distinction to domestic and to imported products, do not in themselves constitute a measure having an equivalent effect to a quantitative restriction, but they may have such an effect when, on account of the price level fixed, they place imported products at a disadvantage, in particular because their competitive advantage due to lower production costs is neutralized or else because a maximum price is fixed at so low a level that — given the general standing of imported product as compared with national products — traders wishing to import the products in question into the Member State concerned could do so only at a loss.

3. The fact that the provisions relating to a State monopoly of a commercial character have the effect of obliging foreign producers to observe a uniform trading margin for retail sales on the domestic market, whereas no comparable duty exists in respect of the products of that same monopoly when they are marketed abroad, does not amount to discrimination within the meaning of Article 37 of the Treaty. It is merely the consequence of the existence of a monopoly having a commercial character and entailing the regulation of trading margins, whereas no such monopoly and no such regulation exist in other Member States. If the disparities between national laws on trading margins for the retail trade in such products were to have adverse effects on competition in the common market, it would be the duty of the competent Community institutions to eliminate such effects by harmonizing the provisions laid down in Member States by law, regulation or administrative action.

In Case 78/82

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, René-Christian Beraud, acting as Agent, assisted by Eugenio de March, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Arnaldo Squillante, Capo del Servizio del Contenzioso Diplomatico, Trattati e Affari Legislativi [Head of the Department of Contentious Diplomatic Affairs, Treaties and Legislative Matters] and Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that by continuing to fix uniform margins for sales of manufactured tobacco, the Italian Republic has failed to fulfil its obligations under Article 37 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due and K. Bahlmann, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties set out in the course of the written procedure may be summarized as follows:

I — Summary of the facts

1. The retail sale in Italy of products made from manufactured tobacco is subject to a State monopoly, which was most recently set out in Law No 724 of 10 December 1975 (Gazzetta Ufficiale No 4 of 7 January 1976). The monopoly consists in the power conferred on the tax authorities to approve persons authorized to sell manufactured tobacco, having ensured that they meet the legal conditions which must be satisfied by persons permitted to sell the products governed by the monopoly, which bear a heavy consumer tax. The monopoly entails, in particular, special rules governing the amount and composition of the resale prices to the public of manufactured tobacco.

Law No 825 of 13 July 1965 (Gazzetta Ufficiale No 182 of 22 July 1965), as amended by Law No 724 of 10 December 1975, fixes a scale of prices for resale to the public which is made up of a wide range of retail prices, each of

which is divided into three parts, namely the share taken by the supplier to pay the manufacturer and wholesale distributor, the share taken by the exchequer by way of consumer tax and the share taken by the resale trader (the margin) as remuneration for the retail sale. The margin is equal to 8% of the final resale price charged to the public. The scale of retail prices comprises 71 different public resale prices in the case of cigarettes, 213 prices for cigars, 91 prices for cigarillos, 133 prices for shredded tobacco and 36 prices for snuff. Domestic and foreign manufacturers choose for each of their products one of the public resale prices appearing in the scale (or suggest a price which does not appear), in which all the brands are then entered by decree of the Ministry of Finance.

The resale trader purchases the products subject to the monopoly net of the margin and must market them at the prices fixed by the scale of public resale prices, neither exceeding nor undercutting them. His remuneration consists of the margin fixed in the scale of resale prices.

Products made from manufactured tobacco are, furthermore, subject to a production monopoly in Italy.

2. By a letter of 2 April 1980, the Commission informed the Italian Government that the Italian legislation on the monopoly in manufactured tobacco included, in its view, a number of measures which were incompatible with the Treaty. In accordance with Article 169 of the EEC Treaty, the Commission invited the Italian Government to submit its observations within two months. The letter was directed, apart from the fixing of uniform trading margins, at the *de facto* maintenance of the monopoly at the wholesale stage, at the maintenance of the monopoly on retail trade, conditions regarding access to the tobacconist's trade, the requirement of Italian nationality for retailers, and the arrangements for purchasing and paying for tax labels under the Italian monopoly. On the subject of fixing standard margins as a percentage of the retail price, the Commission argued in substance that the system in force was liable to distort the conditions of competition by contravening the principle of equality of opportunity enjoined by Article 37 of the Treaty.

