# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
22 November 2001 *

In Case T-139/98,

**Amministrazione Autonoma dei Monopoli di Stato (AAMS)**, represented by P.G. Ferri and D. Del Gaizo, lawyers, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by G. Marenco and L. Pignataro, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

**Rothmans International Europe BV**, established in Amsterdam (Netherlands), represented by S. Crosby, solicitor, with an address for service in Luxembourg,

* Language of the case: Italian.

and

**JT International BV**, formerly R.J. Reynolds International BV, established in Hilversum (Netherlands), represented by O.W. Brouwer, F.P. Louis and T. Janssens, lawyers, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of Commission Decision 98/538/EC of 17 June 1998 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/36.010-F3 — Amministrazione Autonoma dei Monopoli di Stato) (OJ 1998 L 252, p. 47) and, in the alternative, for reduction of the fine imposed,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: E. Sheehan, Legal Secretary,

having regard to the written procedure and further to the hearing on 20 March 2001,

gives the following

## Judgment

### Background

1 The present action seeks annulment of Commission Decision 98/538/EC of 17 June 1998 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/36.010-F3 — Amministrazione Autonoma dei Monopoli di Stato) (OJ 1998 L 252, p. 47, hereinafter 'the contested decision'). Amministrazione Autonoma dei Monopoli di Stato ('AAMS') is a body forming part of the financial administration of the Italian State which, in particular, engages in the production, import, export and wholesale distribution of manufactured tobaccos. AAMS's activities and the way it is organised are set out in, and regulated by, Italian Royal Decree-Law No 2258 of 8 December 1927.

2 Following upon three applications submitted under Article 3 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-1962, p. 87), by R.J. Reynolds Tobacco GmbH and R.J. Reynolds Tobacco Company SAE (in May 1996), by Rothmans International BV (in September 1996) and by International Tobacco Company (in June 1997) (hereinafter 'the complainants'), the Commission, by letter SG (97) D/1583 of 28 February 1997, sent AAMS a statement of objections with a view to assessing whether certain aspects of the latter's conduct in the cigarette sector in Italy were compatible with Article 86 of the Treaty. The statement of objections was also sent to certain third party undertakings. By letter of 19 May 1997, AAMS submitted its observations on the objections put forward by the Commission. R.J. Reynolds International BV and Rothmans International BV also submitted written observations, which were forwarded to AAMS by the Commission on 13 June 1997.

3 In accordance with Article 19(1) of Regulation No 17 and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition, 1963-1964, p. 47), AAMS and third parties were heard by the Commission on 11 July 1997 and the Commission received written observations on the hearing from AAMS on 25 July 1997. It then adopted the contested decision.

*The contested decision*

4 The Commission found that Article 45 of Law No 907 of 17 July 1942 (GURI No 199 of 28 May 1942) gave AAMS the exclusive right to produce manufactured tobacco on national territory. It found that, at the time when the contested decision was adopted, AAMS was producing not only the cigarette brands which it owned but also brands owned by Philip Morris. It also noted that over several decades, AAMS had concluded licensing agreements with Philip Morris and that in 1995 AAMS manufactured some 54 million kilograms of cigarettes, of which 40 million kilograms were its own brand and 14 million the brand of Philip Morris (recital 2 of the preamble to the contested decision).

5 The Commission found that the importation into Italy of cigarettes from other Member States and their wholesale distribution were liberalised by Law No 724 of 10 December 1975 (GURI No 4 of 7 January 1976) and that, consequently, imports were allowed through distribution warehouses other than those of AAMS. It observed that, despite that liberalisation, all Community cigarettes continued to be imported into Italy by AAMS, which also handled their wholesale distribution on the basis of agreements concluded by it with foreign manufacturers (hereinafter 'foreign firms') wishing to sell their cigarettes in Italy (recital 5 of the contested decision).

6 The Commission found that Law No 1293 of 22 December 1957 (GURI No 9 of 13 January 1958) regulated the way in which the distribution and sale of articles subject to monopoly — and hence of cigarettes — was organised. Under that Law, those services were provided by:

(a) departmental inspectorates, which supervised distribution and sales services;

(b) primary distribution units (hereinafter 'warehouses'), whose function was to receive, store and distribute products for sale. The warehouses were also responsible for collecting sales tax and paying it to the Treasury;

(c) warehouse outlets, which removed the products stored in the warehouses, in return for payment, and sold them to authorised retailers;

(d) secondary distribution units (wholesale warehouses, hereinafter referred to as 'magazzini'), which removed the products stored in the warehouses and the warehouse outlets, in return for payment, and sold them to authorised retailers;

(e) retailers (recital 6 in the preamble to the contested decision).

7 The Commission made clear that the inspectorates, the warehouses and the warehouse outlets were part of AAMS, that private individuals were responsible for the management of the 'magazzini' and that AAMS was not present in the

market for retail sales of cigarettes (see recitals 7 to 9 and 32 in the preamble to the contested decision). It added that retail sales of all cigarettes in Italy were subject to a monopoly, that the management of tobacco outlets was regulated by decree and, in particular, by instructions given by AAMS and that, since 1 January 1993, foreign firms had been able to entrust the wholesale distribution of their cigarettes to commercial traders with 'bonded warehouses' used to market other products liable to excise duty (recitals 31 and 32 of the preamble to the contested decision).

8 In order to determine whether AAMS held a dominant position within the meaning of Article 86 of the Treaty, the Commission identified three markets for products and services, characterised by a high degree of interdependence, so that any action taken in one of them could have an appreciable effect on the others. First, there was the market for cigarettes produced in Italy or in other Member States for distribution and sale on Italian territory (hereinafter 'the cigarette market'). Second, there was the market for services relating to the distribution and wholesale of the abovementioned cigarettes (hereinafter 'the wholesale distribution market'). Third, there was the market for services relating to the retailing of the cigarettes (hereinafter 'the retail distribution market') (recitals 22 to 27 of the preamble to the contested decision).

9 The Commission went on to hold that, from a geographic point of view, those markets were coterminous with Italian territory for the following reasons:

(a) the preferences of Italian smokers were different from those of smokers in other Member States;

(b) retail prices for cigarettes differed considerably from those in other Member States;

(c) in order to meet the requirements of the prevailing Italian regulations, all foreign manufacturers wishing to sell their products in Italy were required to label their cigarette packages with appropriate warnings (such as 'Tobacco seriously damages your health') in Italian;

(d) there were no parallel imports of cigarettes into Italy (recital 28 in the preamble to the contested decision).

10 On the basis of those various factors, the Commission concluded that the relevant markets for the purposes of the instant case were: the Italian market for cigarettes, the Italian wholesale distribution market and the Italian retail distribution market (recital 29 of the preamble to the contested decision).

11 The Commission went on to assess AAMS's position on those markets. First, as regards the Italian cigarette market, it found that it consisted of a duopoly made up of Philip Morris and AAMS (which together held some 94% of the market), with other firms having only a marginal share of the market (recital 30 of the preamble to the contested decision).

