approved by the Minister for Economic Affairs and may only take effect with his approval and after the expiry of a certain period. In addition it may be asked whether the facilitating effect referred to does in fact exist; either certain undertakings have a market power which might be abused with regard to the fixing of prices or they do not have such a power and accordingly the system of compulsory prices has no effect on the level of prices. In addition in this context reference was correctly made to the fact that the effectiveness of Community law with regard to the combating of abuses by undertakings has by no means been detrimentally affected.

For that reason it will be necessary to disregard the wording of the question — 'encourages the abuse' — and it will have to be assumed that in this respect the Hof van Cassatie had in mind a line of thought which is also evident in the arguments submitted by INNO. The question must therefore be examined whether the Treaty prohibits a situation whereby something that might previously have been achieved by means of an abuse — namely the compliance with the prices fixed by the manufacturers and importers — is henceforth prescribed by legislation.

Even in the context of this consideration it would be difficult to reach the conclusion that the provision of Belgian law of concern to the Hof van Cassatie is inapplicable.

We may here leave aside the fact that the provision is also applicable to small producers and importers in whose case abusive conduct can certainly not be said to have been replaced by legislative provisions so that the question at least arises whether the provision in question can be regarded as inapplicable in its entirety. The decisive factor is rather that the detrimental effect to international trade is an important criterion for the application of Article 86 as well. If however in the examination of the problem of measures having an effect equivalent to quantitative restrictions on imports it was assumed that Article 58 of

the Belgian Law of 1969 did not have such an effect the same assumption must be made in respect of Article 86.

Accordingly with regard to Article 86 it may be concluded that that provision does not give rise to the inapplicability of the said Belgian provision and its fixed price system.

5. There remains only to interpret Article 90 of the EEC Treaty that is to examine the question whether undertakings to which the State grants special or exclusive rights may be said to exist if the way is opened for manufacturers or importers of certain products to fix compulsory prices to the consumer and to examine the problem whether the retention of those rights conflicts with Article 7 and Articles 85 to 94 of the Treaty.

With regard to this question as well a number of divergent views have been aired. Placing them in a logical order, the first objection to be examined is that the interpretation of Article 90 is not relevant in the present case. It is argued that it cannot apply because the price system under Article 58 is a component of the Belgian system of taxation on tobacco for the appraisal of which particular provisions apply; moreover the fact must be borne in mind that Article 90 is not directly applicable and that for that reason it is of no significance in national judicial proceedings.

That argument can be answered in a few words. In respect of the first part of the objection reference may be made to what I said above before dealing with Article 30 of the EEC Treaty with regard to Article 99 et seq. of the Treaty. As regards the second part I refer to an earlier judgment (in Case 155/73, *Giuseppe Sacchi)* from which it is clear that in any event Article 90 (1) in conjunction with directly applicable provisions – of which Article 86 is certainly one – quite definitely has direct effect.

Further in the consideration on that basis of how the phrase 'undertakings to which Member States grant special or exclusive rights' is to be understood the word 'undertakings' certainly causes no problems. In fact the use of the general term 'undertakings' following the use of the term 'public undertakings' leads to the evident conclusion that undertakings within the meaning of that provision include private undertakings.

The answer to the question whether, in the case of the Belgian system, *rights* can be said to be granted is more difficult because the point has been much argued. In this respect the view was put forward that undertakings do not have the right to determine compulsory consumer prices but that it is the State which declares the prices to be binding. With regard to undertakings there exist primarily obligations, namely to pay the tax on tobacco and value added tax on the basis of the price stated on the tax labels and to notify any alterations in the price. In addition the rights are certainly not given to the undertakings in their own interest and in order to facilitate their business but are measures which serve to implement a particular State policy.

In addition there was no unanimity on the question whether, if it is assumed that rights are granted, it must be accepted that *special* rights are granted. In this respect it was argued that the matter is dependent on a comparison of all undertakings within the relevant economic sector within which there is competition but not on a comparison of all economic entities. If this is accepted the inescapable conclusion is that the Belgian rules are applicable to all manufacturers and importers of processed tobacco.

In my opinion the following remarks may be made with regard to these issues.

In principle in interpreting Article 90 the fundamental concept governing that

provision must not be lost sight of. The provision is intended to ensure that no breach is made in the Treaty rules by the fact that a State so influences undertakings by means of its measures as to introduce a situation which is contrary to the Treaty and which is not permitted to the undertakings. The number of the possibilities which exist according to the economic structure and the organization of the State becomes clear from reading the learned commentaries to Article 90. Accordingly and also because any departure from the Treaty rules is to be judged particularly strictly Article 90 is, in principle, not to be interpreted narrowly according to the wording but to the sense and purpose of the provision and the endeavour to give it the greatest possible effectiveness.

In the light of this I find it quite acceptable to refer to a granting of rights within the meaning of Article 90 in the present factual situation. The decisive factor is that the economic entities concerned, albeit in conjunction with legislative provisions, are placed in the unusually strong position of having the retail traders obliged to comply with the prices fixed by them which, in the absence of legislation, would only be conceivable by way of agreement. On the other hand I do not regard it as all-important that in the context of those provisions there also arise obligations — to pay taxes and to notify price-increases — in particular as they may easily be logically distinguished from the said powers. In my view the interests served by the system and the grounds on which it is based are also of no importance. Certainly only to take account of rights which are granted in the interests of the undertakings and in pursuit of which interests of the State play no part would be to interpret too narrowly Article 90 and to deprive it, in part, of its effects. It would contradict the finding that the characteristic of Article 90 is to cover in this way co-operation between State measures — and thus also State aims — with the activities of undertakings. For that reason in this assessment the effects on the application and implementation of the Treaty rules must stand to the fore.