The Italian Government replied to the Commission in a letter of 7 July 1980 from the office of its Permanent Representative, justifying the terms of the monopoly in manufactured tobacco on the various points raised by the Commission.

On 13 November 1980 the Commission, acting under the first paragraph of Article 169 of the Treaty, delivered to the Republic of Italy a reasoned opinion in which it claimed that by maintaining the measures in question that State had failed to fulfil its obligations under Article 37 of the Treaty. Apart from the monopoly in manufactured tobacco, the reasoned opinion related to the adjustments to be made to the monopoly in matches, to which reference had been made in a letter from the Commission of 23 December 1976 and the Italian Government's reply thereto of 1 March 1977.

Following a number of contacts between the Italian authorities and the Commission, the Italian Permanent Representative forwarded to the Commission on 26 June 1981 the reply of the Italian Government to the reasoned opinion, informing the Commission of a series of

proposed amendments to the monopoly in order to comply, on most of the points raised by the Commission, with the guidelines laid down by the latter. The uniform margins used in determining retail prices were, however, retained because the Italian Government considers that the retention of uniform margins constitutes a fundamental component in the structure of the "revenue-producing monopoly" in tobacco, pursuant to Article 90 (2) of the Treaty.

As a result of that commitment by the Italian authorities to adopt the legislative and administrative measures required for compliance with the reasoned opinion on most of the contested points, the Commission decided to suspend proceedings for failure to fulfil a Treaty obligation except as regards the point concerning the fixing of uniform trading margins, which is the subject of the present case.

II — Procedure and conclusions

1. By an application lodged at the Court Registry on 24 February 1982, the Commission brought an action under the second paragraph of Article 169 of the Treaty claiming that the Court should:

1. Declare that by continuing to fix uniform trading margins for retail sales of manufactured tobacco the Italian Republic has failed to fulfil its obligations under Article 37 of the EEC Treaty;

2. Order the defendant to pay the costs.

2. The Italian Republic contends that the Court should:

1. Dismiss the application;

2. Award costs accordingly.

3. The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. Nevertheless, it put certain questions to the Commission and the Italian Government.

III — Submissions and arguments of the parties

1. The *Commission* claims that the State's fixing of a uniform trading margin which traders are obliged to grant to the retailer and which applies both to products deriving from its production monopoly and to products imported from other Member States is contrary to Article 37 of the EEC Treaty.

(a) Such a measure is discriminatory *per se*, because the producer-State is thereby induced to fix the margin in accordance with the sales policy which it is pursuing for its own products. That margin is not, however, necessarily one suited to the sales policy for the imported products. On the contrary, it is arguable that a fixed margin cannot, by definition, suit the whole range of products being sold on the national market. It is as if a producer were to impose on his competitors the margin which he himself fixes for retailers in respect of his own products. Article 37 aims precisely to prevent a Member State holding a production monopoly from

taking advantage of its distribution monopoly in order to create a situation of that kind.

As long ago as the judgment of 3 February 1976, Case 59/75 *(Pubblico Ministero* v *Manghera* [1976] ECR 91) the Court held to be discriminatory, for the purposes of Article 37, the maintenance of an exclusive right of importation held by a State which itself produces the goods in question, the reason being that the monopoly cannot but prefer its own products to those of competitors. Similarly, the fixing of uniform trading margins by a State holding such a monopoly must be regarded as discriminatory because that State cannot but fix the margins in such a way as to favour the marketing of its own products. Most Italian-made manufactured tobacco is in any case sold at prices lower than those of products from other Member States, so that the imposition of a margin fixed as a percentage of the retail price weighs more heavily in real costs on expensive products, which are generally imports, than on Italian products, which are usually cheaper.