12 Second, the Commission found that AAMS held a dominant position on the Italian wholesale distribution market. Despite the fact that the import and wholesale distribution of cigarettes had been liberalised, manufacturers preferred to continue to use the AAMS network to distribute their own products in Italy. According to the Commission, foreign firms had considerable financial difficulty in setting up a sufficiently extensive independent wholesale distribution network. The Commission found, in that connection, that foreign firms had systematically chosen to use AAMS for the distribution of their cigarettes in Italy. The Commission also described it as an 'unavoidable trading partner' for foreign

firms, since it had a *de facto* monopoly. Furthermore, it was not possible for those undertakings to entrust wholesale distribution of their cigarettes to traders with bonded warehouses, since the latter would have encountered insurmountable financial obstacles. First, Italian regulations required manufactured tobaccos to be kept on separate premises from other goods subject to excise duty and that involved the parties concerned in substantial investment. Second, cigarette retailers were very different from the customers for other excise goods, so that it would have been necessary to set up a new transport and distribution structure, which would not have brought about any operational synergies with the existing distribution structure. Third, the market share held by foreign manufacturers (excluding Philip Morris, which was tied to AAMS by licensing agreements) was extremely small (about 7%) and hence did not provide a sufficient financial incentive for firms wishing to compete against AAMS in the wholesale distribution of tobacco. Further, it would not have been in the interests of retailers to obtain supplies from a different wholesaler if the latter could supply them only with a small proportion of the cigarettes they required (recital 31 in the preamble to the contested decision).

13 In the third place, the Commission found that AAMS was not present on the market for retail sales of cigarettes (recital 32 in the preamble to the contested decision).

14 The Commission found that AAMS had abused its dominant position on the market for the wholesale distribution of cigarettes. It identified two kinds of conduct on the part of AAMS:

— the conclusion of standard distribution agreements with certain cigarette manufacturers, under which the latter made AAMS responsible for the introduction and wholesale distribution on Italian territory of cigarettes which they manufactured in another Member State;

— certain unilateral actions on the part of AAMS concerning cigarettes manufactured in another Member State and subsequently brought into Italy (recital 12 in the preamble to the contested decision).

Clauses of the distribution agreement

15 The Commission found that AAMS had developed a standard-form contract (hereinafter 'the distribution agreement') for the wholesale distribution in Italy of cigarettes manufactured in another Member State by a foreign firm. The latest version of the contract dated from 1993 and was for a five-year period (recital 13 in the preamble to the contested decision).

16 It pointed out that the text of the distribution agreement had been drawn up unilaterally by AAMS and that the foreign firms had not had any opportunity either to negotiate its various terms or to propose amendments which took account of their point of view or their specific interests. According to the Commission, those firms found that they were extremely dependent on AAMS and were compelled to accept the clauses imposed by AAMS in full, thus enabling it to control and even veto their competitive initiatives in order to protect its own sales (recital 14 in the preamble to the contested decision).

— The clause relating to the time-limit for the introduction of new cigarette brands onto the market

17 The Commission observed that Article 1.3 of the distribution agreement provided that AAMS could allow foreign firms to introduce new brands just twice a year and maintained that the clause thus limited a foreign firm's opportunities to

launch new cigarette brands on the Italian market at the moment it considered best (recital 35 in the preamble to the contested decision).

— The clause relating to the maximum quantities of new cigarette brands allowed onto the market

18 The Commission noted that the fifth paragraph of Appendix B to the distribution agreement provided that the quantities of new brands introduced could not exceed 5 000 kilograms, while the sixth paragraph of the Appendix provided that, during the first year, orders from AAMS had to be the same as in the preceding month. It took the view that those provisions deprived the foreign firm of the ability to decide freely the conditions and arrangements for the launch of a new product, including the volume to be marketed at the time of the launch. It added that the volume set was wholly inadequate in relation to the requirements for launching a new product in Italy. The Commission pointed out that AAMS's cigarettes and those manufactured under licence were not subject to the quantitative ceiling and that, as a result, the cigarettes of foreign firms were discriminated against, as compared with those of AAMS, for no valid reason (recitals 36 and 37 in the preamble to the contested decision).

— The clause relating to the maximum monthly quantities of cigarettes allowed on the market

19 The Commission took the view that the clause laid down in the second paragraph of Appendix B to the distribution agreement, according to which the quantities of cigarettes of the foreign firm to be marketed in Italy were to be commensurate with the quantities sold during the previous month, restricted the freedom of the firm to decide on the volume of goods to be sold. It explained that the clause was not justified by any objective need to protect any legitimate financial and/or

commercial interests that AAMS might have. In that regard, it found that AAMS's distribution network was over-extensive, which allowed it to respond favourably to any requests from foreign firms to increase the quantities distributed without having to strengthen its distribution structures. AAMS had distribution capacities of some 102 million kilograms of cigarettes a year, while actual market requirements in Italy were around 90 million kilograms. Furthermore, the Commission noted that the clause in question did not appear to be justified by any need to ensure that the quantities of foreign cigarettes distributed by AAMS corresponded to the market's actual capacity to absorb them. It was not in the interests of a foreign firm to make available through that network more cigarettes than the market could actually absorb, since, after a given time, it was required to withdraw all unsold cigarettes stored in AAMS warehouses at its own expense. In addition, if cigarettes remained in storage in the warehouses for a long time, the foreign firm had to replace them with other more recent products. Lastly, the Commission pointed out that the cigarettes produced by AAMS, whether as its own brand or under licence, were not subject to any comparable limitation and hence enjoyed a considerable competitive edge as compared to cigarettes manufactured abroad (recitals 38 to 40 of the preamble to the contested decision).

— Clause relating to increases in the monthly maximum quantities of cigarettes allowed on the market

20 The Commission stated that the Article 2.5 of the distribution agreement provided that the foreign firm might ask AAMS to increase the quantities of cigarettes to be placed on the Italian market but that the possibility was, however, subject to a threefold limitation, which seriously jeopardised the competitive freedom of the firm. First, AAMS's agreement to any increase was required. Second, only increases not exceeding 30% of the 'monthly order allowed' were permitted. Third, approval of such increases gave rise to an obligation on the part of the foreign firm to pay a higher distribution fee calculated, not on the basis of the 'additional' quantities, but on the basis of the total quantity sold. According to the Commission, limiting increases to 30% of the 'monthly order allowed' seriously jeopardised the competitiveness of the foreign firm by preventing it from responding in full to demand on the Italian market and had particularly serious

effects in the case of cigarette sales, which are strongly affected by the seasons. Furthermore, the obligation, in the event of an increase in quantities, to pay AAMS an additional amount calculated on the basis of total quantities sold was not justified, since the distribution fee was structured in such a way that its amount gradually diminished as the quantities sold increased (recitals 41 to 44 of the preamble to the contested decision).

— Clauses relating to the packaging of cigarettes and to inspections

21 The Commission found that Article 4.1 of the distribution agreement required the foreign firm to print the word 'Monital' (an abbreviation of 'Italian monopolies') on each cigarette intended for sale on the Italian market. It took the view that the obligation did not appear to be justified by the need to distinguish cigarettes marketed lawfully from contraband cigarettes, but constituted a means of promoting AAMS through a competitor's product and was capable of creating doubt on the part of consumers as to the identity of the cigarette manufacturer in question. The Commission also found that the inspections provided for in Article 5 of the agreement could not be regarded as necessary to enforce compliance with the rules in force, that as a result they were unjustified and that AAMS could not require a foreign firm to pay an annual amount for each packaging of each brand as payment for those inspections. The effect of the controls was to delay unjustifiably the launch of new brands of foreign cigarettes on the Italian market (recitals 45 and 46 in the preamble to the contested decision).

Abusive practices

22 The Commission found that AAMS had on several occasions refused to accede to requests from foreign firms under Article 2.5 of the distribution agreement, asking it to increase the maximum quantities of imported cigarettes allowed on

the market, and that the effect of that conduct had been to prevent the firms from placing on the Italian market the volume of cigarettes that they judged opportune and hence to weaken their competitiveness (recital 47 in the preamble to the contested decision).