If one interprets Article 90 in the light of this basic attitude it is further difficult to deny that *special* rights are granted in the context of the Belgian fixed price rules for tobacco products with regard to the manufacturers and importers. In this respect it is not of decisive importance that within the sector of the production and marketing of tobacco products only manufacturers and importers, therefore not all the economic entities in question, have the power to fix prices. In my opinion the view which in this context has regard to the individual economic sectors and which gives central importance to the question of competitive conditions within a sector is fundamentally wrong. The scope of Article 90 is evidently more extensive as is shown by reference to Article 7 and other provisions of the Treaty apart from those relating to competition. Accordingly it must be assumed that Article 90 is applicable if an economic sector is wholly subject to a monopoly and if a single undertaking is given exclusive rights. Even in such a case care must be taken to ensure that State measures are not used to do what undertakings themselves are not permitted to do under the Treaty.

If these conclusions with regard to the first part of the question are accepted the further problem arises whether it follows from Article 90 that the creation of a fixed price system as such is inadmissible. That is the view of INNO which, in reliance on the legal writings (cf. for example Mestmäcker, Europäisches Wettbewerbsrecht, p. 652), argued that Article 90 is applicable if undertakings are given the opportunity to evade competition; as in the present case no distinction can be drawn between the exercise of the right which must be regarded as contrary to the Treaty and the granting of the right, the creation of such a legal situation itself

must be regarded as contrary to the Treaty. Opposed to this is the view of those who, in reliance on the wording of Article 90, argue that a distinction should be drawn between the establishment of special rights and additional State measures and then the question must be answered whether these must be individual measures or whether general provisions may also be taken into consideration.

In my opinion the following brief remarks may be made in respect of these last problems raised in the proceedings.

The view that the establishment of special rights of the kind at issue in the present instance infringes Article 90 certainly runs contrary to the wording of the provision. Moreover reference may be made to the fact that it has already been made clear in the decided cases that under the Treaty the establishment of a monopolistic situation characterized even by the exclusion of any competition is not inadmissible and furthermore no objections may be raised against the extension of such exclusive rights. This is expressed quite clearly in the judgment in Case 155/73. I am therefore of the opinion that Article 90 does not render automatically inadmissible such State measures if they enable undertakings to evade competition.

As in the present case additional State measures going beyond the granting of rights do not exist the conclusion may well be drawn — without its being necessary to examine the question how State measures must be created — that nothing is to be found in Article 90 which makes the Belgian fixed price system incompatible with the Treaty.

There are moreover further considerations to support this conclusion as to the inapplicability of Article 90. If one examines the effects which are not admissible under the Treaty there can certainly be no suggestion of an infringement of Article 7, that is failure to comply with the prohibition of discrimination on the grounds of nationality. In this respect the mere fact that the fixed price rules are equally applicable to domestic and imported products is sufficient. With regard to the competition rules envisaged by Article 90 on the other hand — the provisions of Articles 92 to 94 are clearly of no application to the present case — it is important with regard to Article 86 that the Belgian measure has no effect on the creation of a dominant position in respect of which it is not the legal position alone but rather the economic factors which are significant. It can also not be said to exert any influence on possible abuses with regard to the fixing of the level of prices. A not insignificant fact which must not be forgotten is that Articles 85 and 86 are only applicable in the event of detrimental effects on inter-State trade. However in another context I have already stated that such a situation cannot be said to exist having regard only to the effects of Article 58 of the Belgian law.

To summarize therefore it may also be stated that even if a wide interpretation is given to Article 90 which in principle I prefer for various reasons there is nothing to support the suggestion that Article 58 of the said Belgian law should be declared inapplicable.

6. In view of the foregoing I propose that the following answers should be given to the questions referred for a preliminary ruling by the Belgian Court of Cassation:

(a) Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty are not to be interpreted as meaning that a Member State is

prohibited from enacting legislation under which, as regards both imported tobacco products and those manufactured within its territory, the selling price to the consumer shown on the tax label and fixed by the manufacturer or importer is declared to be of binding effect, provided that steps are taken to ensure that those importations can be effected in conditions enabling prices to be fixed independently without hindrance from other operators on the market or from any national administrative practice in respect of the issue of tax labels.

(b) The same holds true of provisions of Community law concerning the prohibition of measures having an effect equivalent to quantitative restrictions on imports.

(c) A case of undertakings being granted by the State special or exclusive rights in the sense of Article 90 may be said to exist where the State gives manufacturers and importers of certain products, by means of legislation under which the price fixed by them becomes obligatory upon sale to the consumer the possibility of fixing compulsory retail sale prices. Legislation of this nature applicable to the sector of tobacco products does not infringe Article 7 or Articles 85 to 94 of the Treaty, to which Article 90 refers.

(d) Article 5 of Council Directive No 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco does not prohibit the Member States from enacting legislation under which, in the case of imported tobacco products and those manufactured within the national territory, the retail selling price shown on the tax label is mandatory, that is to say, may not be exceeded or undercut.