In order to argue that a measure is not discriminatory, it is not sufficient to contend that it is universally applicable. The concept of discrimination between nationals of Member States referred to by Article 37 must be viewed in the context of the common market considered as a single entity. It calls for an analysis of the position of domestic and Community traders, not at national, but at Community level. Whereas the Italian monopoly may freely export its products to other Member States, choose its trade promotion policy and grant to the resale trader whatever remuneration it considers most suitable, when Community exporters sell their products in Italy they are forced to pay the retailer a fixed margin, of a size dictated by the State.

The Commission maintains that the only reasonably sure way of eliminating the possibility of discrimination that represents, for the purposes of Article 37 of the Treaty, is to eliminate the fixing of uniform margins. The State nevertheless has the option of fixing a minimum margin, basing itself on the obligation on the part of the retailer, as part of the lawful State monopoly, to negotiate with all suppliers, and on the concern to guarantee them a minimum remuneration. The State may further introduce a prohibition on loss-leaders, by establishing a maximum margin the amount of which may not exceed the total profit of the trader.

(b) In addition, the fixing by the State of trading margins is liable to distort competition, and adversely affects the equality of opportunity for imports from other Member States required by Article 37 of the Treaty read in conjunction with the Court's judgment of 13 March 1979 (Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935, at p. 954). The fixing of uniform trading margins is intrinsically hostile to competition because it obstructs the free play of economic forces. It prevents importers from allowing retailers a larger margin in individual cases and from granting marketing premiums, thereby restricting

the manufacturers of the imported products in their choice of commercial strategy. Those disadvantages handicap imported products as opposed to those already established in the market, which are mostly domestic products. The importers are forced to grant the remuneration fixed by their direct competitor, namely the State as holder of the production monopoly. Whilst the Italian State, as holder of the monopolies in both production and distribution, may control both the margin and the resale price to the public, importers may control only the price. Those disadvantages are further aggravated in an country such as Italy, where the ban on all advertising relating to tobacco primarily affects the imported product, less familiar than the domestic product.

It cannot be maintained that the fixed margin is justified as an instrument of consumer protection ensuring the transparency of the components in the final price. If such were the true basis of the fixed margin, the latter would have to stand as a general, permanent rule in the marketing of all consumer products, not only those subject to a monopoly. A floating margin does not, in itself, affect the level of public resale prices, and therefore it cannot be claimed that the fixing of uniform margins is necessary for the purpose of avoiding an uncontrolled rise in prices.

(c) As regards the possibility of justifying a breach of Article 37 and of the conditions of competition by pleading Article 90 (2) of the Treaty, as did the Italian Government in its reply to the reasoned opinion, the Commission does not *a priori* rule out reliance thereon as far as monopolies falling under Article 37 are concerned. However, the conditions laid down by Article 90 (2) are not, it alleges, satisfied in this particular case.

First, the monopoly on the marketing of tobacco is not a revenue-producing monopoly. In order to be such, it is not sufficient that the monopoly sets out to collect a tax on consumption. The essential purpose of the monopoly must be to produce the maximum State revenue, whereas a comparison of tax revenue from manufactured tobacco in Member States reveals that the tax revenue derived from tobacco sales in Member States having no marketing monopoly is no lower as a result than that collected in Member States which do hold such a monopoly.

Next, the Commission rejects the argument that the enforcement of Article 37 would prevent the Italian tobacco monopoly from bringing in the revenue which, it is alleged, it was specially designed to produce, and that the revenue could be realized only by the maintenance of a system of fixed margins. It has not even been established that the system of fixed margins does indeed help to produce the most revenue. In any case, the elimination of any possibility of competition at the level of trading margins is not necessary to maintain the alleged revenue-producing role of the monopoly on sales and is grossly disproportionate, since the maximizing of revenue can never warrant such a grave distortion of the fundamental provisions of the Treaty. That a system of fixed margins in no way constitutes an indispensable component of a revenue-producing monopoly is

borne out by the fact that the only other Member State with a monopoly in manufactured tobacco, namely France, has recently undertaken to relax marketing margins, and that Italy itself has abandoned fixed margins as far as the monopoly in matches is concerned.