23 The Commission also found that AAMS inspectors who supervised the activities of the 'magazzini' took action which was required neither by the legislation in force nor by any term of the agreement and which was aimed at promoting domestic cigarettes and limiting sales of imported cigarettes. The restrictive effect of such conduct was particularly severe in the cases where AAMS had required 'magazzini' to comply with sales quotas applicable both to AAMS cigarettes and to foreign cigarettes. Further, AAMS inspectors took action with regard to retailers which was required neither by the legislation in force nor by any contractual provision and which was aimed at promoting AAMS cigarettes and limiting sales of imported cigarettes (recitals 48 to 53 in the preamble to the contested decision).

24 On the basis of those findings, the Commission adopted the contested decision, the operative part of which reads as follows:

'*Article 1*

Taking advantage of its dominant position on the Italian market for the wholesale distribution of cigarettes, [AAMS] has engaged in improper behaviour in order to protect its position on the Italian market for cigarettes, in breach of Article 86 of the EC Treaty, through the use of clauses compulsorily inserted in distribution contracts as set out in Article 2, and through unilateral practices as set out in Article 3.

*Article 2*

The compulsory clauses improperly inserted by AAMS in the distribution contracts are as follows:

(a) the clause relating to the time-limit for the introduction of new cigarette brands onto the market (third paragraph of Article 1);

(b) the clause relating to the maximum quantities of cigarettes allowed on the market (Appendix B, fifth and sixth paragraphs);

(c) the clause relating to the maximum monthly quantities of cigarettes allowed on the market (Appendix B, second paragraph);

(d) the clause relating to increases in the monthly quantities of cigarettes allowed on the market (fifth and sixth paragraphs of Article 2);

(e) the clause relating to the printing of "Monital" on the cigarettes (Article 4);

(f) the clause relating to inspection and analysis of the cigarettes (Article 5).

*Article 3*

The improper unilateral practices pursued by AAMS are as follows:

(a) refusal to authorise increases in the monthly quantities of foreign cigarette imports requested by foreign undertakings in conformity with the distribution contracts;

(b) behaviour with regard to "magazzini" and retailers, designed to promote national cigarettes and to limit sales of foreign cigarettes.

*Article 4*

AAMS shall forthwith put an end to the infringements referred to in Articles 2 and 3, in so far as it has not already done so. In particular, AAMS shall amend the clauses of the distribution contracts referred to in Article 2 which are still in force, in such a way as to eliminate the abuses found by this Decision to have occurred. The new distribution contracts shall be submitted to the Commission.

*Article 5*

AAMS shall refrain from continuing or repeating the behaviour referred to in Articles 2 and 3 and from all activities having an equivalent effect.

To that end, AAMS shall, for a period of three years from the date of notification of this Decision, forward to the Commission within two months of the end of each calendar year, a report on the preceding year describing the quantities of foreign cigarettes distributed by AAMS as well as any refusal (total or partial) to distribute such cigarettes.

*Article 6*

A fine of ECU 6 000 000 is hereby imposed on AAMS in respect of the abuses referred to in Articles 2 and 3.

...'.

**Procedure**

25 The applicant brought this action by application lodged at the Court Registry on 7 September 1998.

26 By document lodged at the Court Registry on 15 February 1998, Rothmans International Europe BV applied to intervene in the case in support of the defendant's claims.

27 By document lodged at the Court Registry on 23 February 1999, JT International BV also applied for leave to intervene in the case in support of the defendant's claims.

28 By Order of the President of the Fifth Chamber of the Court of First Instance of 6 July 1999, those two companies were granted leave to intervene in the present case in support of the defendant's claims.

29 Following the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) opened the oral procedure. By way of measures of organisation of procedure, it asked the parties to produce documents and to reply in writing to certain questions before the hearing. The parties complied with those requests.

30 The parties presented oral argument and replied to the questions put by the Court at the hearing on 20 March 2001.

**Forms of order sought**

31 AAMS claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the fine;

— order the Commission to pay the costs.

32 The Commission contends that the Court should;

— dismiss the application;

— order AAMS to pay the costs.

33 Rothmans International Europe BV, intervener, claims that the Court should:

— dismiss the application as unfounded;

— order AAMS to pay the costs incurred as a result of its intervention.

34 JT International BV, intervener, claims that the Court should:

— dismiss the application;

— increase the fine substantially;

— order AAMS to pay the costs, including those of the interveners.

**The main claim seeking annulment of the contested decision**

35 In support of its claim for annulment, AAMS raises a single plea alleging infringement of Article 86 of the Treaty and manifest errors of assessment relating to:

— the definition of the relevant geographic market;

— the existence of a dominant position on the Italian market for wholesale cigarette distribution;

— the restrictive effects of certain terms of the distribution agreement;

— improper unilateral practices.

*The first part of the plea: manifest error of assessment as regards the relevant geographic market*

Arguments of the parties

36 AAMS disputes the validity of the definition of the relevant geographic market relied on in the contested decision. First, the factors taken into consideration by the Commission in order to segregate the Italian market from the rest of the European market are inadequate and very general. The different habits of consumers, which are linked to tradition, tastes and national customs, are a relatively general phenomenon and are not a particular feature of tobacco products. On the basis of those factors, it would accordingly be difficult to identify any markets in Europe extending beyond national territories. Second, the applicant is surprised that provisions concerning labelling imposed by a Community directive should 'delineate the national market and, consequently, result in the compartmentalisation of the European market'. The arguments relied on by the Commission are thus contrary to the very notion of the common market and the objective of harmonisation pursued by Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1).

37 The Commission and the interveners maintain that AAMS's arguments are not such as to cast doubt on the validity of the definition of the relevant geographic market. They point out that AAMS does not dispute the findings of fact in the contested decision.

Findings of the Court

38 First of all, the contested decision defines the relevant product and services markets as the markets for cigarettes manufactured in Italy or in other Member States and for services relating to wholesale distribution and retail sale of those cigarettes. The applicant does not dispute the validity of those definitions.

39 Turning next to the relevant geographical market, it is settled case-law that that market must be defined so as to determine whether the undertaking concerned is in a dominant position in the Community or a substantial part of it. The definition of the geographical market, as that of the product market, accordingly calls for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns specifically the relevant products. It is not at all necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'the same' or 'sufficiently homogeneous' (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 44 and 53; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 91). Furthermore, the market may be confined to a single Member State (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28).

40 According to recital 28 in the preamble to the contested decision, from a geographic point of view, the three markets for the products and services concerned (see paragraph 36 above) are coterminous with Italian territory. It is apparent both from the contested decision and from the documents before the Court that AAMS supplied the services provided for by the distribution agreement solely in Italy and that it was present neither as a manufacturer nor as a distributor of cigarettes on the markets of the other Member States. Furthermore, AAMS does not dispute that, at the time when the contested decision was adopted, it was the only trader present on the Italian market for the wholesale distribution of cigarettes and that it had for many years enjoyed a *de*

*facto* monopoly on that market. Those facts are sufficient on their own to support the Commission's analysis in the contested decision concerning the definition of the geographical market and to rebut AAMS's arguments in that regard.

41 But in addition, the definition of the geographical market employed in the contested decision is supported by various other undisputed facts which are apparent from the decision and which illustrate the special nature of the market. Those facts include in particular:

— the existence, in Italy, of legislation governing all operations concerning cigarettes and, in particular, the production, import, storage, labelling, wholesale distribution and retail sale of cigarettes;

— considerable differences in retail sale prices between Italy and other Member States;

— the lack of parallel imports of cigarettes into Italy;

— the fact that Italian consumers have particular preferences;

— the fact that AAMS brands of cigarettes had a very large market share in Italy, while they were virtually non-existent in the other Member States;

— the fact that Philip Morris cigarette brands had a higher market share in Italy than in the other Member States.

42 The Court finds, in the light of the foregoing, that the Commission could rightly conclude that the relevant markets defined in the contested decision are coterminous with Italian territory. As to the remainder, it should be pointed out that, as the Commission argues, the fact that Italian legislation regarding tobacco labelling has been imposed by a Community directive in no way precludes that legislation from being taken into consideration as a determining factor in the definition of the relevant geographical market.

43 It follows that the first part of the plea must be rejected.

*The second part of the plea: alleged error of assessment as regards AAMS's dominant position on the Italian market for the wholesale distribution of cigarettes*

Arguments of the parties

44 AAMS submits that the Commission committed an error of assessment in the contested decision with regard to its dominant position on the relevant market, in that the Commission overestimated the difficulties involved in creating an alternative distribution network. Referring to the judgment in Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215, it takes the view that the Commission could not conclude that it held a dominant position on the Italian market for the wholesale distribution of

cigarettes on the basis of the finding that following the liberalisation of that market in 1975, all the foreign firms had continued to use AAMS's distribution network. Those firms had had the chance either to set up their own distribution network or to use the services of other firms distributing similar goods subject to excise duty. AAMS points out that there are a considerable number of authorised 'bonded warehouses', located throughout Italy, which may be used for the distribution of manufactured tobacco and that all that is needed is an extension of the bonded warehouse's operating licence.

45 AAMS takes the view that the Commission's argument that the operators of bonded warehouses do not form a viable substitute in the wholesale cigarette distribution sector cannot be accepted. First, the costs of adapting the premises are negligible. Second, so far as relations with the customers are concerned, AAMS is not involved in the transport of the goods to the various tobacco retailers, since the latter are themselves responsible for obtaining supplies from AAMS's outlets. The use of other wholesalers would not result in tobacco retailers altering their behaviour and incurring new costs. Further, the warehouses for other goods subject to excise duty form part of a more extensive network than that made up of AAMS's warehouses and 'magazzini'. Lastly, AAMS points out that cigarette retailers also run catering sales outlets and have dealings with the distributors of alcoholic products subject to excise duty. Third, the cigarettes distributed by AAMS on behalf of third party firms account not for 7% but for 46% of total cigarette consumption in Italy.

46 AAMS also points out that its distribution agreement does not contain an exclusivity clause preventing producers from using other distribution channels. Furthermore, none of the complainant firms sought to use the existing alternative distribution network. AAMS notes that JT International BV merely states in its observations that on several occasions it investigated whether it would be possible to use an alternative distribution network but that it has failed to explain what its attempts involved and on what grounds it concluded that the option would not be economically viable.

47 Finally, AAMS concludes that the effect of the contested decision has been to impose on it, in its capacity as a trader on the market in tobacco production, disproportionate costs far outweighing the obligation not to place obstacles in the way of other manufacturers.

48 The Commission points out that AAMS does not dispute that it holds 100% of the Italian market for the wholesale distribution of cigarettes and concludes therefrom that it has a *de facto* monopoly on that market. It points out that, according to Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 41, very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. AAMS has not pleaded any exceptional circumstances which might justify a proposition other than that unequivocally advanced by the Court of Justice. The Commission adds that at the time when the contested decision was adopted there were no potential competitors on the Italian market for the wholesale distribution of cigarettes and that AAMS appeared, from an economic point of view, to be an 'unavoidable trading partner' on that market.

49 The Commission and the interveners suggest that AAMS's argument that importers could either (i) use an alternative distribution network in Italy composed of bonded warehouses used for other products, which — like tobacco — are subject to excise duty or (ii) set up their own distribution networks is unfounded for the reasons set out, in particular, in the contested decision. The Commission points out that before 1 January 1993, foreign cigarette manufacturers were not able to use other distribution networks, since Decree-Law No 513/92 of 31 December 1992 (incorporated into Law No 427 of 29 October 1993, transposing into the Italian legal system Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) entered into force only on 1 January 1993. As regards the possibility of using bonded warehouses after that date or setting up their own distribution networks, such a solution was not practical, since potential competitors would have been faced with insurmountable financial obstacles. The Commission concludes that AAMS merely mentions the existence of possible alternative distribution networks but that it fails to provide concrete evidence that distribution through other warehouses than its own would not have entailed a considerably higher financial burden for the manufacturers.

50 JT International BV submits that there was no realistic alternative for the wholesale distribution of cigarettes in Italy and that AAMS is aware of that fact. In that regard, it notes that, at the end of 1997, several foreign manufacturers asked for the distribution agreements to be amended to make them compatible with Community competition law and to put an end to the most blatant discrimination and that AAMS, when faced with those requests, told the manufacturers that the agreements were not negotiable, adding that, unless they returned the agreements duly signed within a few days, it would suspend distribution of their cigarettes. The notion of a dominant position, as defined by settled case-law, entails an undertaking having power to behave independently of its suppliers, of its consumers and of its competitors over a considerable period of time (*United Brands* and *Michelin*). The conduct of AAMS vis-à-vis other cigarette manufacturers is symptomatic of its ability to ignore the requests of the other parties to its agreements with impunity.

Findings of the Court

51 It is settled case-law that very large market shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for — without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffman-La Roche*, paragraph 41). Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (*United Brands*, paragraph 65).

52 In the present case, AAMS does not dispute either that its share of the Italian market for the wholesale distribution of cigarettes was 100% or that it preserved that share in its entirety, despite the fact that at law foreign firms were able either to set up their own distribution network or to entrust the wholesale distribution of their cigarettes to traders operating bonded warehouses. Further, AAMS's argument alleging that the creation by foreign firms of their own distribution networks could be justified from an economic point of view cannot be accepted. The financial difficulties that foreign firms (other than Philip Morris), whose total share of the Italian cigarette market is less than 10%, would have encountered when setting up an independent distribution network and AAMS's ability to decline the requests of those firms for amendments to be made to the distribution agreement are factors which may properly be taken into account in a finding of a dominant position. Furthermore, AAMS did not deny at the hearing that retailers are in any event obliged *de facto* to obtain their supplies from AAMS's warehouse outlets.

53 It follows that the Commission did not make a manifest error of assessment when it found that AAMS held a dominant position on the Italian market for the wholesale distribution of cigarettes.

54 Consequently, the second part of the plea must be rejected.

*The third part of the plea: alleged error of assessment as regards the restrictive effects of certain clauses of the distribution agreement*

55 AAMS claims that the distribution agreement entered into with foreign firms did not contain unfair terms and it disputes the basis of Article 2 of the contested decision in its entirety. It challenges, in particular, the Commission's arguments regarding the clauses concerning the maximum quantities of new cigarette brands that could be launched on the market, the maximum quantities of cigarettes

allowed on the market every month and increases in the monthly maximum quantities of cigarettes allowed on the market (Article 2(b), (c) and (d) of the contested decision), as well as those concerning the clause relating to the monitoring of cigarettes (Article 2(f) of the contested decision). However, AAMS does not set out any specific argument as to the merits of paragraphs (a) and (e) of Article 2 of the contested decision.

Clauses relating to the maximum quantities of new cigarette brands, to the maximum monthly quantities of cigarettes allowed on the market and to increases in the monthly quantities of cigarettes allowed on the market

— Arguments of the parties

56 AAMS explains that, since the market was liberalised in 1975, it has acted on behalf of third parties on the market for wholesale distribution in so far as it has storage available, since its storage capacity exceeds what it requires for the distribution of its own goods. AAMS states that it has no interest in developing its current distribution network. Nor is it obliged to do so, since it does not have a statutory monopoly, which would require it to guarantee a certain quality for a service which could easily be provided by other operators. AAMS adds that its refusal to negotiate specific clauses with any one of the manufacturers was justified by its concern to ensure that all the users of its distribution network were treated equally, regard being had to the limitations of that network. Moreover, account must be taken of its actual capacity to operate on the market on the basis of the structures available to it. The maximum storage capacity in its warehouses amounted to 10 500 000 kilograms of manufactured tobacco and there was no surplus in relation to the normal supply requirements of the market, according to the rules laid down by the distribution agreement.