Lastly, the fixing of trading margins is contrary to the interests of the Community because it affects trade within the Community inasmuch as it restrains importers from offering marketing premiums in order to encourage sales of their products.

2. The *Italian Government* contends that the maintenance of uniform trading margins as part of the legal monopoly on retail sales is consistent with the Treaty.

(a) The economic and legal reasons for the price system are related to the characteristics of the monopoly, which was adjusted for the purposes of Article 37 of the Treaty. In Italy, in the case of manufactured tobacco, the monopoly has been specially designed to produce the maximum revenue for the State, over and above the possibilities offered by the normal system of taxing the consumption or the manufacture of certain goods. The resale trader acts as a veritable tax-collector. The system of fixed margins avoids the progressive elimination of "marginal" producers which would create a *de facto* monopoly on the market, causing an increase in illegal consumption and therefore considerable losses to the exchequer.

The fact that the margin is fixed also serves to protect the consumer by ensuring the transparency of the different components of the final price of a product and by preventing an uncontrolled increase in prices.

(b) The system of fixing trading margins entails no discrimination. It is a matter of limiting the income of retailers of manufactured tobacco by means of uniformly restricting their profit margins, and thus it entails partial price control. The margin of 8% applies strictly and uniformly to domestic and imported products alike. No trader is put in a different situation. The uniformity of the margin is the most logical consequence of the existence of a monopoly on retail sales which has been adjusted for the purposes of Article 37 of the Treaty, because it is designed to prevent the retailer subject to the monopoly from discriminating against the consumer who seeks, or the producer who offers, a product the sale of which is remunerated by a lower margin.

The State does not fix the margin on the basis of its sales policy for its own products, but applies the same provisions throughout for all sales of articles subject to the monopoly, guaranteeing to all domestic and foreign traders the greatest freedom in selecting prices. The margin of 8% constitutes a fair and adequate remuneration for the retailer's role.

Since the margin is fixed as a percentage of the final selling price, the resale trader collects a higher margin in absolute terms on the sale of imported products, with the result that the latter enjoy an advantage. Thus, on the sale of a packet of 20 home-produced cigarettes of the most widely sold brand, the retailer collects a remuneration of LIT 72, whereas he collects LIT 120 on the sale of 20 cigarettes of the most widely sold foreign brand. Moreover, to assert that imported products are more heavily

taxed is illogical in view of the fact that the action was brought by the Commission because the uniform margin constituted an insuperable upper limit.

The principle of non-discrimination prohibits Member States from adopting in their territories measures which treat products placed in analogous situations differently. It permits differences in treatment between products marketed inside the country and those marketed abroad which are attributable to the disparity of the laws of the various Member States. The principle of non-discrimination prohibits placing an imported product at a disadvantage as compared with the domestic product. In the absence of a common organization of the market the Member State may adopt special provisions for the domestic market which do not lead to discrimination between domestic and imported products but which differ from the provisions applicable in other States.

(c) Alleged distortions of competition may be examined in the context of Article 37 of the Treaty solely to determine the possible existence of discrimination. Since no discrimination has been established, the action must *ipso facto* be dismissed without any examination of the arguments relating to competition.

In any case, there is no restriction on competition because the system in force enables the importer to offer the product for sale at a more competitive price without interfering with the resale trader's percentage margin, thereby stimulating sales.

Foreign products are marketed in larger quantities in fact than domestic products. Their retail sales are, in absolute terms, better remunerated than those of domestic products. Their distribution is facilitated by extensive advertising, from which domestic brands do not benefit, because the ban on advertising is in practice openly disregarded in the case of foreign brands. At present, 263 foreign products and 66 domestic products are marketed in Italy.

Furthermore, not every measure affecting competition constitutes *ipso facte* a forbidden infringement. Member States are empowered to regulate commerce and, in particular, to intervene to control prices at the retail stage, provided that the common organization of that sector of the market is not thereby endangered. Even where there is a common organization of the market, the Court has accepted in its case-law price-control at the retail stage and action taken to control retailers' trading margins if it is designed to safeguard, besides the interests of the final consumer, the fiscal and economic interests of the State. Such a power would, *a fortiori,* encounter no serious objection as regards products which are not subject to a common organization of the market.