57 AAMS states that, even if it is accepted that it had a certain excess storage capacity, the restrictive clauses in the distribution agreement are proportionate to the need to protect against the serious risk that it might be unable to satisfy the demands of other manufacturers.

58 AAMS takes the view that, although in theory a manufacturer must be free to set the quantities of his products to be placed on the market and that a foreign undertaking has no interest in putting larger quantities of cigarettes into the distribution chain than can be absorbed by the market, it cannot, however, be obliged to supply a service without taking into account the resultant risks for its financial interests or to rely on other traders to make economic appraisals and decisions which put its legitimate interests at stake. According to *United Brands*, the fact that an undertaking holds a dominant position does not deprive it of its entitlement to protect its own commercial interests.

59 AAMS adds that, in Case C-7/97 *Bronner* [1998] ECR I-7791, the Court of Justice specifically addressed the question whether, and to what extent, a producer is required to make its own distribution network available to a competing producer. In *Bronner*, the Court of Justice would not have accepted the arguments, put forward in the present case by the complainants and taken up in the contested decision, concerning, in particular, the difficulty of using an alternative distribution channel and on the basis of which the complainants require AAMS to satisfy in full the demands of the competing producers.

60 Account should also be taken of the fact that the overall demand for cigarettes is very stable and that, as a result, an increase in demand for a brand may arise only if there is a reduction in demand for other brands. Moreover, if regard is had to the statutory prohibition on cigarette advertising, forecasts of cigarette consumption cannot take account of the likely effects of advertising campaigns for the product at issue.

61 In any event, the Commission's arguments concerning seasonal variation in consumption of certain types of cigarettes are vitiated by a significant error of assessment, since the normal system of supply operated by the warehouses is sufficiently adapted to the need to respond to increases in demand. Hence, the foreign firms could have grounds for requesting increases in the quantities of cigarettes only in very specific circumstances. Consequently, the distribution agreement adequately safeguards the interest of those firms — which is that AAMS's distribution network should not place unwarranted obstacles on their ability to market their products. The offending clauses are necessary to meet AAMS's essential requirements — not as a cigarette manufacturer in competition with the foreign firms but as a part of the distribution service.

62 As regards, in particular, the clause relating to the increase in the monthly maximum quantities of cigarettes allowed on the market (Article 2(d) of the contested decision and paragraph 20 above), AAMS explains that the limit of 30% laid down by Article 2.5 of the distribution agreement meets an absolute requirement for compatibility with storage capacity. AAMS states that it has to take account of the fact that it could be faced with competing applications and that it would not be in a position to ensure that all applications were treated equally. Furthermore, increases under that clause are negotiated with the manufacturers and the conditions for such increases are set objectively and with regard to relevant factors. In the present case, the clause has been properly applied by AAMS, since there are only a few cases in which it can be claimed that its refusal was unjustified.

63 AAMS states that the payment of an additional fee where the quantities of cigarettes placed on the market are increased, as required by Article 2.5 of the distribution agreement, seeks to prevent (i) sums having to be advanced over a long period and (ii) certain negative economic consequences arising as a result of cigarettes not ordered by retailers remaining too long in the warehouses. That fee covers, for example, expenditure incurred for rail transport from the Italian border to the warehouse, for unloading the trains and for storing and managing the stock. The facts set out by the Commission in recital 42 in the preamble to the contested decision, which seek to show that AAMS does not, as a general rule,

incur any financial risk stemming from payment for quantities of foreign cigarettes in excess of market requirements, are irrelevant, since they do not concern products which may be stored for longer than the normal period. Lastly, AAMS disputes the contested decision in so far as the Commission, in recital 43 thereto, does not accept that there is any proper basis for the method of determining the flat-rate fee for the abovementioned financial costs. However, the method of calculating the fee is a response to AAMS's specific and wholly legitimate concern to avoid providing additional accounts and to prevent foreign firms from disputing the amount of the costs to be reimbursed to AAMS.

64 As regards more specifically the clause restricting the introduction of new brands of cigarettes onto the market (Article 2(b) of the contested decision and paragraph 17 above), the contested decision is vitiated by a serious defect, since it does not take account of the fact that the stocks of new brands constitute additional stock in the sense that they are additional to stocks of existing brands determined by reference to actual consumption. The clause limiting the opportunities to introduce new brands of cigarettes onto the market is thus necessary in order to ensure that stock capacity is protected for reasons akin to those set out in the foregoing paragraph and is not an obstacle to the effective launch of a new brand onto the market.

65 As a preliminary point, the Commission and the interveners challenge the merits of AAMS's argument that its refusal to negotiate the individual clauses with any one of the manufacturers is justified by the need to ensure that those manufacturers are treated equally. They point out that the contested decision in no way states that AAMS has to negotiate the clauses of the contract with each firm. In the contested decision, the Commission complains that AAMS insisted upon the foreign manufacturers entering into distribution agreements containing unfair clauses and left those manufacturers no choice but to comply with the agreements or to stop using AAMS's services for the distribution of their products in Italy. The Commission also points out that in France and Spain — countries whose tobacco industry shows many similarities with that of Italy — manufacturers negotiate the terms of distribution agreements with the distributors.

66 The Commission finds as a fact that AAMS distributed 106.8 million kilograms of manufactured tobacco in 1985 and 90.5 million kilograms in 1997, namely a reduction in the order of 15%. Since AAMS has never asserted that its distribution capacity had been reduced, the view could be taken that its capacity remained unchanged and exceeded actual distribution requirements by 15%. The Commission and the interveners observe that AAMS merely puts forward the wholly unrealistic proposition that several foreign manufacturers might, at the same time and despite the actual trends of the Italian market, ask it 'to put additional quantities into the chain of distribution'. Further, such an increase in the volume of cigarettes, although unlikely, could easily be accommodated by AAMS's distribution network.

67 The Commission considers there to be a contradiction in AAMS's defence so far as the application of *Bronner* is concerned. AAMS has consistently defended its position as a distributor, rather than a manufacturer, of cigarettes. Given that, as AAMS itself admits, the approach adopted in that judgment applies to relations between competing manufacturers rather than distributers and manufacturers, AAMS's argument conflicts with the way the approach is alleged to apply in the present case.

68 In any event, the judgment in *Bronner* cannot be construed out of context. In that case, the abuse concerned arose as a result of an undertaking with a dominant position on the market in daily newspaper publishing refusing to allow competitors access to the market in the distribution of daily papers. The difference is that AAMS does not deny access to the market in question but makes access conditional on the foreign firms accepting unfair terms in the distribution agreement.

69 As regards the clause relating to increases in the monthly quantities of cigarettes allowed on the market and, in particular, the obligation to obtain AAMS's approval for any additional product sales, the Commission explains that, although it is the case that the fact that the undertaking concerned holds a dominant position on the market does not deprive it of its entitlement to protect

its own commercial interests, it is nevertheless appropriate to bear in mind that a distributor has every interest in complying with directions given by his supplier if the latter's aim is to provide adequate supplies for the market. In the present case, the foreign cigarette manufacturers have no interest in putting into the distribution chain larger quantities of cigarettes than can be absorbed by the market. It is not possible to accept AAMS's claim that the firms' assessments are subject to significant margins of error, since (i) the overall demand for cigarettes has become much more stable and (ii) Italian legislation prohibits tobacco advertising. In that regard, the Commission observes that AAMS's distribution network has surplus capacity, which enables it to grant possible requests for increases in the quantities of cigarettes to be distributed. In any event, if there were to be an increase in demand for a certain cigarette brand, the manufacturers of other brands would be inclined, for financial reasons, to place fewer of their brands of cigarettes on the market, thereby avoiding the risk of surplus stocks in AAMS's warehouses.

70 As regards the restrictions on a foreign firm's ability to increase the numbers of cigarettes put on the market, and, more specifically, the maximum of 30% of the 'monthly order allowed' imposed by the distribution agreement, the Commission contends that the latter applies solely to imported cigarettes and puts those cigarettes at a disadvantage in relation to cigarettes manufactured in Italy. That disadvantage applies particularly to brands of cigarettes whose sales are strongly affected by the seasons. Furthermore, the 30% increase is not systematically authorised by AAMS, which enjoys a discretion and may, therefore, refuse to increase the number of cigarettes distributed. The Commission observes that AAMS does not describe the nature of the risks that it pleads as regards its own financial interests and that, in particular, it does not dispute that the provisions of the distribution agreement relating to the increase in the maximum quantities of cigarettes allowed on the market each month seriously jeopardise the competitive freedom of the foreign firm and are dictated solely by the aim of preventing the firm from increasing — to the extent that the market demands — the quantities sold on the Italian market. To ensure that all the operators were treated equally, AAMS could have assessed — on an actual and case by case basis — how many cigarettes could be brought into its distribution network, taking account of the reality of the situation in its warehouses in terms of storage capacity, instead of arbitrarily fixing a maximum quantity amounting to 30% of the sales of the preceding month.

71 As regards the clause relating to the payment of a compensatory fee in the event of the introduction of additional cigarettes, AAMS has not proved that there is a genuine risk of excessive storage periods resulting in economic loss, something which would justify the fee. In any event, a risk of that kind ought, as a general rule, to be excluded, since it may be supposed that the operators of the 'magazzini' conduct their business reasonably and, as a result, make their purchases from the warehouses by reference to the actual demands of the retailers. Furthermore, on the expiry of a fixed period, the foreign manufacturer is obliged to withdraw, at its own expenses, all unsold stocks of cigarettes stored in AAMS's warehouses. Hence, it is the foreign firm which bears any financial risk. Lastly, AAMS has not provided any figures at all indicating the extent of these costs.

72 The Commission contends that the clause relating to the maximum quantities of new cigarette brands allowed on the market is not justified, since AAMS's distribution capacity is adequate to ensure that foreign cigarettes are distributed, and any increase in sales of a brand of cigarettes by a firm entails a corresponding reduction in sales of other brands. Furthermore, the clause is discriminatory, since the Philip Morris cigarettes produced by AAMS are not subject to any maximum quantities.

Findings of the Court

73 At the outset, it must be pointed out that AAMS has objected only in general terms to the Commission's analysis of the three clauses mentioned above, save for its arguments relating to the payment of an additional fee prescribed by Article 2.5 of the distribution agreement.

74 In those circumstances, it is necessary to consider whether the applicant has established that the Commission has made manifest errors of assessment in

finding that the inclusion in the agreement of the three clauses in question constituted an abuse of a dominant position.

75 First, AAMS's argument concerning its refusal to negotiate specific clauses with the various foreign firms is not relevant. In the contested decision the Commission did not object to the use of a standard distribution agreement. It merely complained that AAMS had insisted on the inclusion in the agreement of the six specific clauses outlined in Article 2 of the contested decision.

76 Second, as regards AAMS's arguments concerning the application to the present case of the Court's reasoning in *Bronner*, the Court would point out that that judgment is not relevant here. The Commission does not accuse AAMS of refusing to grant certain foreign firms access to its distribution network but of making access to the network conditional upon the firms accepting unfair terms in the distribution agreement.

77 Nor can AAMS's arguments relating to its storage and distribution capacity be accepted. First, AAMS does not make any mention in its pleadings of having encountered real difficulties in that regard. Second, AAMS does not dispute that it distributed 102 million kilograms of cigarettes in 1983, that 90 million kilograms of cigarettes were lawfully sold in Italy in 1995 and that it did not reduce its storage capacity in the meantime. Finally AAMS did not produce, before the present action was commenced, any figures concerning its actual storage capacity or any concrete examples of difficulties with storage. It is quite apparent from the documents before the Court that, during the administrative procedure, AAMS did not avail itself of the opportunity to adduce any firm evidence in that regard. Thus, in its observations of 19 May 1997 concerning the statement of objections, AAMS argues that the clause limiting the introduction of new brands of cigarettes on the market was necessary for reasons related to

storage capacity. It points out that foreign firms introduced 150 new brands in 1997, which represented an increase of 750 000 kilograms of cigarettes distributed by its network. Furthermore, before the Hearing Officer, AAMS referred to three specific cases in which it had refused to authorise an increase in the maximum monthly quantities of imported cigarettes allowed on the market (namely the cases concerning the brands Lucky Strike, Amadis and Lord Extra). It maintained that it did not authorise an increase in the maximum amount, because those brands of cigarettes did not reflect market demand and, despite the refusal, stock remained unsold in the warehouses. However, AAMS did not state at that stage that there were problems concerning storage capacity. Therefore, the arguments that AAMS put forward after the commencement of the present action concerning its storage capacity cannot be accepted by the Court as proof of a manifest error of assessment on the part of the Commission at the time when the contested decision was taken.

78 AAMS argues that the obligation laid down in Article 2.5 of the standard distribution agreement to pay an additional fee where the number of cigarettes placed on the market is increased is prompted by the need to avoid certain financial risks. Suffice it to say, at this stage, that AAMS merely reproduces the arguments that it put forward during the administrative procedure without adducing any proof at all that the Commission made a manifest error of assessment at the time when the contested decision was adopted.

79 In any event, whilst it is the case that the fact that an undertaking has a dominant position on a market does not deprive it of its entitlement to protect its own commercial interests when they are attacked and whilst such an undertaking must be granted the right to take such reasonable steps as it deems appropriate to protect its interests, AAMS has not proved to the requisite legal standard that the clauses mentioned above were necessary to protect its commercial interests and to avoid both the risk of its distribution network becoming overloaded and the financial risk of cigarettes not ordered by retailers remaining in storage for lengthy periods.

80 In the light of all the foregoing factors, the Court holds that the Commission was fully entitled to find that AAMS's insistence on including the clauses in question in the distribution agreement amounted to an abuse of a dominant position within the meaning of Article 86 of the Treaty.

Clause relating to the inspection of cigarettes

— Arguments of the parties

81 AAMS argues that it has both a power and a duty to carry out the inspections provided for in Article 5 of the distribution agreement as regards the products that it places on the market, since it shares responsibility for ensuring that those products comply with the relevant national legislation. It submits, more specifically, that under the fifth paragraph of Article 37 of Law No 142 of 19 February 1992: 'Any person who places on the market or who, in any event, sells cigarettes having a tar content higher than that laid down by the current provisions of this Article shall be liable to a fine of up to one hundred million [lire] and imprisonment of up to two years'. AAMS also points out that in the contested decision the Commission referred to a piece of national legislation, namely Law No 224 of 24 May 1988, on which it had never relied in order to justify the inspections at issue.

82 The Commission contends that the inspections delay, without any justification, the launch of new brands of foreign cigarettes onto the Italian market. AAMS's argument that it is required to ensure compliance with the legislation applicable in the sector cannot be upheld, since it is incumbent upon the manufacturer to make sure that a product complies with the legislation in force concerning cigarettes. Furthermore, the clause is unfair inasmuch as it requires the foreign

manufacturer to pay an annual flat-rate fee for each packaging of each brand regardless of the inspections carried out by AAMS. Its true objective is to place a further obstacle on the import of cigarettes.