In Article 2 (3) (c) of Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (Official Journal, English Special Edition 1970 (I), p. 17), the Commission itself listed among the illegal measures only those which fix profit margins or any other component of the price of

imported products alone, or which fix different ones for domestic products and for imported products, to the detriment of the latter.

(d) At all events, any breach there may be of the rules on competition and of any other Treaty standard are fully and entirely vindicated by Article 90 (2) of the Treaty.

There is no doubt that the tobacco monopoly in Italy is of a revenue-producing character. It is sufficient, in that connection, to have regard to the extremely large share of the tax element in the final price of the product, amounting to about three-quarters thereof, and to the position of the retailers, who function as tax-collectors. The monopoly was introduced for the purpose of obtaining tax revenue for the State, although there were other, and different, aims besides that. The State's fiscal policy is not always to gather the maximum possible in tax receipts, and from a Community standpoint revenue-producing monopolies afford one of the instruments for implementing the fiscal policies of Member States. A modern revenue-producing monopoly is an ensemble of measures serving a number of purposes which are closely inter-related. It is therefore impossible to subscribe to the thesis that undertakings having the character of a revenue-producing monopoly are exclusively those whose sole purpose is to obtain for the State the maximum of tax receipts in absolute terms.

The fixing of the margin contributes decisively to ensuring that the public resale prices of products within the revenue-producing monopoly are transparent and verifiable. It prevents competition in margins, the effect of which would be to incite sellers to evade the heavy tax-burden, and it thereby limits the phenomenon of smuggling. The fact that the margin is fixed therefore helps, *de jure* and *de facto*, the monopoly to achieve its aim of producing revenue on the most advantageous terms. It guarantees the neutrality of retailers and enables the enormous distribution network to be properly monitored.

The development of trade within the Community is, the defendant contends, in no way compromised by fixing the margin assigned to the retailer of the products within the monopoly. The measure in question is entirely neutral as regards competition between imported and domestic products. No producer, whether domestic or foreign, can offer marketing premiums or incentive bonuses to retailers. During the last 20 years, and since the abolition by law of all tobacco advertising, the range of products on the market — domestic and foreign alike — has changed considerably, and foreign products have greatly increased their share in the Italian consumer market, moving up from 2.47% in 1962 to 37.30% in 1981. At all events, it is quite out of the question in the circumstances to speak of Community trade as having been affected "to such an extent as would be contrary to the interests of the Community".

The question as to whether France has given up the revenue-producing side of its monopoly on tobacco or has at least ceased to fix trading margins for manufactured tobacco is irrelevant to the Italian position on that point. As for the Italian monopoly on the retail sale of matches, the Commission is wrong in maintaining that Article 2 of the Ministerial Decree of 25 June 1973 relaxed the margin. The decree relaxed only the margin on the distribution and

wholesale of matches, while maintaining the obligation to grant a remuneration of 8% of the public resale price to the retail trade.

3. On that last point, the *Commission* replies that, on the strength of correspondence with the Italian Government in connection with proceedings for a breach of the Treaty regarding the match monopoly, the Commission was able to take the view that the decree of 25 June 1973 on the importation of matches from EEC countries had relaxed retail trading margins for matches, with the result that it had long regarded the breach in the matter of matches as having been rectified.

IV — Oral procedure

At the sitting on 1 March 1983 oral argument was presented by the Commission, represented by E. de March, a member of its Legal Department, and by the Republic of Italy, represented by O. Fiumara, Avvocato dello Stato.

The Advocate General delivered her opinion at the sitting on 26 April 1983.

Decision

1 By an application lodged at the Court Registry on 24 February 1982, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty seeking a declaration that, by continuing to fix uniform trading margins for the retail distribution of manufactured tobacco, the Italian Republic had failed to fulfil its obligations under Article 37 of the EEC Treaty.

2 In Italy, manufactured tobacco products are subject to a State monopoly which affects both production and distribution thereof. As far as the retail trade, in particular, is concerned, the monopoly consists in restricting it to tobacconists approved by the fiscal authorities and numbering about 80 000. Tobacconists are required to sell tobacco products at public resale prices indicated by a scale of charges fixed by law.

3 That scale of charges comprises a wide range of retail prices, each of which is made up of three parts, namely the remuneration of the manufacturer and the wholesale distributor, the share taken by the exchequer and the margin taken by the retailer. That margin amounts to 8 % of the public resale price. The authorities administering the monopoly in their capacity as manufacturer, and the importers, are free to choose for each of their products one

of the public resale prices shown in the scale, or even a price not shown which is then incorporated into it.

4 On 13 November 1980, pursuant to the first paragraph of Article 169 of the EEC Treaty, the Commission delivered to the Republic of Italy a reasoned opinion in which it claimed that the latter had failed to fulfil its obligation to adjust its monpoly on sales of manufactured tobacco products to comply with Article 37 of the Treaty, namely by maintaining certain procedures under that monopoly. Amongst the contested procedures, the fixing of uniform trading margins was cited. Further to that reasoned opinion, the Italian Government and the Commission agreed on a series of adjustments to the monopoly. However, the Italian Government refused to abandon the system of uniform margins for retail sales.

5 The Commission thereupon brought the present proceedings, the scope of which is limited to the single question concerning the maintenance of such uniform trading margins, seeking a declaration that the system is contrary to Article 37 of the Treaty.

6 Article 37 (1) of the Treaty provides that "Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States".

7 The Commission claims that the fixing by the State, whose monpoly also includes the production of the goods in question, of uniform trading margins for the retail trade is a discriminatory measure. On the one hand, the State is necessarily induced to prefer the products of its domestic manufacture to those of foreign competitors, and to fix the margin at a level which favours the marketing of its own products. On the other hand, discrimination arises from the fact that the Italian monopoly, when exporting to other Member States, may freely choose its sales promotion policy whereas foreign manufacturers selling to Italy are obliged to comply with the uniform trading margin fixed by the State.

8 The Commission further claims that the uniform trading margin is liable to distort competition and to place imports from other Member States at a

disadvantage. The uniform margin is intrinsically hostile to competition in its effects, inasmuch as it makes it impossible for the manufacturers of foreign products to grant marketing premiums, and compels them to adopt the same marketing methods as the Italian monopoly on production.

9 The Italian Government takes the view that the system of uniform trading margins entails no discrimination. The measure in question is one which applies without distinction to all products, domestic and foreign alike, and which is designed to prevent tobacconists from subjecting customers and producers to discrimination. The margin of 8 % affords a fair and sufficient remuneration for tobacconists and was not fixed as part of a sales policy designed to favour domestic products. In the absence of a common organization of the market, every Member State may adopt special provisions, which may differ from those in force in other Member States.

10 The Italian Government further argues that alleged distortions of competition do not fall to be examined in the light of Article 37 of the Treaty. It also denies the existence of a restriction on competition and emphasizes that the measure in dispute constitutes, in substance, an intervention in the shaping of retail prices which is accepted in the case-law of the Court. In the alternative, the Italian Government argues that Article 90 (2) of the Treaty permits a derogation from the Treaty provisions because the Italian monopoly on the retail trade in manufactured tobacco has the character of a revenue-producing monopoly and because the abolition of the uniform trading margins would obstruct the particular aims of the monopoly. The margin's invariability ensures the transparency of prices, precludes a price-cutting war and helps to restrict smuggling.

11 In the first place it should be recalled, as the Court has held, in particular, in its judgments of 3 February 1976 (Case 59/75 *Pubblico ministero* v *Manghera* [1976] ECR 91) and of 13 March 1979 (Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935), that Article 37 of the Treaty does not demand the total abolition of national monopolies having a commercial character but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. It is clear not only from the wording of Article 37 but also from its position in the general

scheme of the Treaty that the article is designed to ensure compliance with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States, and thereby to maintain normal conditions of competition between the economies of Member States should a given product, in one or other of those States, be subject to a national monopoly of a commercial character.