— Findings of the Court

83 As regards AAMS's claim to be responsible for ensuring that the cigarettes it distributes comply with Italian law, AAMS and the Commission disagree as to which provisions of Italian legislation are relevant in this case. The Commission argues that Law No 224 of 24 May 1988 concerning liability for defective products applies in the instant case. It is quite apparent from the provisions of that law, which has been supplied by the Commission (see paragraph 29 above), that the manufacturer is liable for any damage caused by a defect in its product. However, if the manufacturer of the product cannot be identified, each supplier is deemed to be a manufacturer unless it informs the injured person, within a three-month period, of the identity of the manufacturer or of the person who supplied it with the product. It must be held that, given AAMS's major role in the cigarette trade in Italy, it is unlikely that it would be unable to identify the manufacturer of any defective cigarettes distributed through its network and thus avoid liability under Law No 224 of 24 May 1988. As regards AAMS's claim that it carried out the inspections provided for by Article 5 of the distribution agreement to ensure that Italian tobacco legislation, in particular the fifth paragraph of Article 37 of Law No 142 of 19 February 1992, was not contravened and that it did not incur a penalty thereunder, it is appropriate to point out that Article 11 of the distribution agreement requires the foreign firms (i) to supply AAMS with cigarettes that do not contravene the relevant Italian legislation in force, (ii) to withdraw all stocks of cigarettes that do not conform thereto and (iii) to accept all liability in respect of the sale of the cigarettes. In those circumstances, it must be held that the inspections are disproportionate and needless.

84 It follows from the foregoing that AAMS has not adduced any persuasive evidence capable of establishing that the Commission's analysis of the clause referred to in Article 2(f) of the contested decision is vitiated by a manifest error of assessment.

85 It follows that the third part of the plea must be rejected in its entirety.

*The fourth part of the plea: alleged error of assessment as regards improper unilateral practices*

Arguments of the parties

86 AAMS submits that, as regards its refusal to approve increases in the maximum monthly quantities of cigarettes allowed on the market, the Commission was able to point to only a few cases of unjustified refusals in 1995 and 1996. It adds that the Commission, in founding its complaint on an unjustified refusal, admits by implication that the contractual term itself, which provides for the possibility of such a refusal, is not irregular. So any irregularity would reside only in misapplication of the clause, something which — in over 10 years — has given rise to difficulties in only a few cases.

87 The contested decision does not contain an adequate statement of reasons as regards either AAMS's conduct towards the 'magazzini' or the Commission's allegation in the third paragraph of recital 18 of the preamble to the contested decision that JT International BV informed AAMS that a number of warehouses had repeatedly cut supplies of certain brands of cigarettes intended for the 'magazzini'. The decision is founded solely on a complaint from JT International BV, the merits of which have not been proved. Furthermore, the conduct of the AAMS inspectors, referred to in the third paragraph of recital 18, relating to letters sent to certain 'magazzini' identifying 'excessive stocks in relation to market requirements' and requiring the local warehouse 'to check specifically requests for supplies in order to improve the balance of stocks and rationalise the

management of allocations' granted are not evidence of any irregularity intended to put foreign cigarettes at a disadvantage. Those letters show that there was a procedure designed to ensure an efficient and regular service.

88 AAMS challenges the Commission's assertion, in recital 19 in the preamble to the contested decision, that it constantly monitored the trading activities of retailers with a view to promoting the cigarettes that it produced itself. AAMS maintains that in its relations with retailers it was acting in its capacity as a public authority. AAMS observes that, in its judgment in Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 49, the Court of Justice found that 'the activity of AAMS at the stage of retail sale, which consists essentially in authorising the opening of tobacco outlets and in controlling their number and distribution throughout Italy, amounts in effect to the exercise of a State right and not an economic activity *stricto sensu*'. It submits that consequently it was not possible to assess its conduct towards retailers in the course of a procedure initiated under Regulation No 17 and dealing with its activity as an undertaking. AAMS adds that, although it is the case that Article 86 of the Treaty (read in conjunction with Article 5 of the EC Treaty (now Article 10 EC)) requires Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (Case C-35/96 *Commission* v *Italy* [1998] ECR I-3581, paragraph 53), it is nevertheless the national court that is competent to ascertain whether infringements of that kind have occurred when the rules of the Treaty are applied in favour of individuals while the Court of Justice is competent in the context of actions brought under Articles 169 and 170 of the EC Treaty (now Articles 226 EC and 227 EC).

89 The Commission states that AAMS does not dispute that applications to place increased numbers of cigarettes on the market were refused and that it has merely drawn attention to the limited number of refusals without, however, giving any reasons at all for them.

90 As regards its conduct towards the 'magazzini', AAMS does not dispute the facts set out in the fax from JT International BV (see Annex 38 to the complaint and

Annex C to the application). As regards the examples given in the third paragraph of recital 18 in the preamble to the contested decision, an examination of the content of the letters sent by the inspectors (see Annexes 17 and 18 to the complaint submitted by Rothmans and Annex C to the application) shows unequivocally that AAMS wanted to impose quotas on the volume of foreign cigarettes. AAMS's conduct towards retailers (see recital 19 in the preamble to the contested decision) amounted, in substance, (i) to complaining (using the supervisory powers conferred on its inspectors) that the retailers had ordered foreign cigarettes in quantities comparable to the total monthly sales of virtually the whole sector or (ii) to fixing the minimum amount of monopoly goods to be kept permanently in stock. The Commission and the interveners do not deny that AAMS had supervisory powers over authorised retailers and tobacco retail stores. However, the conduct mentioned above was specifically intended to promote AAMS's cigarettes and to limit sales of imported cigarettes. In those circumstances, AAMS's inspectors did not act within their supervisory powers but for the sole purpose of specifically promoting AAMS's business activities to the detriment of its competitors. As a result, the fact that the conduct in question took the form of an administrative measure in no way affects the Commission's finding that the purpose of the conduct was to promote AAMS's business activities. Consequently, the measures taken by AAMS may be likened to business activities, which may be examined under Article 85 of the EC Treaty (now Article 81 EC) and Article 86 of the Treaty, in accordance with the rules of procedure in Regulation No 17 (Case 41/83 *Italy* v *Commission* [1985] ECR 873). The anti-competitive effects of those activities were particularly significant and were blatantly inconsistent with the principle of the neutrality of the distribution system.

91 JT International BV is surprised that AAMS has relied on the judgment in *Banchero*. In that case, the Court specifically asked the Italian Government whether the legislation governing cigarette distribution in Italy contained a provision favouring national production and was told that 'procurement choices were a matter entirely for retailers to determine on the basis of market demands'. However, in a statement to the Italian Parliament in November 1995, the former managing director of AAMS acknowledged that AAMS's conduct towards retailers was unlawful. According to JT International BV, the Court might have decided the case quite differently if the information given to it by the Italian authorities had been correct.

Findings of the Court

92 In the contested decision the Commission states that AAMS, taking advantage of its dominant position on the Italian market for the wholesale distribution of cigarettes, adopted various improper courses of conduct, which were intended to protect and strengthen its position on the Italian cigarette market.

93 First, AAMS's arguments relating to its refusal to approve increases in the maximum monthly quantities of cigarettes allowed on the market cannot be accepted. AAMS does not deny that it refused on several occasions, particularly in 1995 and 1996, to allow foreign firms to increase the maximum amount of cigarettes allowed on the market, as they had asked to do under Article 2.5 of the distribution agreement. It merely tries to play down the significance of those unjustified refusals by pointing out that the Commission found only a few cases over a limited period of time.

94 Nor can AAMS's arguments concerning the conduct of its inspectors towards the 'magazzini' and retailers be accepted. The Court holds that the Commission has shown to the requisite legal standard that the effect of AAMS's conduct was to prevent foreign firms from placing on the Italian market the quantities of cigarettes that they judged to be appropriate and that it weakened their competitiveness.

95 In recital 18 in the preamble to the contested decision, the Commission listed eight examples of actions taken by AAMS inspectors with regard to the 'magazzini', which it alleges demonstrate that AAMS intended to favour national cigarettes and restrict sales of imported cigarettes. It is appropriate to point out that AAMS raises objections to the relevance of the facts set out in the first three examples described in recital 18 but does not dispute the facts recounted in the five other examples featuring in that recital. It is quite apparent from the last five

examples that the AAMS inspectors sent the 'magazzini' letters on several occasions requiring them, in particular, to observe sales quotas applying to national and imported cigarettes. The following paragraph can be found in one of those letters: 'It goes without saying that an increase in sales of foreign products must go hand in hand with a proportional increase in the sales of domestic products. Exceptional sales of non-domestic products will in any case have to be offset within the next two months...' (fourth example in recital 18 to the contested decision). The Court finds that AAMS has not shown, to the requisite legal standard, that the conduct of its inspectors was vindicated by a concern to ensure that the service was efficient and regular or that it was required by the legislation in force or by contractual terms. As a result, the Commission has adequately proved that the conduct of AAMS's inspectors amounted to abuse within the meaning of Article 86 of the Treaty. Furthermore, the contested decision contains an adequate statement of reasons in that regard in recitals 48 to 50.

96 The Commission also held in the contested decision that AAMS's inspectors had adopted a course of conduct towards retailers intended to promote sales of AAMS's cigarettes and to limit those of imported cigarettes. The conduct in question is described in recital 19 in the preamble to the contested decision and consisted, in particular, in stressing to the retailers the need to sell a minimum quantity of domestic cigarettes, something which AAMS does not dispute.

97 However, AAMS argues that in its relations with retailers it was acting in its capacity as a public authority and that those relations cannot be examined in the context of a procedure under Regulation No 17. The Court asked AAMS to provide further details about the regulatory powers exercised by its inspectors in the course of the four operations referred to in recital 19 to the contested decision and to explain in what respect the inspectors' conduct was consonant with the objectives of the legislation applying in the cigarette sector (see paragraph 29 above).

98 In its reply, AAMS restated that its inspectors were carrying out public duties and had statutory supervisory powers over distributors and retailers in the cigarette sector under Article 2 of Law No 1283/1957. It added that its inspectors were obliged to monitor the activities of the distributors and retailers of monopoly goods under Italian Law No 1074/1958 in order to prevent fraud. According to AAMS 'if retailers receive abnormally large supplies, that may result from, or be symptomatic of, factors such as prohibited advertising of the products or the illegal provision or supply of goods to third parties'. It argues that, in any event, even if the actions in question were not consonant with the objectives of the provisions concerned, they are merely liable to be declared an abuse of powers.

99 It is appropriate to point out that the actions referred to in recital 19 to the contested decision were taken in order to favour the sale of domestic cigarettes and that AAMS's arguments concerning the need to prevent fraud and unlawful advertising are merely speculative and unpersuasive. Consequently, the Court holds that AAMS has not established that the Commission made a manifest error in its appraisal of the actions in question.

100 In those circumstances, the fourth part of the plea must be rejected.

**The alternative claims seeking a reduction in the fine imposed**

*Arguments of the parties*

101 AAMS maintains that if the Court upholds its arguments relating to a dominant position on the relevant market, it ought to annul the contested decision in its

entirety, including the part relating to the fine. If the Court upholds only the arguments relating to the terms of the distribution agreement and the unilateral practices, it ought to reduce the fine. As regards the length of time of the infringement and, in particular, the alleged refusal of AAMS to approve increases in the maximum monthly quantities of cigarettes allowed on the market, the contested decision refers only to certain events which took place in 1995 and 1996. Consequently, the infringement should be regarded as of medium, rather than long duration, which has consequences for the calculation of the fine (Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3)). Furthermore, the Commission confines itself to stating that the distribution agreements at issue were in existence as early as 1985, without explaining how or why that fact has any impact on the gravity and duration of the infringement, in the absence of any conduct specifically intended to limit competition or, above all, on what grounds that fact may, on its own, provide justification for the amount of the fine imposed.

102 The Commission refutes AAMS's argument that the improper unilateral practices complained of in the contested decision concern only certain events in 1995 and 1996 and reiterates that the infringement must be regarded as being of long duration. It is clear that the distribution agreements were in existence as early as the end of 1985, which allows the infringement to be regarded as one of long duration and, accordingly, the amount of the fine as justified. Furthermore, AAMS's infringements of Article 86 of the Treaty form part of a policy specifically seeking to impede, seriously and systematically, competing manufacturers from gaining access to the Italian cigarette market and to restrict their opportunities for expansion within that market. The Commission therefore concludes that AAMS's actions amount to a serious infringement of Article 86 of the Treaty.

103 JT International BV takes the view that the fine imposed by the Commission is too low, given both the duration and the gravity of the infringement committed by AAMS and the fact that the conduct constituting an abuse was deliberate and disregarded a clear line of cases decided by the Court and describing the

obligations of an undertaking with a dominant position as well as numerous attempts by foreign firms to draw AAMS's attention to the unlawfulness of its conduct. JT International therefore asks the Court to use its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and to set the fine at a considerably higher level than EUR 6 million so that the penalty has an appropriate deterrent effect.

*Findings of the Court*

104 First of all, as regards the applicant's arguments concerning the circumstances in which it would be appropriate to set aside the fine or to reduce the amount thereof, the Court has not upheld AAMS's claim for annulment of the contested decision and so there are no grounds to set aside that part of the decision relating to the fine or to reduce the amount of the fine on that basis.

105 Furthermore, AAMS cannot validly rely on the fact that the contested decision refers only to certain events which took place in 1995 and 1996 and that the infringement must, therefore, be regarded as of medium duration, rather than of long duration. Even if the Commission has found only a few examples of AAMS refusing to approve increases in the maximum monthly quantities of cigarettes imported between 1995 and 1996, that conduct must not be considered in isolation, but globally as part of a series of actions taking place between 1990 and 1996. The assessment made by the Commission of the duration of the infringement is not vitiated by any error, since it is apparent from recitals 16 to 19 in the preamble to the contested decision that the actions which AAMS is alleged to have taken as regards cigarettes in Italy occurred over a seven-year period, namely from 1990 to 1996. In those circumstances, the conclusion must be drawn that the Commission has adequately demonstrated that the infringement of which AAMS stands accused was of long duration.

106 The fourth paragraph of Article 37 of the EC Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. JT International BV intervened in the present action in support of the form of order sought by the Commission. Its claim for an increase in the fine must be rejected as inadmissible, given that the Commission did not seek such an increase.

107 It follows from the foregoing that the claims of AAMS and JT International BV concerning the legality and the amount of the fine must be rejected in their entirety.

## Costs

108 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since AAMS has been unsuccessful and the Commission has asked for costs to be awarded against it, AAMS will be ordered to bear its own costs and to pay those of the Commission.

109 In addition, AAMS will pay the costs of the interveners, they having made an application to that effect.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders AAMS to pay the costs of the Commission and of the interveners and to bear its own costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 22 November 2001.

H. Jung P. Lindh

Registrar President