12 Since the rules at issue apply without distinction to domestic and imported products, it is appropriate to consider whether they are none the less liable to have a discriminatory effect or to distort competition by restricting imports of tobacco products, thereby impeding trade within the Community.

13 The Commission maintains that, in view of the general ban on advertising introduced by Italian legislation, foreign producers are at a disadvantage in marketing imported products because they are unable to allow retailers higher trading margins in order to encourage them to sell their products.

14 That objection, however, cannot be accepted. The impossibility of granting marketing premiums exists as much for the Italian tobacco-producing monopoly as for foreign producers. Moreover, the Commission has not demonstrated that granting marketing premiums constitutes the only commercial tactic which would enable foreign products to establish themselves on the market, especially as competition in retail prices remains possible. The figures submitted by the Commission on the development of tobacco imports into Italy and the market share of imported products there as compared with other Member States, as well as the figures submitted by the Italian Government which the Commission has not challenged even though it has disputed their interpretation, do not in any case support the thesis that imported products, unlike domestic ones, cannot compete effectively on the market except by means of marketing premiums for retailers.

15 It should further be stressed that the trading margin fixed by law has for years remained unchanged at 8 % of the retail price. No power of decision and no margin of discretion in the matter are conferred on the authorities, who play no rôle in fixing the trading margin. There is nothing to support the claim that the margin takes account of special needs of products subject to the Italian monopoly in the light of the market situation. The Commission has thus failed to establish in what way the fixing of the margin could, in such circumstances, favour the marketing of domestic products alone.

16 As to whether the disputed rules restrict imports of foreign products, it should be recalled that, as the Court has repeatedly observed (see the judgments of: 26 February 1976, Case 65/75 *Tasca* [1976] ECR 291; 24 January 1978, Case 82/77 *Openbaar Ministerie* v *Van Tiggele* [1978] ECR 25; and 6 November 1979, Joined Cases 16 to 20/79 *Openbaar Ministerie* v *Danis* [1979] ECR 3327), national measures regulating the fixing of prices, which apply without distinction to domestic and to imported products, do not in themselves constitute a measure having an equivalent effect to a quantitative restriction, but they may have such an effect when, on account of the price level fixed, they place imported products at a disadvantage, in particular because their competitive advantage due to lower production costs is neutralized or else because a maximum price is fixed at so low a level that — given the general standing of imported products as compared with national products — traders wishing to import the products in question into the Member State concerned could do so only at a loss.

17 In the present case, the rules in dispute do not affect the freedom of producers to fix the retail prices of their products. Competition may be freely pursued in the essential field of retail prices. Foreign producers of tobacco products are free either to take advantage of more competitive production costs or to pass on higher production costs in their entirety. It is not contested that the uniform margin represents an adequate remuneration to tobacconists for the retailing of tobacco products, whether they be imported or domestic products.

18 Admittedly, the provisions in dispute have the effect of committing foreign producers to the observance of a uniform trading margin on the Italian market whereas there is no analogous obligation on foreign markets in respect of products from the Italian monopoly. That situation, however, does not amount to discrimination within the meaning of Article 37 of the Treaty. It is merely the consequence of the existence of a monopoly having a commercial character and entailing the regulation of trading margins, whereas no such monopoly and no such regulation exist in other Member States. If the disparities between national laws on trading margins for the retail trade in tobacco products were to have adverse effects on competition in the common market, it would be the duty of the competent Community institutions to eliminate such effects by harmonizing the provisions laid down in Member States by law, regulation or administrative action.

19 It is clear from the foregoing that the Commission has failed to demonstrate that the provisions in dispute constitute discrimination in respect of imported products and prejudice the free movement of goods under normal conditions of competition. The application must therefore be dismissed as unfounded.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the Commission has failed in its arguments, it should be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

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

Delivered in open court in Luxembourg on 7 June 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the French.

2 — Subparagraphs (a) and (f).

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